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INDIAN CASES.

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VOLUME XLVII.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

October 16, 1917.

Present :—Lord Parker of Waddington, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

Bhaiya RAJ KISHORE DEO—APPELLANT

versus

BANI MAHTO AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Official document, admissibility of—Register of minhaidari *villages.*

A register of Minhaidari villages is an official document and is admissible in evidence under section 35 of the Evidence Act. If, however, it can be shown that a particular part of the register is in excess of the official duty by reason of which it came into existence, that part would be inadmissible.

Appeal from a judgment of the Calcutta High Court (Mr. Justice Chitty and Mr. Justice Teunon), dated the 29th April 1912.

FACTS.—The point raised in the case was as to the admissibility of a certain register of Minhaidari villages which was made in 1866. It would appear from this document that a survey of the whole Tappah Utari was made and a number of particulars were recorded regarding the villages and the tenants. It was argued before the High Court that there was no necessity for the Revenue Officer to record particulars of the various tenancies in the villages. The High Court wrote in their judgment on this matter as follows: "As to that it is impossible to say anything definitely without knowing more about the object and purpose for which this survey was made. But as we find in all the entries which have been put before us that the tenancies are mentioned and particulars of the tenancies given, we may reasonably infer that that was one of the objects for which the enquiry was conducted by the Revenue Officer."

Messrs. *L. De Gruyther, K. C.*, and *J. M. Parekh*, for the Appellant.

JUDGMENT.

LORD PARKER OF WADDINGTON.—In this case the question is as to the nature of the respondents' holding. It is admitted that the document under which their predecessor-in-title originally held, and which created the holding, is lost, and the only question that their Lordships have to decide is whether another document consisting of a register, as evidence of the contents, was or was not properly admitted. Now clearly this register is an official document, and therefore it is admissible in evidence under section 35 of the Indian Evidence Act. It may be possible that in the case of such a document, if it could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible, but no attempt has been made to show this in the present case. The document has been admitted by both Courts below as proper evidence in the case, and their Lordships see no reason to reverse or to vary that decision.

The appeal, therefore, should, in their Lordships' opinion, be dismissed. The respondents not having appeared, there is no question of costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2974 OF 1916.

June 12, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

HARA NARAIN BERA—DEFENDANT—APPELLANT

versus

SRIDHAR PANDE AND OTHERS—PLAINTIFFS RESPONDENTS.

Res judicata—*Matter not decided by Court—Suit for declaration of title by survivorship, dismissal of—Subsequent suit for declaration that certain alienations shall not bind reversion, maintainability of—Causes of action—Limitation Act (IX of 1908), Sch. I, Arts 93, 95, 120—Suit for declaration that document shall not bind reversion—Limitation.*

A decision cannot operate as *res judicata* on a question which the Court deliberately abstained from deciding [p. 3, col. 1.]

The dismissal of a suit based on the allegation that the plaintiff took a certain property by survivorship on the death of a certain person, cannot operate as *res judicata* on the claim of the plaintiff, put forward in a subsequent suit, for a declaration that a *kot kobala* executed by the deceased and a compromise decree entered into in a suit to enforce it are not binding on the inheritance when it comes to the hands of the plaintiff as a reversioner [p. , col. 1.]

Articles 93 and 95 of the Limitation Act have no application to a suit by a reversioner for a declaration that a *kot kobala* executed by the last owner and a compromise decree made in a suit to enforce the *kot kobala* are not binding on the inheritance. The Article that applies to such a suit is Article 120 and where the plaintiff is in possession, limitation does not begin to run until some act is done on the documents sought to be declared not binding on the inheritance. [p. 3, col. .]

Appeal against the decree of the District Judge, Midnapur, dated the 4th September 1916, affirming that of the Subordinate Judge, 3rd Court of that District, dated the 27th July 1914.

FACTS appear from the judgment.

Babu *Jogesh Chandra Dey* (with him Babu *Sarada Charan Maity*), for the Appellant:—This appeal is on behalf of the defendant No. 1 and it arises out of a suit brought by the reversioner for a declaration that a certain *kot kobala* and a compromise decree made in a suit to enforce the *kot kobala* are not binding on him.

My first point is that the present suit is barred by the doctrine of *res judicata*. After the death of Khetra Mohan the plaintiff had brought a suit against Khetra Mohan's widow for declaration of his right by survivorship in which he failed. In that suit he could have and should have made the claim which he is now making. Refers to section 11 of the Civil Procedure Code. Further, the question of the genuineness of the document, sought to be got rid of, should not have been allowed to be raised in this suit.

The next point is that the present suit is barred by the three years' rule of limitation. Refers to Articles 93 and 95 of the Limitation Act. Both the Courts have set aside the compromise decree on the ground of fraud. The present suit is not merely a suit for a declaration that the *solenama* decree in the previous suit is not binding on the plaintiff but also is one for setting aside a fraudulent decree, and therefore the three years' rule of limitation applies to it. Refers to *Parekh Ranchor* v. *Bai Vakhat* (1).

The last point is that the declaration sought for in the suit, *viz.*, that the plaintiff is the heir and reversioner after the death of Khettro Mohan's widow, ought not to have been given as nobody knows now who will be the reversioner at the death of the widow.

Babu *Bhujanga Bhusan Mukerjee* for Babu *Mohini Mohan Chatterjee*, for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 1 against the decision of the learned District Judge of Midnapore, dated the 4th September 1916, affirming the decision of the Subordinate Judge of the same place. The suit was brought by a Hindu reversioner for a declaration that a *kot kobala* said to have been executed by one Khetra Mohan Pande in the year 1302 and the *solenama* decree which was entered into in the suit to enforce the *kot kobala* were not binding on the reversioner The facts found are all clearly in favour of the plaintiff. What has been urged in this appeal and which was urged also in the Courts below is this. The present plaintiff brought a former suit against the widow of Khetra Mohan. In that suit, he alleged that the property now sued for was part of the joint family property and that the family being governed by the Mitakshara school

(1) 11 B. 119; 6 Ind. Dec. (N. S.) 79.

of Hindu Law, on the death of Khetra Mohan he took the property by survivorship. That suit failed, and the first argument that has been raised in this appeal is that the present suit is barred by the doctrine of *res judicata*, on the ground that the plaintiff could have included the present cause of action in the former suit which he brought. It is quite clear that a person having two separate and independent causes of action is not bound to include them both in the same suit. He may bring a suit for each separate and independent cause of action. It is quite clear that a suit based on the allegation that the plaintiff took the property by survivorship on the death of Khetra Mohan is essentially different from a suit for a declaration that a certain alienation made and the compromise decree entered into by the widow are not binding on the inheritance when it comes to the hands of the reversioner.

The next point urged in the appeal was that the question whether the *kot kobala* was a genuine document or not was not capable of being agitated in the present suit as that matter had been determined in the former suit brought by the plaintiff. The judgment of the Appellate Court in the former suit stated expressly that the Judge did not decide the question as to whether or not the *kot kobala* was genuine. The Court having deliberately abstained from diciding the question, it is difficult to see how that matter is *res judicata*.

The next point urged was that the suit was barred by limitation. It is said that Articles 93 and 95 of the First Schedule to the Indian Limitation Act apply to a suit of this nature. Articles 93 and 95 have nothing to do with a suit of this nature. The Article that applies is Article 120. In any case, it is obvious that the present appellant entered into possession of the property within six years prior to the institution of the suit. In that view, it is quite clear that the plaintiff was not bound to bring his suit until some act was done on the document which it was sought to declare not binding on the inheritance. The learned Judge was, therefore, quite right in holding that the suit was not barred by limitation.

The last point was that the declaration made by the learned Judge was wrong. The declaration, so far as regards the plaintiff, is obviously right, the declaration being that the plaintiff when he succeeds to the property will not be bound by this transaction. The only matter that may be urged against the form of the decree passed by the learned Judge is that it ought to have been drawn in more wide terms so as to include not only the plaintiff but also any other reversioner who may succeed to the property on the death of Khetra Mohan's widow. The appellant before us has clearly no ground to complain in regard to the form in which the learned Judge has drawn up the decree. There is nothing in this point.

The present appeal, therefore, fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 1010 OF 1918.

June 6, 1918.

Present:—Mr. Justice Martineau.

NANAK AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGWAN SINGH AND ANOTHER—PLAINTIFFS, PRABHU—DEFENDANT—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 4 (6)—"Landlord", meaning of—Pre-emption—Sale of occupancy rights to mortgagee with possession of proprietary rights—Vendor's collateral, whether can pre-empt.

The term 'landlord' as defined in section 4 (6) of the Tenancy Act includes a mortgagee in possession. [p. 4, col. 1.]

Where, therefore, plaintiff sued for possession by pre-emption of certain land sold by defendant No. 1, an occupancy tenant, to the mortgagees with possession of the proprietary rights:

Held, that the plaintiff was not entitled to succeed, inasmuch as the sale must be held to have been made in favour of the landlord. [p. 4, col. 1.]

Akbar Hussain v *Ali Ahmad*, 38 Ind. Cas. 712; 116 P. R. 1916, followed.

SAJJADI BEGAM *v.* DILAWAR HUSAIN.

Miscellaneous second appeal from the order of the District Judge, Hoshiarpur, dated the 10th January 1918, reversing that of the Munsif, 2nd class, Hoshiarpur, dated the 1st November 1917, and remanding the case under Order XLI, rule 23, Civil Procedure Code.

Mr. *Kanwar Narain*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Prabhu, defendant No. 1, an occupancy tenant under section 6 of the Tenancy Act, has sold his occupancy rights to defendants Nos. 2 to 6, who are mortgagees, with possession, of the proprietary rights. The plaintiff sues for pre-emption on the ground that he is a collateral of the vendor.

The first Court dismissed the suit, holding that the mortgagees of the proprietary rights were the landlords, and that in accordance with the ruling of *Akbar Hussain* v. *Ali Ahmad* (1) the plaintiff had no right of pre-emption as against them.

On appeal the lower Appellate Court has remanded the case, being of opinion that the term "landlord" in the ruling quoted was used in the sense of "proprietor" and was not meant to include a mortgagee.

The defendants have filed a second appeal in this Court. It has been held in certain cases that the term "landlord" as defined in section 4 (6) of the Tenancy Act includes a mortgagee in possession. The learned District Judge admits this, but thinks that in *Akbar Hussain* v. *Ali Ahmad* (1), the word should be taken as used in the restricted sense of "proprietor." I do not agree with this view. The case of 1916 decides that there is no right of pre-emption in respect of a sale by an occupancy tenant of his occupancy rights to the landlord, under whatever section of the Act he holds his tenancy. The decision is based on the rights given to the landlord by the provisions of the Tenancy Act, and consequently the word "landlord" in the ruling must have the meaning which it bears in the Act itself and therefore includes a mortgagee in possession. I can see no warrant for the contrary conclusion, and I hold that the ruling of 1916 applies to the present case and the suit must fail.

I accept the appeal, set aside the order of the lower Appellate Court, and restore that of the first Court dismissing the suit. The plaintiff-respondent will pay the appellant's costs throughout.

Appeal accepted.

(1) 38 Ind Cas. 712; 116 P. R. 1916.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 186 OF 1917.

April 25, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SAJJADI BEGAM—PLAINTIFF—APPLICANT

versus

DILAWAR HUSAIN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Decree conditional on payment of money within certain period, whether can be altered—Jurisdiction of Court—Discretion, exercise of—High Court, power of interference of.

Once certain terms are embodied in a decree the Court itself which passed the decree, even if it so desires, has no jurisdiction to alter it save on an application for review of judgment. [p 5, col. 1.]

Where, therefore, a Court made a decree in plaintiff's favour conditional upon his paying an extra Court-fee within a certain time and directed that the suit would stand dismissed in the case of non-compliance with the condition:

Held, that the Court had no jurisdiction to interfere with the decree by extending the time for payment of the extra Court-fee. [p. 5, col. 1.]

Civil revision from an order of the Additional Subordinate Judge, Moradabad.

Mr. *Iqbal Ahmad* for Mr. *Muhammad Yusuf*, for the Applicant.

Mr. *S. A. Haidar*, for the Opposite Party.

JUDGMENT.—The facts connected with this and the connected application are shortly as follows:—A suit was brought by the plaintiff for dower and also to set aside certain deeds executed by her deceased husband. A question as to the sufficiency of Court-fees arose, and eventually the Court made a decree in the plaintiff's favour conditional upon her paying an extra Court fee of Rs. 20 within a week. If this extra Court-fee was not paid the suit was to stand dismissed. What we have just now stated was all embodied in and was part of the decree

itself. Unfortunately (it is said through the negligence of the plaintiff's Pleader) she did not get proper information, with the result that she deposited Rs. 10 only within the time allowed. The defendants then made an application for execution of the decree on the ground that the decree was now in their favour, the deposit of Rs. 20 not having been made as provided in the decree. The plaintiff sought in vain to be allowed to pay in the extra Rs. 10. The Court doubted that it had jurisdiction to extend time and rejected the application for extension of time. The plaintiff comes here in revision and contends that the Court had jurisdiction and it ought to have exercised it. This Court always feels great difficulty in interfering with the discretion of the Courts below on matters of discretion. But there seems to be a more formidable objection to the present application, namely, that once the term about depositing the Rs. 20 was embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own decree save on an application for review of judgment under section 114 read with Order XLVII, rule 1. The case of *Naik Ram* v. *Bhagwan Chand* (1) is cited. This was a decision of a single Judge and the judgment consists of a single line. The circumstances were no doubt in principle the same as in the present case The judgment of the Court is: "The Court had undoubtedly jurisdiction to extend the time." It has been over and over held in pre-emption suits, where the decree itself provides that the pre-emptor is to have possession conditional upon his paying the pre-emption money into Court within a specified time and that upon his failure to do so the suit shall stand dismissed, that the Court has no jurisdiction to extend the time. The ground for these decisions has always been that the Court has no jurisdiction to interfere with its own decree save in the manner we have mentioned above. There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with. The only exception is that of a mortgage decree—time can be extended in mortgage decrees by virtue of the provisions of Order XXXIV. We reject the application but under the circumstances we make no order as to costs.

We may here mention that we think that it would have been better had the Court, after determining that the extra fee was payable, ordered the fee to be paid within a certain time, and delayed passing its decree until that time had expired.

Application rejected.

(1) 42 Ind. Cas. 613; 15 A. L. J. 511.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2361 OF 1916.

June 12, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

THE HON'BLE BABU BROJENDRA KISHORE ROY CHOWDHURY—

DEFENDANT No. 7—APPELLANT

versus

Raja JUGENDRA KISHORE ROY CHOWDHURY—PLAINTIFF AND OTHERS—

DEFENDANTS RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 106—Record of Rights, entry in, correction of—Plaintiff and defendant recorded as joint landlords—Partition—Burden of proof.

In a proceeding under section 106 of the Bengal Tenancy Act for the correction of an entry in the Record of Rights, in which the names of the plaintiff and his co-sharer defendant No. 7 were entered as joint landlords, it was found that there had been a partition between them long before the Record of Rights and that the plaintiff had been in sole possession since the partition:

Held, that although there was nothing to show what was the precise result of the partition, still in the absence of any evidence on the part of defendant No 7 to show that the plaintiff's possession was as a co-sharer on his behalf, the plaintiff should be recorded as the sole landlord. [p. 7, col. 1.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 15th July 1916, reversing that of the Assistant Settlement Officer, Mymensingh, dated the 8th May 1915.

FACTS appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babu *Charu Chandra Bhattacharjya*), for the Appellant.—The appeal arises out of a suit under

section 106 of the Bengal Tenancy Act. Plaintiff and defendant No. 7 are proprietors of Mouza Goalpara in equal shares. A holding was recorded under the plaintiff and defendant No. 7 jointly. Plaintiff brings this suit under section 106 of the Bengal Tenancy Act to have the holding recorded in his name alone and not jointly in the name of the plaintiff and defendant No. 7. The first Court dismissed the suit; the lower Appellate Court has decreed it.

The finding is that the plaintiff is in possession but his possession is also on my behalf. The plaintiff has failed to prove his exclusive title. In the petition plaintiff sets up partition and says that the property is in his possession, but that is not proved.

When the question of title arises between owners of two separate estates, the Revenue Officer must confine himself to the question of possession and should not go into the question of title. Referred to *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1), *Koli Sundari* v. *Girija Sankar* (2) and *Ram Chandra Bhanj Deo* v. *Nanda Nondanananda Deb* (3).

These are cases of rival proprietors. As to the co-sharers there is no reported case. *Jogendra Nath Roy* v. *Krishna Fromoda Dassi* (4) says that no suit lies except a suit under section 106 or section 105.

[CHITTY, J.—That case has been dissented from in subsequent cases.]

The Judge amends the entry upon possession only, though he finds that plaintiff has not proved exclusive title. Therefore the entry should not have been made in plaintiff's name alone. The entry is the entry of the name of the landlord of each tenant, therefore the question of title should be gone into. The Judge says that he would decide the question upon possession only under the authorities, but there is no authority. He finds that the plaintiff has not got exclusive title and corrects the entry in plaintiff's name alone.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Bir Bhusan Dutt*), for the Respondents.—There is no distinction in principle between co-sharers and rival proprietors. The name of the landlord of the tenants is to be entered. In the cases cited between two rival proprietors, the Settlement Officer has to decide who is in actual possession.

[CHITTY, J.—As between co sharers, possession of one may be possession of the other, but between rival proprietors no such presumption arises.]

The position here is the same as that of rival proprietors because partition is admitted.

[CHITTY, J.—The allotment is not known and not proved.]

If the Judge finds that the plaintiff was in possession and getting rent, the question of title should not have been gone into.

JUDGMENT.—This is an appeal by defendant No. 7 arising out of proceedings under section 106 of the Bengal Tenancy Act. Plaintiff brought the suit for correction of the entry in the Record of Rights in which the names of the plaintiff and defendant No. 7 were entered as the landlords. Plaintiff's case was that there had been a partition of the estate between the co-sharers, that this particular part of the estate had fallen to his share and that he was the sole landlord of the tenants whose names were recorded in this Record of Rights. No evidence appears to have been given with regard to the partition, but we find from the judgment of the Special Judge that it was admitted by the Pleaders on both sides that there was a partition, said to be a private partition, that some lands were still held *jmali* and some exclusively. There was, however, no evidence before the Special Judge to show in detail what lands were so held, and how at the time of the partition this land was treated. The Special Judge then went into the evidence of possession and, acting upon the authority of the cases which say where there is a question between rival proprietors the question of possession is the most important question for consideration, he found that the plaintiff had from 1304 onwards acted as the sole landlord of this part of the estate that he had let out the land to the tenants and had been receiving rent from them. There was no

(1) 12 C. W. N. 8.
(2) 11 Ind. Cas. 184; 15 C. W. N. 974.
(3) 20 Ind. Cas. 295; 19 C. L. J. 197; 18 C. W. N. 938.
(4) 12 C. W. N. 1032; 8 C. L. J. 322; 35 C. 1013.

evidence before the learned Special Judge that the defendant No. 7 had asserted any right to the possession of this property either by letting out the land, or by receipt of rent, or in any other way. He, therefore, found that the plaintiff was really in possession and that his name should be recorded as the landlord of the tenants. It is objected on appeal on behalf of the defendant No. 7 that the cases referred to by the learned Special Judge deal only with the question of rival Zemindars and not, as in this case, with the question of rival co-sharers. There is this distinction that in the former case there can be no question of joint possession or possession of the one being the possession of the other. In the case of co-sharers there is this possibility, that the possession of one might be regarded as the possession of the other though exercised in the name of one only. But we think that, in the circumstances of this case, the learned Special Judge was justified in the conclusion at which he arrived. We start with the admission that there was a partition. It is true that there is nothing to show what was the precise result of that partition or what lands were allotted to the several co-sharers. That partition must have taken place before 1304. We find that from that date, that is to say, for twenty years past, the plaintiff has been in possession of this land and treating it as if he were in sole possession so far as his co-sharers were concerned. In the absence of any evidence on the part of the defendant No. 7 to show that that is possession on his behalf, we think that the learned Special Judge is justified in saying that the record was incorrect and that the plaintiff should have been recorded as the sole landlord in this particular case. That, of course, does not conclude the question of title which may be determined in other proceedings. The result is that the appeal must be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 280 OF 1918.

June 18, 1918.

Present:—Mr. Justice Broadway.

SIKANDAR SHAH—DEFENDANT—APPELLANT

versus

GHULAM NABI SHAH—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), s 12—Decision on question of value for purposes of Court-fee incidental to decision on question of value for purposes of jurisdiction —Appeal, whether competent.

Plaintiff sued for possession of certain land which he valued for purposes of Court-fee and jurisdiction at Rs 764-7-0. On an objection by the defendant that the suit had been undervalued, the Munsif appointed a Local Commissioner who fixed the value at Rs. 943, but the Munsif refused to accept this valuation and having come to the conclusion that the land was worth considerably over Rs 1,000 returned the plaint for presentation to the proper Court. On appeal the District Judge held that the Munsif had wrongly disregarded the Commissioner's valuation and returned the case to him for disposal. The defendant preferred a second appeal to the Chief Court:

Held, (1) that in arriving at a valuation of the land the Munsif only looked at the question from the point of view of his own jurisdiction and although he decided the value for purposes of Court-fee. this decision was merely incidental to his decision on the question of the value for purposes of jurisdiction and section 12 of the Court Fees Act was not, therefore, applicable to the case. [p. 8, col. 1.]

(2) that under these circumstances the appeal to the District Judge was competent and was rightly decided. [p. 8, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Montgomery, dated the 24th July 1917, reversing that of the Munsif, 1st Class, Pakpatan, District Montgomery, dated the 3rd April 1917, returning the plaint for amendment.

Messrs. *Cooper* and *Badr-ud-Din Kureshi*, for the Appellant.

Mr. *Jai Gopal Sethi* for Mr. *L. M. Datta*, for the Respondent.

JUDGMENT.—In this case the plaintiff sued for possession of certain land which he valued for purposes of Court-fee and jurisdiction at Rs. 764-7-0. The defendant raised an objection that the suit had been undervalued for purposes of Court-fee, whereupon the learned Munsif of Pakpattan appointed a Local Commissioner who fixed the value at Rs. 943. The learned Munsif, however, refused to accept this

valuation and came to the conclusion that the land was worth considerably over Rs. 1,000. He accordingly returned the plaint for presentation to the proper Court, as the value he fixed on the property rendered the suit beyond his pecuniary jurisdiction. Against this order returning the plaint the plaintiff preferred an appeal to the learned District Judge, who held that the learned Munsif had wrongly disregarded the Local Commissioner's valuation, and, fixing the value of the suit at Rs. 943, returned the case to the Munsif's Court for disposal. Against this order the defendant has preferred an appeal to this Court and has contended that the appeal to the learned District Judge was barred by section 12 of the Court Fees Act. Mr. Cooper who appeared on behalf of the appellant contented himself with reading section 12 and urged that the words of that section were perfectly clear and that, therefore, the appeal to the learned District Judge was bad. I am, however, unable to agree in this view. The learned Munsif in arriving at a valuation of the land clearly *only looked at the question from the point of view of his own pecuniary jurisdiction*, and although, inasmuch as the values for purposes of Court fee and that of jurisdiction were identical, he decided the value for purposes of Court fee, this decision was merely incidental to his decision on the question of the value for purposes of jurisdiction. In these circumstances I am of opinion that the appeal to the learned District Judge was competent and has been rightly decided by him.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 190 AND 2987 OF 1915.

May 2, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

BENI MADHAB CHACKRABUTTY AND OTHERS—APPELLANTS

versus

BHOLA NATH MAJILA AND OTHERS—RESPONDENTS.

Res judicata—*Rent suit, finding in*—Kabuliyat *held to be valid and effective*—*Subsequent suit to challenge validity of* kabuliyat, *maintainability of.*

The question whether the decision in a rent suit can operate as *res judicata* on matters other than the relationship of landlord and tenant, depends upon what were the issues raised and decided between the parties in the rent suit. [p. 9, col. 1]

Where in a rent suit, a *kabuliyat* has been held, on a judicial determination, to be valid and effective as against the tenant and to have been properly executed, a subsequent suit by the tenant for a declaration that the *kabuliyat* is null and void is barred by the rule of *res judicata*. [p. 9, col. 1.]

Appeals against the decrees of the District Judge, Burdwan, dated the 29th October 1914, affirming those of the Additional Munsif at Kalna, dated the 5th September 1913.

FACTS appear from the judgment.

Babu *Jatindra Nath Sen*, for the Appellants:—Defendant No. 1 is the *patnidar* of a *mehal*. Plaintiff's father executed a *kabuliyat* in favour of the *patnidar* of the *mehal*. Plaintiff brings this suit to set aside the *kabuliyat* and to set aside a rent decree which defendant obtained under the *kabuliyat*. In the rent suit against the plaintiff, the plaintiff put in objections that he was not in possession of the land and that the *jama* was a fictitious one. The Court overruled the objections and decided the rent suit in favour of defendant No. 1 and against the present plaintiff.

Two points are taken now: (1) The suit is barred by limitation, being brought after 3 years, *i.e.*, 3 years from the filing of the written statement in the rent suit, when the existence of the *kabuliyat* became known to the plaintiff, (2) the suit is barred by *res judicata*. In the rent suit the same point was taken between the same parties.

I rely on *Sreenath Dutt* v. *Kaser Sheikh* (1).

Babu *Satish Chandra Mukerjee* (with him Babu *Bhupendra Kumar Ghose*), for the Respondents, was called upon to argue on the point of *res judicata*.—In the rent suit there were several parties, relief was also claimed against other parties. The plaintiff here not only prays for the cancellation of the *kabuliyat* but also prays for a decree for possession. In the rent suit the question was not directly and substantially in issue but was incidentally

(1) 20 Ind. Cas. 344; 18 C. W. N. 116.

raised, which cannot operate as *res judicata*. The question in the rent suit was as to the existence of the relationship of landlord and tenant.

[FLETCHER, J.—You could have raised any defence in the rent suit, no matter whether it was a rent suit only. The *kabuliyat* has been found to be genuine and effective.]

Babu *Jatindra Nath Sen* was heard in reply.

JUDGMENT.

No. 190 OF 1915.

This is an appeal by the defendant No. 1 against the decision of the learned District Judge of Burdwan, dated the 29th October 1914, affirming the decision of the Munsif of Kalna. The plaintiff sought in this case for a declaration that a *kabuliyat*, dated the 26th Sraban 1308 filed by the defendant No. 1 in rent suit No. 7 of 1909, and the rent decree passed thereon are null and void and inoperative and that the annual *jama* of Rs. 17 created by the said *kabuliyat* or the decree is false and fictitious, and further that the plaintiff is not bound to pay any rent to the defendant No. 1 in respect of the said annual *jama* of Rs. 17. Before us the case has been argued on two grounds: *First* of all limitation and *secondly*, *res judicata*. Taking the second point first it appears that the present appellant, the defendant No. 1, brought a suit against the plaintiff in this case to recover rent on the basis of the *kabuliyat*, and it is quite clear from the findings in that case that the *kabuliyat* was held on a judicial determination to be effective and valid and to have been properly executed; and the matters referred to by the plaintiff in this suit could have been made the grounds of attack in the rent suit. It is said that there is some rule that in a rent suit no matter is *res judicata* excepting whether the relationship of landlord and tenant exists. It depends on what were the issues raised between the parties and decided in the rent suit. It is quite clear that in a case of this nature exactly the same points as have been adjudicated on in the rent suit arise, and it is not competent to maintain the present suit as against the defendant No. 1. In that respect, we may cite the decision of Sir Lawrence Jenkins, reported as *Sreenath Dutt* v. *Kaser Sheikh* (1). It is quite clear that the relief granted by the lower Courts to the plaintiff against the defendant No. 1 cannot be supported.

The question of limitation, we need not enter into.

The appeal of the defendant No. 1 must accordingly be allowed and the decree, passed against him by the lower Courts, set aside and the suit dismissed against him. The plaintiff will pay to the defendant No. 1 his costs in this appeal.

No. 2987 OF 1915.

This appeal will be governed by the judgment in Second Appeal No. 190 of 1915 just now disposed of. It is accordingly decreed in the terms of the said judgment.

Appeals allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 751 OF 1914.

May 12, 1916.

Present:—Mr. Batten, A. J. C.

Seth DHANNA LAL—PLAINTIFF—APPELLANT

versus

SHAMBHU—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s 70—Execution, admitted—Attestation, whether to be proved—Mortgage executed by two persons—Admission of execution by one, effect of.

Where there are two executants of a mortgage-deed, attestation may be according to law in respect of one of them and not in respect of the other. [p. 11, col. 1.]

Where execution is admitted and due attestation not denied, the question of attestation does not arise or if it does arise, the maxim *omnia præsumuntur rite esse acta* comes in, unless there is evidence that attestation is not according to law. [p. 11, col. 1]

Balkishan v. *Narainsha*, 42 Ind. Cas. 299; 13 N. L. R. 121, followed. [p. 11, col. 1.]

Appeal from the decree of the Divisional Judge, Hoshangabad, dated the 8th June 1914, in Civil Appeal No. 51 of 1914.

Mr. *P. S. Kotwal*, for the Appellant.

Sir *Bipin K. Bose*, for the Respondent.

JUDGMENT.—In this case the appellant-plaintiff sues on two mortgage-deeds, dated the 22nd March 1900, purporting to be executed by Dowla and Shambhu sons of Bhika. One mortgage is for Rs. 365-8-0 and the other for Rs. 500. Dowla is dead and his son is defendant No. 1, Shambhu is the respondent-defendant No. 2, the third de-

fendant Govind is the brother of Dowla and Shambhu, and the fourth, fifth and sixth defendants are the sons and grandsons of another brother Khuman. The plaintiff's case is that Dowla and Shambhu were managers of the joint family and incurred the debts for the benefit of the joint family. All the defendants except Shambhu denied execution, consideration, valid attestation and valid registration of both mortgages. Shambhu admitted execution but denied receipt of consideration and made other pleas. Among other issues were issues as to whether Dowla executed with Shambhu for consideration, whether the deeds were validly attested and whether Dowla and Shambhu were managers. Neither of the lower Courts has described the signatures to the deeds quite accurately. The deed for Rs. 665 8 0 purports to be signed by the marks of Shambhu and Dowla. Then came the following entries:—

(1) Saksi (witness) Tikamdas at the request of Shambhu.

(2) Saksi Mukundram at the request and in the presence of Shambhu.

(3) By the pen of Gopalrao at the request of Shambhu.

Then comes a bit of paper gummed on possibly another signature. The deed for Rs. 500 purports to be signed by marks of Shambhu and Dowla. Then comes the word "Gowai" and then

(1) Saksi Tikamdas at the request of Shambhu.

(2) Saksi Mukundram at the request of, and in presence of, Shambhu.

(3) By the pen of Mukundram.

(4) Saksi Shambhu at the request of Dowla and Sambhu.

This Shambhu is Shambhu Patel, not the second defendant; he is dead but the other two attesting witnesses Tikamdas and Mukundram are alive.

The only witness called on the question of execution and attestation is Motiram, P. W No. 1. He has been extremely badly examined. He says that the deed for Rs. 665 8 0 was written by Gopalrao whose signature appears on it and that the signature of Shambhu Patel is in Shambhu Patel's writing; though I do not find Shambhu Patel's name in this deed. His signature is probably covered by the paper used for repairing the deed. He says the deed was written in his presence. He says that he himself wrote the deed for Rs. 500 and that Shambhu signed in his presence, and Tikamdas and Mukundram attested in his presence. He does not remember whether Shambhu attested in his presence. He describes the sequence of events as follows: "I had been sent for by the father of the plaintiff to write the other deed (for Rs. 500). He came for me. When I arrived about 2 or 3 lines of the deed for Rs. 665-8-0 had been written and I proceeded with the other deed without waiting for this to be finished. Gopal and I were asking the mortgagors and mortgagee about the details of the deed and writing according to instructions..... I know Dowla; he is Shambhu's elder brother. He was not present when the deed written by Gopal had been executed and attested. He came after those attesting witnesses had left, and after Shambhu had signed the deed which I had written and after the witnesses had attested it. I waited for him and signed after he had put his mark in my presence".

The evidence of this witness proves that the attesting witnesses did not see Dowla sign the deed. He does not remember whether he saw Shambhu Patel attest. He was not asked whether the other two attesting witnesses saw Shambhu sign the deed. Neither side asked him any questions about this. He certainly does not prove that the attesting witnesses did not see Shambhu execute.

After the examination of this witness the plaintiff gave up Mukundram and Tikamdas whom he had cited as witnesses. He evidently considered it useless to call them in the face of Motiram's evidence that they were not present when Dowla signed.

It is clear to me from the way in which Motiram was examined by both sides that it was not considered necessary to prove the attestation in respect of Shambhu, who had admitted execution, and that the issue as to execution and attestation was considered as referring only to Dowla. As against Dowla, the plaintiff was bound to call an attesting witness to prove execution, and he was also bound to prove attestation according to law. As against Shambhu he did not have to prove due attestation unless the pleadings called for such proofs.

My views on the scope of section 70 of the Evidence Act are given in full in First Appeal No. 95 of 1914 [*Balkishan* v. *Narainsha* (1)], judgment delivered this day. It is evident that when there are two executants of a mortgage-deed, attestation may be according to law in respect of one of them and not in respect of the other. In this case the execution and due attestation was not put in issue as regards Shambhu. The deeds of mortgage on the face of them purport to have been duly attested as regards Shambhu, and there is no evidence which indicates that as regards Shambhu the attestation was not according to law. The plaintiff did not consider he was called upon to prove it, and the defendants did not cross-examine the witness on the point. The case of Shambhu must, therefore, be considered as entirely separate from that of Dowla. I have held that when execution is admitted and due attestation not denied, the question of attestation does not arise or that if it arises, the maxim "*omnia præsumuntur rite esse acta*" comes in unless there is evidence that the attestation was not according to law. I, therefore, hold that the suit as against Shambhu cannot be dismissed on the ground that his execution of the deed was not attested according to law. The Divisional Judge, besides holding that attestation was not according to law in respect of both executants, also held that it was not proved that Dowla and Shambhu were managers or that the debts had been contracted for the benefit of the family.

In appeal to the Divisional Judge, Shambhu, as in this Court, was the sole respondent and in that Court, as in this, the sole prayer was that the mortgage deeds should be enforced as against Shambhu and his share of the property.

With reference to the above remarks I remand the suit for further trial by the Divisional Judge (1st Court) with reference to the liability of Shambhu and his share, the only point decided in this Court being that the deeds are not inoperative against Shambhu because of absence of legal attestation. Refund certificate will issue; other costs will be costs in the suit.

Case remanded.

(1) 42 Ind. Cas. 299; 13 N. L. R. 121.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1993 OF 1916.

May 9, 1918.

Present :—Mr. Justice Fletcher and Mr Justice Smither.

Bibi KACHHIRANNESSA CHOWDHURANI—PLAINTIFF—APPELLANT

versus

HEM CHARAN KASYA—DEFENDANT—RESPONDENT.

Mortgage—Interest, heavy rate of—Proviso for capitalising arrears of interest—Undue influence—Presumption—Civil Procedure Code (Act V of 1908), O. VI, r. 4—Pleadings—Failure to give particulars, effect of.

In a suit on a mortgage bond the Court should not presume that undue influence has been exercised upon the mortgagor, from the mere fact that the rate of interest stipulated for is heavy and there is a proviso in the bond for capitalising the interest in arrear. [p. 12, col. 1]

The Court should not go into the question of undue influence at all where the defendant denies the execution of the mortgage and no particulars of the alleged undue influence are given as required by Order VI, rule 4 of the Civil Procedure Code. [p. 12, col 1]

Appeal against the decree of the District Judge, Dinajpur, dated the 24th June 1916, affirming that of the Munsif, 1st Court at that place, dated the 7th June 1915.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal* (with him Babu *Jitendranath Das Gupta*), for the Appellant:—The appellant is the mortgagee and advanced Rs. 49 to the father of the respondent on a mortgage security with interest at the rate of 3 pice per rupee per month with annual rests. The simple interest comes to 56 per cent. Both Courts allowed me 56 per cent. but disallowed the compound interest on the ground of undue influence. I submit the Courts ought not to have disallowed compound interest. The respondent denied the mortgage and did not give any particulars of the alleged undue influence. The denial of mortgage and the plea of undue influence are inconsistent and cannot both be pleaded in defence in a mortgage suit. If you deny the mortgage, if you say you did not execute the mortgage bond, how can you say that the proviso for compound interest was obtained by undue influence? Referred to *Mahomed Baksh Khan* v. *Hosseini Bibi* (1).

(1) 15 C. 684; 15 I. A 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 1040 (P. C.).

[SMITHER, J.—The father executed the mortgage. The defendant knew it and ought not to have denied.]

There was no issue of undue influence and the particulars of the alleged undue influence were not given. If there had been an issue of undue influence, my client would have proved that there was no undue influence or at any rate would have asked the defendant to state the particulars of the alleged undue influence.

JUDGMENT.—This is an appeal against the decision of the learned District Judge of Dinajpur, dated the 24th June 1916, affirming the decision of the Munsif of the same place. The suit was brought to enforce a mortgage security. The mortgage was one that secured an advance of Rs. 49 with interest at the rate of three pice per rupee per month. There was a proviso in the mortgage bond for capitalizing the interest in arrear with annual rests. It may be admitted that the interest is heavy. The view that the learned Judges of the Courts below have taken is this: That the proviso for capitalizing the interest in arrear was obtained by undue influence. There are many reasons why such a point should not have been decided. *First* of all, the mortgagor or the representative of the mortgagor denied the mortgage. *Secondly*, no particulars of the alleged undue influence were stated as required by Order VI, rule 4, Civil Procedure Code, and, if that had been pleaded and the particulars given, the plaintiff might have produced evidence showing that the parties were at arm's length and had separate and independent advice. Whether that is so or not, we do not know. It is quite clear that the Court, because it does not like a proviso for capitalizing the interest when in arrear, cannot say that when such a proviso appears in the mortgage there is a presumption that undue influence was exercised. The present appeal must be allowed and the decrees of the Courts below varied by permitting the mortgagee to charge interest in accordance with the contract contained in the mortgage. A fresh period of six months is allowed for redemption. The appellant must have his costs from the respondent both in this Court and in the Courts below.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 226 OF 1915.

June 1, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

RATNA—PLAINTIFF—APPELLANT

versus

HARNAM SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, scope of Document submitted with memorandum of appeal, whether admissible—Findings based on such document, whether binding in second appeal.

The provisions of Order XLI, rule 27, Civil Procedure Code, are mandatory and an Appellate Court is not entitled to admit and consider additional documentary evidence in contravention of those provisions. [p. 13, col. 1.]

Where an appellant attached certain documents to his memorandum of appeal and the Appellate Court passed an order that they should remain on the record:

Held, that the Appellate Court had contravened the provisions of Order XLI, rule 27, Civil Procedure Code, in admitting and considering this evidence and that as its findings had been vitiated by the fact that they were based on evidence wrongly admitted, they were liable to be set aside [p. 13, cols. 1 & 2.]

Kessowji Issur v. *Great Indian Peninsula Railway Co.*, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.), followed.

Jagarnath Pershad v. *Hanuman Pershad*, 3 Ind. Cas. 465; 36 C. 833; 13 C. W. N. 830; 10 C. L. J. 74; 6 M. L. T. 7; 11 Bom. L. R. 861; 19 M. L. J. 435; 36 I. A. 221 (P. C.), distinguished.

Second appeal from the decree of the District Judge (new), Ludhiana, dated the 24th October 1914, reversing that of the Additional District Judge (old), Ludhiana, dated the 30th April 1914, decreeing the claim on payment of Rs. 1,290.

Bhagat *Govind Das*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—On the 26th of July 1894 Sawan Singh and his brother Mihan Singh executed a deed of sale in favour of Bir Singh and others, under which they sold 89 *bighas 7 biswas kham* of land for Rs. 1,500. On the 5th of January 1914 the plaintiff-appellant Ratna instituted the present suit, asking for a declaration to the effect that this alienation was made without consideration or necessity and would not affect his reversionary rights after the death of his father Sawan Singh. The alienees pleaded that Ratna was not the son of Sawan

Singh, that in any case he was not born before the sale was effected and that in any event the alienation was for valid necessity and consideration. The trial Court held that Ratna was the son of Sawan Singh and was born prior to the alienation which, however, was not justified, but that Rs. 1,390 out of the Rs. 1,500 had been shown to have been for valid necessity and the plaintiff was accordingly granted a decree to the effect that the sale would not be binding on him except to the extent of the mortgage charge of Rs. 1,390. The alienees preferred an appeal to the District Judge, who accepted the appeal and dismissed the plaintiff's suit with costs. The plaintiff had also preferred an appeal in the District Court, which was dismissed by the same order. Against this appellate decree Ratna has preferred this second appeal through Bhagat Govind Das and we have heard Dr. Nand Lal at considerabe length on behalf of the respondents. The judgment of the learned District Judge is unsatisfactory. He quite correctly commences by saying that the questions for determination were:

(1) Whether or not the plaintiff is the son of Sawan Singh, vendor? and

(2) Was the full consideration paid for valid necessity?

He, however, comes to no clear finding on either of these two points. With regard to the first, he has been unduly influenced by certain documentary evidence which was placed on the record in the Appellate Court. These documents were attached to the memorandum of appeal and an order was passed on the 26th October 1914 to the effect that they should remain on the record, whereas the judgment itself was pronounced on the 24th of October 1914. It is clear that in admitting and considering this documentary evidence, the learned District Judge has contravened the provisions of Order XLI, rule 27, Civil Procedure Code, which are mandatory, *vide Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1). Dr. Nand Lal referred us to *Gopal Singh* v. *Jhakri Rai* (2) and *Jagarnath Pershad* v. *Hanuman Pershad* (3). The former ruling is of no force against *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1), and in *Jagarnath Pershad* v. *Hanuman Pershad* (3) additional evidence had been taken with the consent of the parties. Having regard to the manner in which this documentary evidence was placed on the record, it is not surprising that the plaintiff-appellant was unable to explain the said documents. Although the learned District Judge does not come to a definite finding as to whether the plaintiff was the son of Sawan Singh or not, he has held that the plaintiff had failed to prove that he was in existence when the sale took place. This finding, however, is vitiated by the fact that to some extent at least it must have been based on the evidence wrongly admitted. As to the second point, *i. e.*, that of necessity, the learned District Judge has come to no real finding, although in dealing with the first point he appears to have considered that the sale had been effected for inadequate consideration. Again he has assumed that at the date of the alienation there were no reversioners in existence other than the vendees themselves who could object to the alienation, although there had been no adequate enquiry on this point.

In these circumstances, we accept this appeal and, setting aside the order of the learned District Judge, remand the case to the lower Appellate Court under Order XLI, rule 23, Civil Procedure Code, for definite findings on the points raised. The learned District Judge will, of course, be entitled to remand the case for further enquiry as to whether there were any other reversioners in existence at the date of the sale, should he think that course necessary, and if he does, it follows that both sides will be entitled to lead evidence on the point.

Dr. Nand Lal contended before us that the suit was barred by limitation and referred to *Inayat Khan* v. *Shabu* (4).

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

(2) 12 C. 37; 6 Ind. Dec. (N. s.) 25.

(3) 3 Ind. Cas. 465; 36 C. 833; 13 C. W. N. 830; 10 C. L. J. 74; 6 M. L. T. 7; 11 Bom. L. R. 861; 19 M. L. J. 435; 36 I. A. 221 (P. C.).

(4) 108 P. R. 1907.

The learned District Judge will also dispose of this point, if raised before him. Stamps on the appeal to this Court will be refunded and other costs will follow the event.

Appeal accepted; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3 OF 1917.

June 4, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

KASISWAR GOSWAMI—DEFENDANT—APPELLANT

versus

AMIRUDDIN *alias* ZUKKA GAZI—PLAINTIFF—RESPONDENT.

Fraud—Decree obtained by false evidence, whether can be set aside.

The mere fact that a decree has been obtained by false evidence is not a sufficient ground for setting it aside. [p. 16, col. 1.]

Appeal against the decree of the Officiating Sub-Judge, Tipperah, dated the 9th September 1916, reversing that of the Munsif of Commilla, dated the 29th November 1915.

FACTS appear from the judgment.

Babu *Ram Dayal Dey*, for the Appellant.—The defendant-appellant obtained an *ex parte* decree for rent against the plaintiff-respondent and his brother on 22nd August 1911, and had the said decree executed against the plaintiff, who thereupon applied under Order IX, rule 13, Civil Procedure Code, for setting aside the same. His application was, however, rejected on the ground that the summons was duly served in his presence, he having declined to sign a receipt in acknowledgment of the service. The plaintiff then brought the present suit for setting aside the said *ex parte* decree as fraudulent. The fraud alleged was that there was no relationship of landlord and tenant between the plaintiff and the defendant, that the claim was false and that the summons was fraudulently suppressed. The Munsif dismissed the suit, holding that the previous adjudication as to due service of summons was *res judicata*, that the tenancy of the plaintiff and his brother under the defendant was proved and that the defendant's suit was not a false one. On appeal, the Subordinate Judge, while agreeing with the Munsif that the question as to the service of summons was *res judicata*, held that the said tenancy was not proved and that the defendant had managed to get the *ex parte* decree by placing a false case before the Court, and he accordingly decreed the suit and set aside the *ex parte* rent decree.

I submit that the substantial point for determination in this appeal is whether the plaintiff, having received summons in the prior suit and not having contested it, can now bring this suit on the same ground of fraud which might and ought to have been his ground of defence in that suit, the other fraud alleged by him as regards suppression of summons being found against him. Refers to section 11, Explanation IV, and Order VIII, rule 2, of the Civil Procedure Code. Fraud must be pleaded specifically in defence, otherwise it is *res judicata* under Explanation IV. The rules of constructive *res judicata* preclude the plaintiff from re-agitating the same matter by merely changing the forum. See *Morufal Huq* v. *Surendra Nath Roy* (1).

[FLETCHER, J., referred to *Kedar Nath Das* v. *Hemanta Kumari Dasi* (2).]

In some cases it has been held that the plaintiff in such a case must prove not only that there was fraud but that he was prevented by fraud from placing his case before the Court. See *Abdul Haque* v. *Abdul Hofez* (3), *Mahomed Golab* v. *Mahomed Sulliman* (4). A different view has also been taken in some other cases. But it is perhaps sufficient to prove that there was fraud and that the plaintiff was prevented by unavoidable circumstances from placing his case before the Court, as was the case in the case of *Lakshmi Charan Shaha* v. *Nur Ali* (5). In such cases the rule of *res judicata* does not apply and a fresh suit is maintainable. In this view all the reported cases can be reconciled.

(1) 15 Ind. Cas. 893; 16 C. W. N. 1002.
(2) 22 Ind. Cas. 709; 18 C. W. N. 447.
(3) 5 Ind. Cas. 648; 14 C. W. N. 695; 11 C. L. J. 636.
(4) 21 C. 612; 10 Ind. Dec. (N. S.) 1038.
(5) 11 Ind. Cas. 626; 15 C. W. N. 1010; 38 C. 936.

[FLETCHER, J., referred to *Khagendra Nath Mahata* v. *Pran Nath Roy* (6).]

That case is not against me. There the substituted service effected by the peon, in the absence of the defendant in the prior suit who could not be found, was held to be legally sufficient, and accordingly the application under section 108 of the old Civil Procedure Code was dismissed. That was consistent with the defendant's having no knowledge of the suit and being prevented from defending it. In fact the other party had him declared a lunatic in a collusive suit. There the Privy Council did not hold that the decision under section 108 of the old Code, so far as it went, was not *res judicata* but that it did not bar a fresh suit. It was not and could not be urged in that suit on behalf of the appellant before the Privy Council that the prior *ex parte* decree sought to be set aside was *res judicata*.

[FLETCHER, J.—In the case of *Lakshmi Charan Shaha* v. *Nur Ali* (5) the prior *ex parte* decree was set aside and the case which was restored was again decided *ex parte*.]

Yes. In that case summons was at first served on a person falsely personating the defendant. At the time of the re-hearing the defendant was prevented by illness from attending the Court and his application by wire for adjournment was rejected.

If on the authority of the case reported as *Dharanidhar Aditya* v. *Hemanga Chandra Jana* (7) the *ex parte* decree be set aside, in this case the original suit will have to be restored and tried again on the merits. Thus two different Courts will be given the chance of coming possibly to opposite conclusions on the same facts constituting the merits of both the cases. Therefore the essentials in a suit to set aside a decree on the ground of fraud should be, *first*, that the claim must be alleged to be false, otherwise why should the decree be set aside; *secondly*, fraud, other than mere falsity of claim in procuring judgment; and *thirdly*, plaintiff having had no opportunity of defending the prior suit. In the first case perjury is inevitable and need not be separately mentioned. In the second and third cases fraud must be proved. Refers to the observation of Lord Justice Brett in *Abouloff* v. *Oppenheimer* (8) quoted with approval in the case of *Lakshmi Charan Shaha* v. *Nur Ali* (5): "Fraud of a party is an extrinsic and collateral act which will vitiate a judgment, that is, something other than that going to the merits of the prior suit, which can be gone into only accidentally in the fresh suit."

Moulvi *Wahid Hussain*, for the Respondent.—The contention of my learned friend that the present suit is barred by the doctrine of constructive *res judicata* has no substance. Explanation IV to section 11 of the Code of Civil Procedure does not apply to this case. Refers to the case of *Khagendra Nath Mahata* v. *Pran Nath Roy* (6). In the present suit it has been found that the previous suit for rent, in which the present defendant obtained an *ex parte* decree against the plaintiff in this suit, was false and fraudulent from start to finish. The cases in which it has been held that a fresh suit to set aside an *ex parte* decree on the ground of fraud is maintainable may be divided into two classes. In the first class may be included cases in which there was service of summons but the defendant had no knowledge of that. In the second class of cases may be included those in which the summons was served to the knowledge of the defendant As regards the second class see *Khagendra Nath Mahata* v. *Pran Nath Roy* (6), *Lakshmi Charan Shaha* v. *Nur Ali* (5), *Pran Nath Roy* v. *Mohesh Chandra Moitra* (9) and *Dwarka Prasad* v. *Lachhoman Das* (10).

Only in *Lakshmi Charan Shaha* v. *Nur Ali* (5) the plaintiff seeking to set aside the *ex parte* decree appears to have had knowledge of the prior suit but there the circumstances were peculiar.

In this case there should at least be some finding as to whether or not the plaintiff was prevented by sufficient cause from contesting the prior suit.

(6) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).

(7) 41 Ind. Cas. 956; 21 C. W. N. 1087; 27 C. L. J. 592.

(8) (1883) 10 Q. B. D. 295 at p. 307; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.

(9) 24 C. 546; 12 Ind. Dec. (N. S.) 1032.

(10) 21 A. 289; A. W. N. (1899) 67; 9 Ind. Dec. (N. S.) 893.

Babu *Ram Dayal Dey*, in reply.—From the finding arrived at by the learned Subordinate Judge it is not clear what is the kind of fraud which was committed by the present defendant in obtaining the *ex parte* decree in the prior suit.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against the decision of the learned Officiating Subordinate Judge of Tipperah, dated the 9th September 1916, reversing the decision of the Munsif of Commillah. The suit was brought by the plaintiff to set aside a decree on the ground that it was obtained by fraud. It is not quite clear from the conclusion arrived at by the learned Judge what exactly he intended to find with regard to the fraud that is alleged to have been committed in the former suit. First of all, as far as I can gather, the learned Judge seems to have held that there was actual service of the summons in the former suit on the plaintiff. The learned Judge has not found whether, if it was so served, the present plaintiff was prevented by any sufficient cause from appearing when the former suit was brought on for hearing. If he was so prevented, the fact that he had been served with the notice would be considerably discounted, as has been held in some cases notably in the Privy Council case of *Khagendra Nath Mahata* v *Pran Nath Roy* (6), where it was found that, although the plaintiff had been served in the earlier suit, steps had been taken to have him declared a lunatic so that possibly he could not attend the Court. That is a matter that must be enquired into by the learned Judge.

The next matter is that it is not quite clear whether the learned Judge intended to find that the former suit itself was a fraud or whether he meant to say that having served the present plaintiff in the former suit, what the present defendant did was to obtain a decree merely by supporting the case by false or perjured evidence; for the mere fact that the decree was obtained by false evidence would not be sufficient by itself to have the decree set aside, the case itself must be found to be a fraudulent one. In our opinion, the more satisfactory way would be to send the case back to the lower Appellate Court to have it re-heared and a more definite conclusion of fact arrived at by the learned Judge. Costs will abide the result of the re-hearing by the learned Judge of the lower Appellate Court.

SHAMSUL HUDA, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 11 OF 1918.

June 7, 1918.

Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Ryves.

NUR UD-DIN KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

PRAN KISHAN CHAKARVARTY AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (a)—Order returning memorandum of appeal for presentation to proper Court, whether appealable—Plaint, whether includes memorandum of appeal—Execution of decree—Duty of executing Court.

A memorandum of appeal is not a plaint. [p. 17, col. 1.]

No appeal lies against an order of an Appellate Court directing a memorandum of appeal to be returned for presentation to the proper Court. [p. 17, col. 1.]

A Court executing a decree is bound to give effect to it as it stands [p. 17, col. 1.]

Execution first appeal from a decree of the District Judge, Cawnpore.

Dr. *S M Sulaiman*, for the Appellant.

Mr. *Peary Lal Banerji*, for the Respondent.

JUDGMENT.—This appeal has been preferred under the following circumstance. A suit was brought by the appellant for dissolution of partnership and for the taking of partnership accounts. The matter was referred to arbitration, and an award was made which was accepted by the Court and in accordance with which a decree was passed. Under the award the defendants were found entitled to Rs. 6,000 and odd from the plaintiff, and the award directed that they should realise the said amount by sale of the partnership assets. The defendants, who are respondents here, made an application to the Court for execution of the decree which, we may mention, has become final. The application

was resisted on the ground that under the terms of the decree the applicants for execution were not entitled to take out execution. This objection was overruled by the Court of first instance and the appellant subsequently paid the amount of the decree and under the terms of the award he obtained possession of the property, namely, partnership buildings and stock-in-trade, etc. The plaintiff preferred an appeal to the District Judge. The District Judge held that the decree was capable of execution but he was of opinion that no appeal lay to him, and he directed the memorandum of appeal to be returned to the appellant for presentation to the proper Court. In his opinion the value of the suit exceeded Rs. 5,000. From this order returning the memorandum of appeal the present appeal was preferred. In the alternative it was prayed that the application might be treated as one for revision if no appeal lay.

In our opinion no appeal could be preferred to this Court from the order directing the memorandum of appeal to be returned for presentation to the proper Court. Under Order XLIII, rule 1, an appeal lies from an order returning a "plaint," but a "memorandum of appeal" is not a "plaint" and therefore that Order has no application to the present case. It may be an omission on the part of the Legislature, but under the law as it stands we are unable to hold that the word "plaint" includes "the memorandum of appeal". This Court in the case of *Nazar Husain* v. *Kesri Mal* (1) held that no appeal lay from an order returning a memorandum of appeal. We see no reason to differ from the view taken in that case. We accordingly hold that this appeal as an appeal is not maintainable. Looking at the case as an application for revision we are of opinion that there are no merits in it, inasmuch as the decree made by the Court awards to the defendants the amount which they sought to recover by execution and which has been paid to them by the applicant. Whether that decree is a right decree or a wrong decree it is now too late to consider. A Court executing a decree is bound to give effect to it as it stands, and the decree in this case does award the amount claimed to the defendants. Therefore the case is without merit and we see no reason to exercise our discretionary powers under the revisional section. We accordingly dismiss the appeal, and decline to take action in revision. The respondents will get their costs.

Appeal dismissed.

(1) 12 A. 581; A. W. N. (1890) 203; 6 Ind. Dec. (N. S) 1116.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2250 OF 1916.

April 17, 1918.

Present:—Mr. Justice Scott-Smith.

Musammat RAM KAUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ACHHRU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Ancestral property—Burden of proof—Presumption - Adoption - Reversion of property, principle of, applicability of.

The burden of proving that a particular property is ancestral lies on the person who claims it as such, and the burden is not discharged by showing that it is not unlikely that the common ancestor acquired the property. [p. 18, col. 2.]

Where in 1885 three brothers were in joint possession of certain land:

Held, that it was not unreasonable to presume that they got the land from their father, but that it could not be presumed further that the latter got it from *his* father. [p. 18, col. 2.]

The principle of reversion to the heirs of a donor or appointor is limited to property over which he had not an unrestricted power of disposal, so that the reversionary heirs of an appointor cannot succeed to the land of the appointed heir on the latter's death without descendants, where the land is not ancestral *qua* themselves. [p. 19, col. 1.]

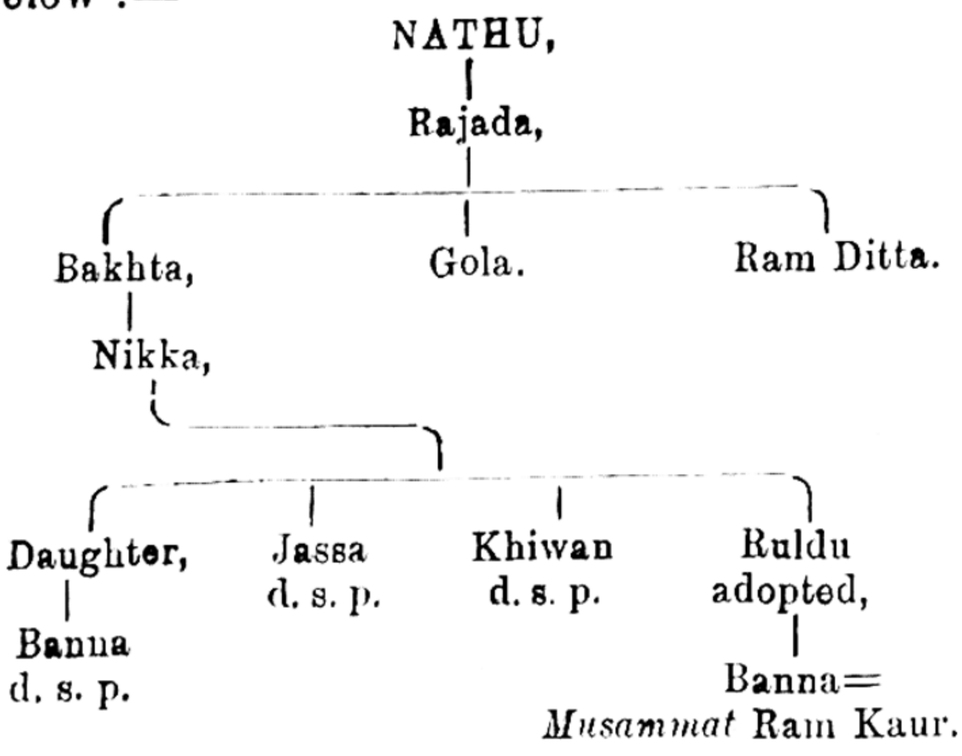
Second appeal from the decree of the District Judge, Jullundur, dated the 15th May 1916, reversing that of the Munsif, 1st Class, Jullundur, dated the 3rd December 1915, dismissing the claim.

The Hon'ble Rai Bahadur Pundit *Sheo Narain*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Civil Appeals Nos. 2250 and 2251 of 1916 may conveniently be disposed of together. The defendants-appellants in these two appeals are *Musammat* Ram Kaur and certain persons with whom she has made exchanges of certain plots of land of which she is in possession as

the widow of Banna. The connection between Banna and the plaintiffs-respondents appears from the pedigree-table set forth below :—



The first Court dismissed the suit, holding that it was not proved that the land was the ancestral property of the plaintiffs. The lower Appellate Court on the other hand held that the land was proved to be the ancestral property of the plaintiffs, and that it was necessary to go into the question whether the exchanges were advantageous or not, as widows could not be trusted to manage the land in which they have a life-interest only. The Court accordingly accepted the appeal and gave plaintiffs the decree asked for. The defendants have come up to this Court on second appeal, and the first point urged on their behalf is that the land is not proved to be ancestral *qua* the plaintiffs. The lower Appellate Court has disposed of the question whether the land is ancestral in rather a summary manner. The part of its judgment which concerns this point is as follows :—

"In my opinion the land is clearly ancestral. Theoretically the Courts demand strict proof of ancestral nature of land. Practically they are ordinarily satisfied with the absence of proof to the contrary."

In my opinion this view of the law is erroneous. Their Lordships of the Privy Council in the case reported as *Atar Singh* v. *Thakar Singh* (1) have laid it down in clear terms that "The onus of proving that the property alienated was not self acquired in the hands of the last male owner was on the plaintiff who could not under the circumstances derive any assistance from conjectures, however reasonable, in place of positive proof." This Court has enunciated the same rule in many judgments, two of which are reported as *Muhammad Umar* v. *Nawab Din* (2) and *Ala Singh* v. *Khark Singh* (3); in the latter it was laid down that the burden of proving that a particular property was ancestral lies on the person who claims it as such.

The burden is not discharged by showing that it is not unlikely the common ancestor acquired it himself. In the first Settlement of 1851 the three sons of Nikka, Jassa, Khiwan and Ruldu, were in joint possession of all the land which subsequently came to Banna. In these circumstances it is not unreasonable to presume that they got the land from their father Nikka, but this presumption cannot be extended so as to hold that Nikka acquired the land from his father Bakhta and that Bakhta acquired it from his father Rajada, who is common ancestor of Nikka and of the plaintiffs. The history of the village shews that persons of the Dhandora *got* along with the representatives of three other tribes purchased the whole of the village for Rs. 500 from the original proprietors. One of the Dhandoras was Nathu who had four sons, one of them being Rajada. Mr Tek Chand on behalf of the respondents urges that there is no evidence to show that any of the land was acquired by purchase or gift and the presumption should be that it was either acquired by Nathu or broken up by his descendants out of the waste lands attached to the village. He asks me to presume, therefore, that the land must have come down from Nathu and his son Rajada. I am unable to draw this presumption. There is nothing to shew how much land Nathu or his son Rajada broke up. The land that Nathu cultivated may have descended to his sons other than Rajada and the land of which Rajada was in possession may have descended to Bhola and Ram Ditta, the ancestors

(1) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359, 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790.

(2) 24 Ind. Cas. 678; 217 P. L. R. 1914; 127 P. W. R. 1914.

(3) 17 Ind. Cas. 392; 257 P. L. R. 1912; 253 P. W. R. 1912.

of the plaintiffs, and the land which Nikka left may have been acquired in the first instance by him or by his father. There is certainly no presumption that Nikka's land came down to him from his grandfather. I, therefore, differ from the lower Appellate Court and hold that the onus lay heavily upon the plaintiffs to prove that the land was their ancestral property, and that they have not discharged this onus.

Prior to 1894 Banna was in possession of 2/3rds of the land left by Nikka and Kesar was in possession of the other 1/3rd. When Kesar died in 1894, mutation of his share was effected in favour of Banna who claimed to be an heir, on the ground that he was the adopted son of Ruldu. No one came forward to object to his claim and the land was duly mutated in his name. Mr. Sheo Narain cites *Bhagat Singh* v. *Sher Singh* (4) as authority for the proposition that the principle of reversion to the heirs of a donor or appointor is limited to property over which he had not an unrestricted power of disposal, and consequently they cannot succeed to the land of the appointed heir on the latter's death without a male descendant, where such land is not ancestral *qua* themselves. In accordance with this authority he urges that the land of Banna will not revert to the plaintiffs after the death of the widow and that consequently they cannot control her dealing with the property. Mr. Tek Chand does not dispute the authority of this ruling, but urges that the fact that Banna was allowed to succeed to Kesar's share shews that he must have been the formally adopted son of Ruldu and not merely an heir appointed according to custom. His argument is that Banna, being the formally adopted son of Ruldu, must be regarded just as if he were his natural son, and that this being so the plaintiffs are his heirs, whether the property was ancestral *qua* them or not. It was, however, never urged in the Courts below that Banna was anything more than an appointed heir of Ruldu and I do not see how the point can be raised now for the first time. The parties are Jats and governed by Customary Law, and there is no reason to suppose that Banna was anything more than an heir appointed according to usual custom. Article 43 of Rattigan's Digest shews that the appointed heir does not acquire the right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place. But the exception under that Article shews that among certain tribes an appointed heir does succeed collaterally. The mere fact that Banna was allowed to succeed to Kesar's share does not, in my opinion, shew that he was the formally adopted son of Ruldu. Banna was in possession of the whole of Nikka's property as the appointed heir of Ruldu, the property was not ancestral *qua* the plaintiffs, and they have, therefore, no *locus standi* to control the alienations effected by Banna's widow.

I accordingly accept the appeal and setting aside the orders of the lower Appellate Court restore the order of the first Court dismissing the plaintiffs' suit with costs in all the Courts.

Appeal accepted.

(4) 24 Ind. Cas. 212; 29 P. R. 1914; 156 P. L. R. 1914.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2011 OF 1916.

June 5, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

MONINDRA NATH CHOWDHURI AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

RADHA PROSANNO GON AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 106—Landlord and tenant—Lease providing for re-entry on certain conditions—Notice to quit, whether necessary.

The provisions for serving a notice to quit on a lessee were inserted in the Transfer of Property Act to provide for cases where the parties to the lease are not regulated by their contract. [p. 20, col. 2.]

Where a lease itself provides that the landlord may at any moment resume possession of the land on payment of full compensation to the lessee for the buildings he may have erected thereon, there is no necessity for giving a notice to quit under section 106 of the Transfer of Property Act in order

to entitle the landlord to get back *khas* possession of the land. [p. 20, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Burdwan, dated the 14th July 1916, affirming that of the Munsif, 1st Court at that place, dated the 26th June 1915.

FACTS appear from the judgment.

Babu *Hira Lal Sanyal*, for the Appellants. —This appeal is on behalf of the defendants and it arises out of a suit for *khas* possession of a piece of land lying within the Burdwan Municipality. The tenancy is from year to year. The question for determination is whether the plaintiffs are entitled to get *khas* possession without the service of a notice under section 106 of the Transfer of Property Act. Without a proper notice to quit as required by section 106 the defendants cannot be ejected. See *Mahananda Roy* v. *Sarat Moni Debi* (1), *Narayan Dasappa* v. *Ali Saiba* (2), *Madar Saheb* v *Sannabawa Gujranshah* ( ), *Parameshri* v. *Vittappa Shanbaga* (4) and *Netrapal Singh* v. *Kalyan Das* (5).

[FLETCHER, J., refers to *Basirat Ali Khan* v. *Manirulla* (6).]

One of the terms of the lease is: "The lessor will have right to take *khas* possession whenever he will require that".

[FLETCHER, J.—On the terms of the contract section 105 of the Transfer of Property Act does not apply, and so no notice to quit is necessary.]

The provisions for resumption in leases are not uncommon, and such terms as mentioned in the lease are often found in almost all contracts, and in spite of that reasonable notice to quit is always given. Refers to *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (7).

Dr. *Jadunath Kanjilal*, for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J. This is an appeal by the defendants Nos. 2 and 3 against the judgment of the learned Subordinate Judge of Burdwan, dated the 4th July 1916, affirming the decision of the Munsif of the same place. The suit was brought for ejectment. The defendants are the original tenant and the two transferees. No notice to quit was served on the defendants Nos. 2 and 3 under the provisions of section 106 of the Transfer of Property Act. The learned Judge considered that the covenant restricting alienation in the lease was binding and, therefore, the defendants Nos. 2 and 3 were trespassers and had no interest. It is not necessary for us to go into that question. The case is a perfectly simple one on the terms of the lease. It was a lease to the defendant No. 1 for the purpose of building a *pucca* house on the land. The lease provided that, if the landlord desired to resume possession of the land, he could do so provided he paid for the value of the buildings; that means the buildings that were to be erected in accordance with the prior provision in the lease. There are no buildings on the land within the meaning of the prior provision of the lease, because they were all swept away by flood. The present buildings are huts and walls not coming within the meaning of the purpose for which the lease was granted. The landlord can, therefore, take possession of the land at any time upon paying compensation, if any. It is said that he cannot take possession without giving notice. That is absurd. The parties must stick to the bargain made and if the defendant No. 1 thought it worth his while to take lease of a piece of land within the limits of the Municipality of Burdwan at a rent of 12 annas a year subject to the provision that the landlord might at any moment re take possession on payment of full compensation for the buildings, then he must stand strictly to that bargain however inconvenient that may be. There are no provisions in the Transfer of Property Act requiring notice to be given in such a case Those provisions for notice were inserted there to provide for cases where the parties are not regulated by their contracts. It is quite clear that the landlord in this case is entitled to resume possession. The suggested hardship on the defendants in having to deliver possession at any moment is considerably discounted when the fact is taken into consideration that for four years by resisting the plaint-

(1) 10 Ind. Cas. 374; 14 C. L. J. 585.
(2) 8 B. 603; 9 Ind Dec. (N. S.) 911.
(3) 2 B. 195 at p. 196; 11 Ind. Dec. (N. S.) 132.
(4) 26 M. 157; 12 M. L. J. 189.
(5) 28 A. 400; A. W. N. (1906) 60; 3 A. L. J. 196.
(6) 2 Ind. Cas. 416; 36 C. 745 at p. 749; 10 C. L. J. 49.
(7) 24 C. 720; 12 Ind. Dec. (N. S.) 1149.

iffs' just claim the defendants have managed to maintain possession of this land in the town of Burdwan at a rent of 12 annas per annum contrary to the terms of the lease. I am not disposed, as at present advised, to disagree with the reasons given by the learned Subordinate Judge in his judgment, and I agree with the conclusion arrived at by him. The present appeal, therefore, fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 105 OF 1912.

September 17, 1913.

Present:—Mr. Batten, A. J. C., and Mr. Mittra, A. J. C.

Pandit MUKAND RAM SUKUL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEO NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 11—Res judicata, *essentials of—Concurrent jurisdiction in pecuniary limits and subject-matter, whether necessary—Accounts, whether can be adjudicated where no further relief can be granted—Mortgage, usufructuary—Mortgagee, failure of, to keep accounts—Presumption*

In order to constitute *res judicata* the two Courts must be of "concurrent" jurisdiction as regards the pecuniary limits as well as the subject matter of the suit. [p. 22, col 2; p. 23, col 1.]

Apart from any special statutory provision, accounts cannot be adjudicated upon by a Court when no further relief can be granted Ordinarily a suit for accounts upon a mortgage cannot be maintained by the mortgagor unless he also asks for redemption [p 23, col. 2; p 24, col. 1]

An adjudication which cannot be the basis of any relief is not binding on the parties. [p 24, col. 1.]

Where on taking the accounts of a usufructuary mortgage it appears that the mortgagee has kept no regular accounts, every reasonable presumption should be made against him. [p. 25, col. 1]

Appeal against the decree of the District Judge Hoshangabad, in Civil Suit No. 24 of 1910, dated the 21st July 1912.

Dr. *H. S. Gour*, for the Appellants.

Messrs. *F. W. Dillon* and *P. S. Kotwal*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of the District Judge of Hoshangabad, dismissing a suit for foreclosure, based on a mortgage deed dated the 13th January 1870, executed by the first defendant Ganpat. This defendant died since the filing of this appeal, and his legal representatives have been brought on the record, on their own application, though they do not seem to have any interest left in the mortgaged property, which was purchased at an auction sale in execution of a decree against Ganpat by the 2nd defendant. The document in suit is in part a usufructuary mortgage and in part a deed of conditional sale. The mortgage is not redeemable within twenty-three years, except on terms of a highly penal character therein laid down. In 1870, the mortgagees brought a suit for possession in the Court of the Deputy Commissioner and obtained a decree on the 13th October 1870, and they have been in possession ever since.

The main questions involved in this appeal are whether on a right interpretation of the document, the mortgagees in possession are bound to credit more than Rs. 751 per annum, as stated therein, and if so, what is the state of account between the parties. The parties rely on certain previous litigation as deciding finally the first and to some extent the second part of the question with which we are concerned. There are some minor points for decision in this appeal which need not be noticed at this stage, though they will have to be dealt with in deciding the grounds of appeal.

It appears to us to be necessary to give an outline of the various former suits which are relied on by the parties, as having the force of *res judicata*. Before proceeding to do so, it is necessary to mention, what is admitted by Counsel on both sides, that suits above the value of Rs. 5,000 could not be entertained either by an Assistant Commissioner, or by an Extra Assistant Commissioner. Such suits were exclusively cognisable by the Deputy Commissioner who was in these Provinces what is called a Zilla Judge in the old Bengal Regulations and in later enactments, a District Judge.

We now proceed to refer to the various suits to which the parties have called our attention in this appeal, as having a material bearing on the case. In 1877 the mortgagor filed a suit in the Court of Mr. Sultan Ali (Suit No. 267 of 1877), an Extra Assistant Commissioner. The plaint in that suit has been eliminated but from the judgment of the Court of the Judicial Commissioner, in Second Appeal No. 89 of 1879 (Exhibit D-28), it appears that the suit was one for "rendition of accounts of receipts and disbursements on account of Mouza Dhamni," the mortgaged village. This judgment of Mr. Grant (afterwards Sir Charles Grant) was followed by a decree directing that "the defendants shall render to the plaintiff a true statement of the charges and receipts of Mouza Dhamni up to the close of Sambat 1933." In execution of this decree, Mr. Vasudeo Ballal Kher, an Extra Assistant Commissioner, held an inquiry by appointing a Commissioner and the result of that inquiry was stated in the final order (Exhibit D-30) to be that "Rs. 13,041 should be credited to the Ganpatsing for seven years 1927 to 1933 both inclusive." It seems an attempt was made by the mortgagor to realise by execution Rs. 13,041 from the mortgagees but this attempt failed. In Exhibit P-5 Col. Ricketts, Additional Commissioner, notes as follows: "The petitioner is entitled to the benefit of that credit in the accounts between him and Makundram Tulsiram but he cannot take out execution for the amount." No second appeal appears to have been filed from the appellate order of Col. Ricketts. In the meanwhile the mortgagor filed in 1881 a second suit for "rendition of accounts" in the Court of Mr. Priest, an Extra Assistant Commissioner. The claim was decreed (Exhibit D-29), following the previous decree of Sir Charles Grant in 1878. Mr. Priest's decree was for rendition of accounts for the Sambat years 1934 to 1937. It was followed up by execution proceedings before Mr. Williams, Extra Assistant Commissioner (Exhibit D-15). The certified copy of these execution proceedings is somewhat imperfect, as the original is torn in many places. Proceedings against the mortgagees by way of attachment had taken place, treating them as persons guilty of a contempt. Some accounts were filed on behalf of the mortgagees, which, as far as can be made out, were meant to show a loss. Objections were taken but Mr. Williams, who apparently understood the decree as one for "explaining accounts," did not eventually record any findings of his own. In 1885 the mortgagor filed a suit (Suit No. 42 of 1885) for redemption and for Rs. 30,958, alleged to have been recovered by the mortgagees in excess of the mortgage-money. A decree for redemption was passed, conditionally on the mortgagor paying Rs. 32,529-13-6. The judgment in this suit is Exhibit P-4. It was passed by Mr. Vithal Ramchandra, Extra Assistant Commissioner, who was by notification No. 4467, dated the 9th September 1884, invested with the powers of a Deputy Commissioner, under section 16 of Act XIV of 1865, Central Provinces Courts Act.

This judgment was reversed on appeal by Col. Ricketts, who dismissed the suit (Exhibit D-26). The main ground for dismissing the suit was that the mortgage money had not been paid off out of the usufruct. The Appellate Court also remarked that it was not necessary to go deeply into the defendants' account. The result was that the state of accounts between the parties was left open for future decision. Although the appellants in their fifth ground of appeal suggested that the litigation of 1885 had the effect of *res judicata*, this was abandoned at the hearing by their learned Counsel, and, in our opinion, the fifth ground of appeal is untenable.

The first point for consideration is whether the mortgagees' liability to account for the usufruct is *res judicata*. Sir Charles Grant's decision was on second appeal from the Court of Mr. Sultan Ali, who in 1877 had powers up to Rs. 1,000 as would appear from a register kept in this Court. In 1881 Mr. Priest also had power to try suits up to the same value. We cannot agree with the Counsel for the appellants that the question of the mortgagees' liability to account for more than Rs. 751 a year was not directly and substantially in issue in the two former suits. But in order to constitute *res judicata* the two Courts must be of "concurrent jurisdiction

as regards the pecuniary limits as well as the subject-matter," as laid down by their Lordships of the Privy Council in the case of *Misir Raghobardial* v. *Sheo Baksh Singh* (1). In 1877 there was no suit for a foreclosure known in these Provinces. By the Central Provinces Laws Act (Act XX of 1875), all Bengal Regulations were repealed except certain Regulations declared therein to be in force. These included Regulation II of 1798 and Regulation XVII of 1806, as they stood with the later amendments made up to 1875. A mortgagee, desirous of taking foreclosure proceedings, had to apply to the Zilla Judge, that is, the Deputy Commissioner, and this after the year of grace had to be followed up, where necessary, by a suit for possession. In our opinion we have to test the competency of the Court, with reference to the analogue of a suit for foreclosure in those days. Neither Mr. Sultan Ali nor Mr. Priest could have tried a suit for possession of the mortgaged property, the principal amount secured by which alone is Rs. 14,000. Nor could these officers have entertained the application under Regulation XVII of 1806. Even if a suit for foreclosure could have been brought in those days, neither of these Courts could have tried it, having regard to the pecuniary limits of their jurisdiction. We have, therefore, come to the conclusion that the question of the mortgagees' liability is not *res judicata* by reason of the two previous suits.

We have, therefore, to determine this question upon an interpretation of the mortgage deed. The document makes an estimate of the income on the basis of the *jamabandis* of the previous year, allows for certain expenditure including Government revenue, and the balance of Rs. 751 is agreed to be credited every year towards the mortgage debt. It will be observed that Rs. 751 is less than the interest payable under the document. It is not expressly stated that the excess interest will be personally paid by the mortgagor. As pointed out by the Judicial Commissioner in the former suit, there is no express covenant entitling the mortgagees to appropriate anything above this figure, if actually realised, except where the excess is due to improvements made by them. The parties must be taken to have known that the assets will increase within the period of twenty-three years, during which the mortgage was practically irredeemable. In our opinion the one-sided bargain pleaded by the mortgagees cannot be presumed but must be made out by clear and unambiguous stipulations in the deed, especially as the mortgagees were dealing with an illiterate rustic. We hold then that the mortgagees are accountable for the usufruct actually realised.

We have now to consider whether the finding arrived at in Exhibit D-30 by Mr. Vasudeo Ballal Kher (an officer with powers up to Rs. 5,000) is final and binding on the parties. The lower Court has mistaken Mr. Kher for Mr. Vithalrao, in part of its judgment. Mr. Kher in execution of Sir Charles Grant's decree found that Rs. 13,041 should be credited to Ganpatsingh for the first seven years' profits. The defendant No. 2 has filed a statement which would go to show that on this finding, even if credit is given in later years for Rs. 751 only, the mortgage debt has been satisfied. We have not tested this statement, as we have come to the conclusion that the finding is *ultra vires* and is also not *res judicata*. We are inclined to think that the decree of this Court did not authorise an adjudication by the Court of first instance. What was probably meant was that the mortgagees should explain their accounts by filing extracts from their books. The judgment of this Court (Exhibit D 28) recognises that the suit was not "one for accounts, in the sense of one for money due after examination of accounts. It was simply for an account as such and without any further relief". Apart from a special Statute, such as the Dekkhan Agriculturists' Relief Act (Act XVII of 1879), it does not appear that accounts can be adjudicated upon by a Court, when no further relief can be granted. The Bengal Regulations, as introduced here by Act XX of 1875, did not authorise such a suit. In *Hari* v. *Lakshman* (2) Westropp, C. J., says,

(1) 9 C. 439; 12 C. L. R. 520; 9 I. A. 197; 7 Ind. Jur. 107; 4 Sar. P. C. J. 395; Rafique & Jackson's P. C. No. 70; 4 Ind. Dec. (N. S.) 941 (P. C.).

(2) 5 B. 614 at p. 616; 3 Ind. Dec. (N. S.) 405.

"ordinarily a suit for an account upon a mortgage cannot be maintained by the mortgagor unless he asks also for redemption". It seems to us that an adjudication which cannot be the basis of any relief is not binding on the parties. A declaratory decree declaring Rs. 13,041 as the credit would be one beyond the pecuniary limits of Mr. Kher. For reasons given in paragraph 5 of our judgment, we hold that this finding is not *res judicata*.

We may notice a ruling of this Court to which no reference has been made at the Bar. In the case of *Kalooram* v. *Ramkishen* (3) Stevens, J. C., held that in a suit for accounts the Court trying the suit does not lose its jurisdiction merely because the amount found due after enquiry happens to exceed the limit of the jurisdiction of the Court. [*Cf. Olpherts* v. *Arjundas* (4).] We think this decision cannot be extended to the case where only a mere declaration, if anything, can be granted by way of relief. If the plaintiff chooses to bring his suit in a Court with limited powers, all that can be declared—even if it were proper to make such a declaration—is that at least Rs. 1,000 or Rs. 5,000, as the case may be, should be credited to the plaintiff. More than that amount is not in that Court's power to declare.

We can find no admission by the plaintiffs that they actually realised Rs. 13,041 in the first seven years. These plaintiffs no doubt start their accounts with the findings of Mr. Vithalrao in 1885 (Exhibit P-4). This finding is based on the finding of Mr. Kher in Exhibit D-30. Practically the plaintiffs adopt it with certain variations. If the plaintiffs are not entitled to introduce their own variation, they ought not to be held bound by the finding of Mr. Kher, by reason of their having partially adopted it as the basis of the suit.

The lower Court has held that under the terms of the mortgage the plaintiffs can only foreclose in respect of the principal, the interest not being a charge on the property (according to the lower Court). This conclusion is deduced from the following passages in the mortgage-deed: "In case I fail to repay the balance at the stipulated time, the whole of the Mouza together with the *sir* land will stand as sold to you on Miti Jaith Badi Punwa 1949 in lieu of the principal amount of the bond. You should then consider this mortgage deed as an absolute sale-deed. The amount of compound interest which will remain due by me will be paid separately." It appears to us that the parties were not contemplating foreclosure proceedings at all. They had in their mind the contingency of a deed of conditional sale executing itself and becoming absolute. In 1870 it would have been somewhat difficult to say whether a right of redemption was left to the mortgagor after the stipulated period. It would have been not easy to say whether the Bengal Regulations or the spirit of those Regulations applied to the Central Provinces. It was in 1873 that their Lordships of the Privy Council in *Gokuldoss* v. *Kriparam* (5) decided the question in favour of the mortgagor. We note that it is nobody's case that the conditional sale became absolute in Sambat 1949. The clause then on which the District Judge relies is void, on the ground that notwithstanding the contract a right of redemption remained in view of the fact that either the Bengal Regulations were in force or the spirit of the Regulations was being given effect to by the Courts in the Central Provinces. The document is silent as to what should be the amount for which foreclosure is to take place. But the document clearly says that if the mortgagor redeemed he must pay the principal and interest. The interest, therefore, is a charge on the property and the plaintiffs are entitled to foreclose the whole of the mortgage debt, including interest.

There are certain judgments filed in the case where the first plaintiff was sued by the predecessors-in-title of the 2nd and 3rd plaintiffs for the profits of their share. The findings arrived at in these suits are not binding on the defendants being *res inter alias*. For want of mutuality the defendants cannot rely on them as against the plaintiffs. Nor can the admissions

(3) 8 C. P. L. R. 86.
(4) 20 Ind. Cas. 928; 9 N. L. R. 112.

(5) 13 B. L. R. 205; 3 Sar. P. C. J. 279 (P. C.).

made by one set of plaintiffs in such a suit against the others be said to be admissions by the mortgagees as such. In our opinion, these judgments must be excluded from our consideration.

The lower Court seems to think that the plaintiffs are responsible for the extinction of *sir* rights. Under the mortgage-deed, the mortgagees were not bound to cultivate them. They were at liberty to lease them out to tenants. By Act XVII of 1889 which received the Governor-General's assent on the 29th October 1889 and came into force at once, *sir* rights were extinguished if the *sir* land was unoccupied by the proprietor on the 29th October 1889 and the land had been leased to tenants for the previous six years "without an express preservation of his *sir* rights." The mortgagees could not anticipate this legislation and they were entitled to lease out the *sir* land.

We have now to determine the amount due to the plaintiffs. The plaintiffs have either kept no accounts or are suppressing them. We are inclined to agree with the District Judge that the latter is the more probable hypothesis. In two previous suits they were directed to render accounts. Assuming that the plaintiffs did not at first know that it was their duty to keep accounts, we consider that they should have started keeping them after the judgment of the Judicial Commissioner in 1878. No explanation has been offered as to why accounts in later years were not kept, or having been kept not produced. The assets in later years must have been very large compared with the estimate made in 1870. It is not possible for the defendants to give evidence regarding the usufruct. The village papers only give the rental demand. Miscellaneous sources of legitimate income are not shown in them. Oral evidence on such matters can scarcely be satisfactory. We think in these circumstances every reasonable presumption should be made against the plaintiffs. Following the decision of Sir Richard Couch in *Baboo Kullyan Dass* v. *Baboo Sheo Nundun Pershad Singh* (6), we set off interest against profits and hold that the plaintiffs are not entitled to anything more than the principal amount of Rs 14,000. There will be the usual foreclosure decree giving six months' time for payment. Each party should bear his costs in both Courts.

Before closing this judgment, we would notice that Ganpat's son Dattu appeared in person before us and suggested that his father was eccentric. It is not possible to entertain such a plea now. One of the appellants is dead and no application has yet been made to bring his legal representatives on the record. The case is analogous to that provided for by Order XLI, rule 4. The decree of the lower Court will be reversed as against all the plaintiffs, though the decree of this Court will be in the name of the two surviving plaintiffs.

Let the decree be drawn up on the lines indicated in this judgment.

Decree reversed.

(6) 18 W. R. 65.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2405 OF 1916.

June 12, 1918.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Walmsley.

NARASINGHA BANA GOSWAMI —DEFENDANT APPELLANT

versus

PROLHODMAN TEVARI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 3, Sch. I, Arts. 120, 132—Appeal, second Limitation, question of, whether can be raised for first time—Turn of worship at temple, whether immoveable property—Mortgage of turn of worship, suit to enforce—Limitation

A turn of worship at a temple is not an interest in immoveable property. Therefore, a suit to enforce a mortgage of a turn of worship is not governed by Article 132 of the Limitation Act but by Article 120. [p. 27, col. .]

A question of limitation can be raised in second appeal even where it has not been set up as a defence in any of the lower Courts [p. 26, col. 2.]

Appeal against the decree of the District Judge, Dacca, dated the 2nd June 1916, affirming that of the Subordinate Judge, 1st Court of that District, dated the 15th September 1915.

NARASINGHA BANA GOSWAMI v. PROLHODMAN TEVARI.

FACTS appear from the judgment.

Babu *Gunoda Charan Sen* (with him Babu *Khitish Chandra Neogy*), for the Appellant. —The appeal arises out of a suit to enforce a mortgage of a *pala* or turn of worship. The mortgage-bond was executed on 29th October 1902; the due date mentioned in the bond for payment is 30th April 1903. Rs. 25 was paid as interest on 12th October 1905. The present suit was brought on 15th April 1915, *i.e.*, 10 years after the payment of the interest.

The *pala* or turn of worship is not an immoveable property, therefore, 12 years' limitation would not apply but 6 years' limitation would apply. Therefore the suit is barred by time. In the lower Court the question of limitation was not argued, though an issue was raised on it. I can raise the question of limitation now on the authorities of this Court.

[CHITTY, J.—You have to show that 6 years' limitation would apply and Article 132, Limitation Act, does not cover it.]

It would come under Article 120, where no other Article applies.

Pala is moveable property. See *Jato Kar* v. *Makund Deb* (1).

The next point is that a *pala* is not transferable, and even if it is transferable, an immemorial custom of transferability of these *palas* should be proved. I rely on *Mahamaya Debi* v. *Haridas Haldar* (2).

Dr. *Sarat Chandra Bysack* (with him Babu *Surjya Kumar Guha*), for the Respondent.—The suit would come under Article 132. Under authorities extending over 30 years the *shebaiti* right has been held to be immoveable property.

[CHITTY, J.—The case in *Jato Kar* v. *Makund Deb* (1) is against you.]

In both the lower Courts the case proceeded upon the assumption that 12 years' limitation would apply and the case was tried on that footing, and the facts were, therefore, not investigated. There may not have been any payment after 1905 but there may have been acknowledgments. What was actually mortgaged was the *shebaiti* right and the *shebaiti* right is immoveable property.

(1) 11 Ind. Cas. 884; 39 C. 227 at p. 230, 16 C. W. N. 129; 14 C. L. J. 369.

(2) 27 Ind. Cas. 400; 20 C. L. J. 183 at p. 187; 42 C. 455; 19 C. W. N. 208.

[CHITTY, J.—The *shebaiti* right may be immoveable property, but here the turn of worship was mortgaged]

In *Jato Kar* v. *Makund Deb* (1) there was no question of limitation at all.

[CHITTY, J.—*Eshan Chunder Roy* v. *Monmohini Dassi* (3) is against you.]

Babu *Gunoda Charan Sen* was not heard in reply.

JUDGMENT.—This was a suit brought by the plaintiff to enforce a mortgage of a *pala* or turn of worship owned and held by the defendant at the temple of the deity Dhaneswari in a $2\frac{1}{2}$ anna share. The mortgage was dated 29th October 1902, the due date for payment being 30th April 1903. The plaintiff in his plaint alleged that Rs. 25 had been paid as interest on 12th October 1905. The suit was filed on 15th April 1915. The question of payment of interest was not gone into by the first Court inasmuch as 13th and 14th April 1915 were holidays. The suit was, therefore, within time if the period of limitation be taken as 12 years. It seems to have been assumed in both the Courts below that the period of limitation would be 12 years, so that in the District Judge's Court the question of limitation was not touched upon. In the grounds of appeal, however, to this Court which have been filed by the defendant this question was distinctly raised. The seventh ground is that the suit is barred by limitation upon the pleadings, inasmuch as the turn of worship is not immoveable property. With regard to the objection that this point was not raised in the Courts below we need only refer to the provisions of section 3 of the Limitation Act, which requires the Court to take notice of a question of limitation even though it has not been set up as a defence. The question of limitation depends on whether a turn of worship is to be regarded as immoveable or moveable property. On this point the authorities of this Court are clear, and there cannot be any longer doubt upon it. In the case of *Eshan Chunder Roy* v. *Monmohini Dassi* (3) it was held that a suit to enforce the right to the worship of an idol was governed by Article 118 of Act IX of 1871 (the Limitation Act then in force) and that not

(3) 4 C. 683; 2 Ind. Dec. (N. S.) 434.

having been preferred within 6 years it was barred by lapse of time. In the case of *Jato Kar* v. *Makund Deb* (1) the point was not one of limitation but of attestation of a usufructuary mortgage bond of a turn of worship under section 59 of the Transfer of Property Act. It was there held that a turn of worship is not an interest in immoveable property. That being so, it follows that this suit is not governed by Article 132 of the First Schedule to the Limitation Act but by Article 120. The suit having been filed long after 6 years had expired, even if the period be taken as running from the payment of interest in October 1905, it is out of time. The appeal must be allowed and the plaintiff's suit dismissed, but, under the circumstances, without costs.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION NOS. 209 AND 210 OF 1917.

February 14, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

LALJI SAHU—PLAINTIFF—APPLICANT

versus

LACHMI NARAIN SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9—Appearance, what amounts to - Plaintiff present in Court but not prosecuting case—Dismissal for default —Restoration, application for.

A party may appear in two ways, either by person or by Pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance within the real meaning of the word. [p. 27, col. 2; p. 28, col. 1.]

On a case being called on, the parties appeared in Court but the plaintiff did not prosecute the case. The Court dismissed the suit for the plaintiff's default. The plaintiff then applied for restoration of the suit, but the Court now held that the suit was not dismissed for default and that, therefore, it had no jurisdiction to restore it:

Held, that the order dismissing the suit was an order made under Order IX, rule 8, of the Civil Procedure Code, and that the Court was required to deal with the matter under Order IX, rule 9. [p. 28, col. 1.]

Civil revision against an order of the Munsif of Jamui, dated the 16th June 1917.

Mr. *Kailaspati*, for the Petitioner.

Mr. *Ganesh Dutt Singh*, for the Opposite Party.

JUDGMENT.—The facts of this case are as follows:—

The applicant before us was a plaintiff in a suit for a declaration that an entry in a Record of Rights was incorrect. The case was instituted on the 28th of January 1916. On the 26th February 1917 an order was recorded in the order-sheet:—

"The plaintiff appears on call but does not prosecute the case. Defendant is ready. Ordered that the suit be dismissed for plaintiff's default with costs to defendant."

On the 24th March 1917 an application was made for restoration of the case under Order IX, rule 9. The learned Munsif, who had himself recorded that the case was dismissed for the plaintiff's default on the 26th February 1917, recorded on the 16th June 1917 that it was not dismissed for default and that, therefore, he had no jurisdiction to make any order restoring it. The plaintiff, therefore, applies to this Court in revision asking us to set aside the order made on the 16th June 1917.

It is contended on his behalf that the plaintiff's appearance and refusal to prosecute amounted to a non-appearance, and that the learned Munsif on that date rightly recorded the matter as a case of default, and that, therefore, the learned Munsif was bound by law to take up, on the plaintiff's application, the question whether under Order IX, rule 9, it should be restored. By the opposite party it is contended that Order IX, rule 9, being appealable, this Court has no power to interfere in revision. It is obvious that there is no order under Order IX, rule 9, against which an appeal would lie. What the Munsif has actually done is to refuse to exercise jurisdiction in the matter at all. We are, therefore, only concerned with the question whether in fact the order made on the 26th of February was an order under Order IX, rule 8. We are of opinion that the view taken in the case of *Gopala Row* v. *Maria Susaya Pillai* (1) is correct. A party may appear in

(1) 30 M. 274; 17 M. L. J. 225.

two ways, either by person or by Pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance within the real meaning of the word It could not be suggested for instance that if when a case was called on, a litigant stood up at the back of the Court and applied for a few minutes' time to bring his Pleader he would be appearing in the true meaning of the word. We are aware that a different view was taken in *Esmail Ebrahim* v *Haji Jan Mahomed Haji Mahomed* (2), but are of opinion that the Madras decision should be followed. The Calcutta cases seem to have gone still further. that even when both plaintiff and his Pleader are present in Court, if the Pleader declines to proceed with the case there is in fact no appearance. It is sufficient for us to say that where the plaintiff is not appearing in person, and his Pleader is absent, the presence of the plaintiff in Court is not an appearance. We hold that the order of the 26th February 1917 was an order made under Order IX, rule 8, and that the learned Munsif was required to deal with the matter under Order IX, rule 9. He will now proceed to do so.

Case sent back.

(2) 3 Ind. Cas. 992; 33 B. 475; 10 Bom. L. R. 1172.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 91 OF 1916.

March 19, 19 7.

Present :—Mr. Mittra, A. J. C.

SHAMRAO—DEFENDANT—APPELLANT

versus

Musammat SATYA BHAWU BAI—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), ss. 35 (4), 91—Tenant right, whether can be willed away Ouster of true tenant by devisee—Suit by tenant to recover possession Limitation—Surrender, implied—Payment of rent on behalf of tenant

S, a co sharer of a village, gave a lease of the ordinary tenant right of his *sir* fields to *R.*, another co-sharer, for 149 years. A sum of Rs. 1,490 was paid in advance by way of rent for the period of the lease. *R.* died leaving a Will, by which he bequeathed all his property to his mother *A*, on whose death *R*'s widow brought a suit for possession of the holding on the ground that her husband had no right to will away the holding and that notwithstanding the bequest she remained the ordinary tenant of the holding:

Held, 1) that *R* had no right to will away the tenant right; [p 29, col. 1.]

(2) that section 91 of the C P. Tenancy Act was not applicable to the case as the ouster, if any, of the plaintiff from the holding was not at the instance of the landlord; [p 29, col. 1.]

( ) that there had been no implied surrender under section 35 (4) of the C. P Tenancy Act, inasmuch as the payment of rent in advance must be taken to have been on behalf of the true tenant. [p. 29, col. .]

A mere non-cultivation of a holding by or on behalf of a tenant is not in itself sufficient to constitute an implied surrender. [p. 29, col. .]

Appeal from the decree of the District Judge, Wardha, in Civil Appeal No. 276 of 19 5, dated the 26 October 1915.

Mr. *M. R. Dixit*, for the Appellant.

Mr. *Gharpure*, for the Respondent.

JUDGMENT.—Certain *sir* land held by one Shamrao, who was a co-sharer in the village of Babulgaon, was leased for 149 years to another co-sharer Ramrao. This was on the 4th April 1903 .It is clear that the lease was not a proprietary lease but a lease of the ordinary tenant right. Ramrao died in 1907, leaving a Will by which he purported to bequeath all his property to his mother *Musammat* Ahalyabai. She, it would seem, was recorded as the ordinary tenant of the holding. She died in 1913 and the plaintiff, who is the widow of Ramrao, brings a suit for possession of the holding, on the ground that her deceased husband had no power to will away the ordinary tenant right and that notwithstanding the bequest to her mother in law, she remained in law the ordinary tenant of the field in dispute. The facts of the case are practically admitted and the only question that remains for decision is whether lapse of time stands in her way. It is urged in the first place that Ahalyabai by reason of her adverse possession became a fresh stock of descent and that the plaintiff is not necessarily heir to her mother-in-law's *stridhan* property. As, however, Ahalyhbai was only in possession from 1907 to 1913, she could not acquire by the ordinary law of prescription a *stridhan*

title to the property. It may, however, be noticed that as she left no issue, the heir to the *stridhan* property would be her husband's *sapinda* and admittedly Ahalyabai was the heir of her husband. This disposes of the first two grounds of appeal.

It is urged again that Ahalyabai was recognised by the proprietary body as the ordinary tenant of these fields. She thereby became an ordinary tenant from whom descent is again to be traced. It is not altogether clear how the proprietary body recognised Ahalyabai as tenant. Under the terms of the *patta* executed in 1903 a sum of Rs. 1,490 was paid in advance for the rent of 149 years. So there was no receipt of rent to be granted by the landlord, nor is it indicated in the argument at the Bar in what other manner Ahalyabai was recognised as a tenant to the exclusion of the present plaintiff who was living in the same house with her mother-in-law.

The ouster, if any, by Ahalyabai was admittedly not at the instance of the landlord. Therefore section 94 of the Tenancy Act will not apply. There remains the question whether section 35, clause 4, of the Tenancy Act is inapplicable to the case. I think it would have been applicable but for the fact that the rent is paid in advance for 149 years. This must be regarded as a payment on behalf of the person legally entitled to the ordinary tenant right.

It is settled law in these Provinces that a tenant right cannot be willed away. Therefore, rent paid in advance must be deemed in law to be a payment on behalf of the true tenant, that is, the present plaintiff. One condition essential for the application of the rule of implied surrender laid down under section 35, clause (4), is wanting in this case, *i. e.*, there has been a payment on behalf of the real tenant. A mere non cultivation by or on behalf of the tenant is not in itself sufficient to constitute an implied surrender.

The appeal fails and is dismissed with costs. I allow full Pleader's fee in this Court.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 155 OF 1917.

June 12, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

BOCHAI MAHTON—JUDGMENT-DEBTOR—APPELLANT

versus

ISRI JAJI—DECREE-HOLDER—RESPONDENT.

Execution—Attachment by consent, effect of—Estoppel—Judgment-debtor, whether can object to sale—Order directing occupancy holding to be sold—Appeal, whether lies.

The primary object of an attachment is that pending the sale the right of the judgment-debtor in the property shall be kept intact for the benefit of any possible purchaser [p. 31, col. 2.]

Consent to attachment means only that the owner of the property attached accepts the limitation put upon his right to alienate the property pending the attachment. [p. 31, col. 2.]

Plaintiff obtained an *ex parte* money decree against the defendant. The latter applied for a re-hearing of the case and pending the re-hearing consented to the attachment of an occupancy holding belonging to him. The case was again decreed against the defendant and the plaintiff applied to have the decree executed by sale of the attached holding. The defendant objected that the holding was not transferable and that he had no saleable interest therein. The Munsif held that the holding could not be sold but that the right, title and interest of the judgment-debtor could be sold. On appeal the District Judge held that the defendant having consented to the attachment was estopped from objecting to the sale:

Held, (1) that the Munsif's order was appealable: [p. 31, col. 1.]

(2) that it was idle for the Munsif to put up to sale the right, title and interest of the judgment-debtor when the whole question before him was whether the judgment-debtor had any right, title or interest in the holding at all; [p. 31, cols. 1 & 2.]

3 that the defendant was not estopped from objecting to the sale by the fact that he had consented to the attachment [p. 31, col. 2.]

Second appeal against an order of the District Judge, Darbhanga, dated the 9th June 1917, affirming that of the Additional Munsif, Darbhanga, dated the 14th March 1917.

FACTS.—Respondent obtained an *ex parte* decree for money against the appellant. Appellant thereafter applied to set aside the *ex parte* decree. Respondent consented to re-hearing being allowed if appellant's occupancy holding was attached before judgment. This was consented to by appellant, whereupon the Court made an order for attachment before judgment and the *ex parte* decree was set aside and the suit restored to its original number. Appellant,

however, again defaulted and *ex parte* decree was again passed against him. In execution of this decree respondent advertised the holding for sale. The appellant objected to the sale, on the ground that the holding was not saleable because there was no custom in the village of transferability of occupancy holdings without the consent of the landlord. On the 14th of March 1917 the learned Munsif made the following order: "The defendant consented to the *kasht* land in question to be attached in this very suit. There is no evidence of transferability of occupancy holdings. So the holding itself cannot be sold. But the right, title and interest of judgment-debtor will be sold.....Let the sale take place accordingly." That very day the sale was held. On the 5th of April 1917 the appellant applied to the learned Munsif to set aside the sale under Order XXI, rule 90, and section 47, Civil Procedure Code. He also appealed to the District Judge against the order of the Munsif ordering the sale. On the 9th June 1917 the District Judge dismissed the appeal, holding that the appellant's consent to attachment estopped him from objecting to the sale. On the 30th of June 1917 the Munsif dismissed the application under Order XXI, rule 90, and section 47, Civil Procedure Code, for default. On the 3rd of July 1917 the present appeal was filed in the High Court against the order of the District Judge passed on appeal. During the pendency of the High Court appeal the sale was confirmed on the 7th of July 1917. On the 9th July 1917 appellant applied under Order IX, rule 9, Civil Procedure Code, to have the order of the Munsif dismissing his application under Order XXI, rule 90, and section 47, Civil Procedure Code, set aside. This was also rejected. Thereafter appellant's application to have delivery of possession to the respondent stayed pending the disposal of this appeal was rejected by Mullick and Roe, JJ., on the 17th of August 1917.

Mr. *Hasan Jan*, for the Respondent, raised preliminary objections to the hearing of the appeal.—The order appealed from is only preliminary order dismissing the appellant's objection to the transferability of the holding. It is not a "decree" within the definition of the term in the Code. The present second appeal is, therefore, incompetent. Moreover, the very day the order appealed from was passed, the sale was held. After the sale the appellant applied to set aside the sale under Order XXI, rule 90, and section 47, Civil Procedure Code, and in his application stated that as there was no custom of transferability the sale was illegal. That application was dismissed for default and the sale was confirmed. Thereafter the appellant applied to have the order dismissing his application under Order XXI, rule 90, and section 47, Civil Procedure Code, set aside under Order IX, rule 9, Civil Procedure Code. This application was also dismissed. No appeal has been filed against the sale or against the subsequent orders dismissing the applications under Order XXI, rule 90, section 47, and Order IX, rule 9, Civil Procedure Code. The sale has, therefore, become final and any order that may be passed in this appeal cannot affect it. The present appeal is, therefore, infructuous and untenable.

[Their Lordships intimated that they would hear the appeal on the merits before deciding the preliminary objections.]

Mr. *Sivanarain Bose* (for Mr. *Sharoshi Charan Mitra*), for the Appellant, contended that the consent to the attachment could not operate as estoppel.

Mr. *Hasan Jan*, for the Respondent.—Consent to attachment implied that the property was saleable. There was no object in having the attachment if the respondent did not wish to sell the holding in pursuance of that attachment. The appellant must have been aware of this intention on the respondent's part. Inspite of this the appellant agreed to the attachment. The appellant must, therefore, be taken to have waived his objection to the intended sale. Moreover, the act of the appellant in agreeing to the attachment induced in the mind of the respondent a belief that the holding was saleable and that belief induced the respondent to agree to have the *ex parte* decree set aside: he thought he had sufficient security for the realisation of his dues. The appellant was benefited thereby, the *ex parte* decree having been set aside. The appellant is, therefore, estopped from contending that the holding is not transferable.

JUDGMENT.

ROE, J.—(*January 9th*, 1918).—In this case the respondent before us held a money decree obtained *ex parte* against the appellant. The appellant had applied for a re-hearing of his case and consented pending the re-hearing to an attachment of an occupancy holding which, it is now alleged, was not transferable by custom. On the case being again decreed against the appellant, the respondent applied to have the decree executed by sale of the attached holding. The appellant objected on the ground that he had no saleable interest in the holding. The learned Munsif dealt with this objection in the following words:—"The defendant consented to the *kasht* land in question to be attached in this very suit. There is no evidence of transferability of occupancy holding. So the holding itself cannot be sold. But the right, title and interest of the judgment-debtor will be sold." On appeal to the District Court the learned Judge found in effect that the appellant having consented to the attachment was estopped from objecting to the sale. He, therefore, directed that the holding be put up to sale. The date of his order being the 30th June 1917, an appeal was filed to this Court on the 3rd July 1917. It appears that pending the appeal to the District Judge the property was actually sold on the 14th March 1917. On the 30th June 1917 an order was made by the learned Munsif refusing a further objection to the sale that the valuation had been wrongly made and on the 7th July the sale was confirmed.

The judgment-debtor now appeals to this Court. It is contended, *firstly*, that the order of the Munsif is not appealable. This, so far as the Calcutta Court was concerned, was definitely decided in *Majed Hossein* v. *Raghubur Chowdhry* (1), *Gahar Khalipa Bipari* v. *Kasi Muddi Jamadar* (2); and in *Wahidunnissa* v. *Dip Narain Pershad* (3) it was assumed that an appeal would lie against an order such as the one before us. Upon the merits of the case we are of opinion that it was idle for the Court of the Munsif to put up to sale the right, title and interest of the judgment-debtor when the whole issue before him was—Has the judgment-debtor any right, title and interest at all? It was merely an unnecessary postponement of a certain litigation to allow the property to go up for sale with the question undecided, and in regard to the order made by the learned Judge we cannot conceive how consent to attachment can amount to estoppel of the objection to sale. Consent to attachment means only that the owner of the property attached accepts the limitation put upon his right to alienate the property pending the attachment. The learned Vakil for the respondent argues that the only possible object of attaching the property was that it might ultimately be sold. But in this suggestion he has omitted to note the fact that the primary object of an attachment is that pending the sale the right of the judgment debtor therein shall be maintained intact for the benefit of any possible purchaser. We cannot see that any estoppel has arisen in the case. It is necessary that the question whether the judgment-debtor had any right, title and interest in the property should be investigated before the sale takes place.

We, therefore, remand the case for a decision upon this issue—Is there in the village in which this holding is situate any custom whereby such a holding is transferable? The record should be returned with the finding of this issue before the first March. It is contended as a last resort by the respondent that any order we may pass upon this appeal will be infructuous inasmuch as the sale has already been effected. On analogy with the case of *Wahidunnissa* v. *Dip Narain Pershad* (3) we are not at present inclined to take that view. The matter will, however, be considered when the issue returns from the Court below.

On remand the learned District Judge found that "there is a custom in the locality according to which holdings are transferred without reference to the landlords, the purchasers subsequently obtaining recognition from the landlords by paying a *salami*."

The appeal was then heard by Roe and Jwala Prasad, JJ., on 12th of June 1918.

(1) 27 C. 187; 14 Ind. Dec. (N. S.) 124.
(2) 27 C. 415; 4 C. W. N. 557; 14 Ind. Dec. (N. S.) 274.
(3) 35 Ind. Cas. 873; 1 P. L. J. 406; 20 C. W. N. 1174; 1 P. L. W. 13 (F. B.).

JAIRAM *v.* GOPIKISAN.

Mr. *Sharoshi Charan Mitra*, for the Appellant.—The finding submitted by the learned District Judge is in my favour inasmuch as it has been found that a *salami* is paid by the purchaser for recognition of the purchase by the landlord. It had been held in a series of cases that payment of *salami* implied that the landlord's consent was necessary.

No custom has been made out in this case.

[ROE, J.—The question is whether the *salami* is merely a fee levied by the landlord for substituting the names of the purchasers in his registers or paid for obtaining the landlord's sanction to the validity of the sale. If it is merely a mutation-fee, payment of it cannot show that there is no custom].

I submit it is paid for obtaining the landlord's consent to the sale.

[Mr. *Hasan Jan*, for the Respondent.—The evidence is that the *salami* is a fixed sum of Re. 1 for sale deed. The amount of the *salami* is wholly immaterial if the landlord has reserved it as the price of his recognition of the purchase.]

The respondent was not called upon.

JUDGMENT.—(*June 12th*, 1918).—On the facts found by the learned District Judge we have no doubt that there does exist a custom of transfer in this village, the *salami* paid in each case being merely a mutation-fee. The appeal is dismissed with costs both of this hearing and of the hearing upon which the case was remanded.

Appeal dismissed.

NAGPUR JUDICAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 258 OF 1917.

January 31, 1918.

Present:—Mr. Batten, A. J. C.

JAIRAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPIKISAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), ss. 35, 36.

45—Surrender of occupancy holding for consideration—Heir of tenant placed in possession—Failure of consideration—Landlord, whether can recover money paid by him—Provision restraining heir from making claim, validity of—Contract Act (IX of 872), ss. 23, 65.

Section 36 of the C. P. Tenancy Act is only exhaustive as to what the claimant is liable to pay and does not deal with any remedy the landlord may have against the tenant who surrenders his holding for valuable consideration, and certainly does not say that he has no remedy. [p 34, col. 2.]

When an occupancy tenant surrenders his holding for consideration under section 35 of the C. P. Tenancy Act and his nearest heir is put in possession of the holding by a Revenue Officer acting under section 36 (1) of the Act, the landlord can recover from the surrendering tenant the consideration he has paid less the amount he has received under sub-section (1) of section 36. [p. 32 col 2: p. 34, col. 2.]

A surrender of an occupancy holding for a consideration is not a transfer in contravention of the provisions of section 46 of the C. P. Tenancy Act. [p 34, cols. 1 & 2.]

A deed of surrender of an occupancy holding provided that if any one set up a claim to the fields surrendered, the tenants would be responsible for costs incurred by the landlord in defending the fields against such claims The surrender was set aside at the instance of the heirs of the tenants:

Held, that the heirs were legally entitled to make the claim, and the agreement to prevent them making a claim was of such nature that, if permitted, it would defeat the provisions of the C. P. Tenancy Act and was, therefore, unlawful under section 23 of the Contract Act and that the landlord could not, therefore, recover the costs incurred by him in the revenue proceedings in defending the surrender against the heirs. [p. 33, col. 2; p. 34, col. 1.]

Appeal from the decree of the Divisional Judge, Nagpur, in Civil Appeal No. 59 of 1916, dated the 30th March 1917.

Mr. *D. N. Khare, R. B.* for the Appellants.

Mr. *W. V. Gharpure*, for the Respondents.

JUDGMENT.—The main question that arises in this case is one which does not appear to have come before this Court before. It is this. When an occupancy tenant surrenders his holding for consideration under section 35 of the C. P. Tenancy Act and his nearest heir is placed in possession of the holding by a Revenue Officer under section 36 (1) of the Act, can the landlord recover from the surrendering tenant the consideration he has paid less the amount paid to the landlord under sub section (1) of section 36? In this case the defendants were the occupancy tenants of an occupancy holding and the plaintiffs are the landlords. The defendants surren-

dered the holding to the landlords in 1911 by a deed of surrender Exhibit P-1 for a consideration of Rs. 1,500. Of this amount Rs. 900 were stated to be received in cash and Rs. 600 were stated to be due on bonds and for grain debt. The deed of surrender recites that the land was in bad condition and that the tenants could not get sufficient profits from it to pay the rent without incurring expenditure for improvements beyond their means. It was also stated that the tenants had other lands for which the whole of their plough bullocks were required. The 1st defendant Jairam was the recorded tenant and the other two defendants are his sons. After the surrender the wives of Jairam applied under section 36 (1) of the Tenancy Act for possession of the holding. The Deputy Commissioner rejected the application, on the ground that it was really that of the surrendering tenant as the three applicants were his wives. On appeal the Commissioner ordered as follows :—

"The Deputy Commissioner has summarily dismissed their claim on the ground that the application is that of the surrendering tenant. I have little doubt that they have been put up by the original tenant, their husband, but as section 36 (1) now stands, they are undoubtedly persons who would be entitled to inherit his right in the holding in the event of his death without nearer heirs. The order of the lower Court must, therefore, be set aside and the appellants will be allowed to have the transfer set aside on payment of arrears of rent and expenses of cultivation. What that payment should be has not been decided. The case is, therefore, remanded to the lower Court for the disposal of this point."

The landlords made a second appeal to the Financial Commissioner, whose order runs as follows :—

"The only point to be decided is whether a widow can succeed to the holding of an occupancy tenant on his death under section 46 of the C. P. Tenancy Act, failing other heirs. It is admitted that she does, and if so, she can apply to set aside a surrender under section 36 of the Act. If no nearer heirs apply, all such heirs are assumed to be dead, and the widow can take the holding back. This is always the interpretation placed on the section and I am not prepared to depart from it. The appeal will, therefore, be dismissed."

The meaning and effect of sub-section (4) of section 36 of the Tenancy Act has been fully discussed by the Financial Commissioner in his order, dated the 22nd August 1916, in the case of *Shankar* v. *hamlal*, published at page 239 of Volume 1 of the C. P. Revenue Manual. With the views expressed by the learned Financial Commissioner I respectfully concur. It appears from his order that it had been previously considered that the fact that consideration had passed was conclusive evidence that the surrender was not *bona fide* and was made with the object of evading the provisions of section 45. The learned Financial Commissioner ruled that this was not a correct view, and the instructions to Revenue Officers have been modified in accordance with the ruling of the Financial Commissioner. The order of the Financial Commissioner rejecting the present plaintiffs' appeal was passed in 1914 and the right of the tenants' heirs to be put in possession was evidently treated as one to which they were entitled as a matter of course because there had been consideration for the surrender. It appears to me extremely probable that if the case had been decided after the above cited ruling of the Financial Commissioner, the decision would have been different.

The deed of surrender contained provisions that the defendants and their heirs would refrain from setting up claims to these fields and that if any one set up a claim, the defendants would be responsible for costs incurred in defending the fields against such claims. The plaintiffs, the landlords, sued for the return of the purchase-money, less the Rs. 454 paid to them under section 36 (1) of the Tenancy Act, together with the costs incurred by them in resisting the 1st defendant's wives' claim. They have been given a decree for both purchase-money and interest, and the costs claimed.

In my opinion the appeal of the defendants must succeed so far as it relates to costs incurred by the plaintiffs in the Revenue Courts. It has been found to be a fact that the defendants did instigate Jairam's wives to claim possession. But the wives as heirs were legally entitled t

make the claim, and the agreement to prevent the wives making a legal claim was of such a nature that, if permitted, it would defeat the provisions of the Tenancy Act, and was unlawful under section 23 of the Contract Act. The claim for repayment of the purchase-money is on a different footing. The surrender for consideration was made in circumstances in which both parties knew there might be a failure of consideration by reason of the heirs making a successful claim under section 36 of the Tenancy Act. Under the principles embodied in section 65 of the Contract Act where there is a failure of consideration, the party who has received advantage must make compensation, measured in this case by the amount of the purchase-money, less the deduction mentioned above. It is argued for the appellants that the Revenue Authorities have decided that the surrender was a transfer made with the object of evading the provisions of section 46 of the Tenancy Act within the meaning of section 36 (4), that the contract of transfer was, therefore, against public policy, being made to defeat the provisions of the law, and the decision of the Revenue Authorities is final under section 95. But all that is really meant by section 36 (4) is that a surrender which is not illegal cannot be remedied if it would be against the provisions of section 46, if it were not a surrender but a transfer. The Financial Commissioner in the ruling cited says:

"The first point to be noticed is that the fact that there has been some consideration for a surrender does not alter the nature of the transaction, which remains still a surrender and does not thereby become a transfer. This has been decided both by the Judicial Commissioner in civil appeals and by the Chief Commissioner and the Financial Commissioner in revenue cases."

He goes on to say that a surrender should not be considered as *bona fide* for the purposes of section 36 (5) if its intention was to deprive the heirs of their rights and if its effects would thus be the same, as regards the heirs, as a transfer in contravention of section 46 (3). In view of this ruling, with which I have already said I respectfully concur, it cannot be said that a surrender to the landlord can ever be in actual contravention of the law, though in certain circumstances it may be remedied just as a transfer in contravention of section 46 may be avoided. If the heirs make no application under section 36 the surrender remains good. I am for these reasons of opinion that there has been no decision that the surrender was such as would defeat the law, and the parties are in a position where the consideration offered by one of them has failed. The plaintiffs are thus entitled to get back their purchase-money, less the aforesaid deduction. The above remarks dispose of the first four grounds of appeal.

The 5th ground is to the effect that the Civil Court has no jurisdiction to try the suit, and that section 36 of the Tenancy Act must be looked to for any remedy that the plaintiffs may have. As to this section 36 is only exhaustive as to what the claimant is liable to pay and does not deal with any remedy the landlord may have against a tenant who surrenders for valuable consideration, and certainly does not say he has no such remedy.

The 6th ground relates to interest. There was no agreement for interest, no demand for the refund of the purchase-money is proved and at the time of the surrender both parties were aware that the surrender might be defeated by the heirs. In these circumstances I disallow the claim for interest.

The result is that the amount decreed is reduced to Rs. 1,346. Costs in proportion in all Courts,

Decree modified.

PATNA HIGH COURT.

CUTTACK CIRCUIT.

APPEAL FROM REMAND ORDER NO. 11 OF 1917.

December 7, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

MRITUNJOY PRAHARAJ—PLAINTIFF—APPELLANT

versus

Sree JAGANNATH JEU—DEFENDANT—RESPONDENT.

Orissa Tenancy Act (II B. & O. of 1913), *ss.* 31, 250

MRITUNJOY PRAHARAJ *v.* JAGANNATH JEU.

(c)—Transfer of occupancy holding—Registration fee, payment of, whether obligatory—Suit to recover fee, maintainability of—Appeal, second, whether lies.

The word "registration" in section 31 of the Orissa Tenancy Act means nothing more than that the landlord should signify his consent to the transfer; and his consent may be either verbal, written or in any way that he thinks proper. [p. 35, col. 2.]

Under section 31 of the Orissa Tenancy Act it is the duty of the transferee of an occupancy holding to apply to the landlord for his consent; and once the landlord gives his consent, the transferee becomes liable to pay the fee prescribed by the Act. If the transferee refuses to pay the fee a suit would lie to recover it, and in that suit a second appeal to the High Court would be competent. [p. 35, col. 2.]

Appeal from an order of the District Judge, Cuttack, dated the 15th June 1917, setting aside a decision of the Deputy Collector of Khurda, dated the 29th January 1917, and remanding the case for trial on other issues.

Mr. *Baikuntha Nath Dutta*, for the Appellant.

Mr. *Bichitrananda Das*, for the Respondent.

JUDGMENT.—The plaintiff sues the defendant, who is his tenant, as transferee of an occupancy holding, for recovery of the registration fee which the plaintiff alleges is payable to him under section 31 of the Orissa Tenancy Act. The defence put forward by the defendant is that there is no obligation upon a tenant as transferee to register his transfer or to pay the fee prescribed by section 31 of the Orissa Tenancy Act.

The learned Deputy Collector yielded to the argument put forward by the defendant and held that there was no obligation upon the defendant to pay any registration fee to the plaintiff; and consequently that the plaintiff's suit was not maintainable.

The learned Judge on appeal took a different view and held that section 31 of the Orissa Tenancy Act created a mandatory duty upon the tenant by way of transfer to apply to the landlord for registration of his transfer within one year from the date of the transfer; and that thereupon the tenant was liable to pay to the landlord a fee equivalent to 25 per cent. of the consideration money or six times the annual rent of the holding. Accordingly the learned Judge reversed the order of the Deputy Collector and remanded the case for hearing on the merits.

The case now comes before us in second appeal, and we have satisfied ourselves that a second appeal lies under this particular Statute. We have listened to a lengthy argument on the construction of section 31. The fee sued for is recoverable under the provisions of section 250 of the Orissa Tenancy Act in the same way as if it were arrears of rent. Clause (*e*) of section 250 enacts that the provisions of the Act applicable to arrears of rent and suits and proceedings in respect thereof shall apply to anything payable or deliverable in respect of any registration fees prescribed under sections 14, 15, 16 and 31. Section 31 runs as follows:—

"When any occupancy holding or portion of a holding is transferred...the transferee or his successor-in-interest shall within two years from the date of the commencement of this Act or within one year from the date of the transfer, whichever is later, apply to the landlord to whom the rent of the holding or portion is payable for registration...The maximum fee payable on such registration shall be a sum equal to 25 per cent. of the consideration money or to six times the annual rent of the holding or portion thereof, whichever is greater."

This section clearly creates a duty upon the tenant to apply for registration. Now "registration" would seem to be an inappropriate term unless some form or procedure is prescribed as the method by which registration is to be effected. However, this difficulty is got over, inasmuch as it is admitted by the learned Vakil appearing for the appellants before us that registration means in this section nothing more than that the landlord should signify his consent to the transfer; and that his consent may be either verbal, written, or in any way that the landlord thinks proper. It is the duty of the tenant to apply to the landlord for his consent; and once the landlord gives his consent the tenant is clearly liable to pay the fee prescribed by the Act. In this case the landlord has voluntarily consented to a transfer of the tenancy to the defendant and once he has done this, his right to sue arises even though the tenant may not have expressly applied for registration. If the tenant fails to apply for registration within the time prescribed, and the landlord does not con-

sent to the transfer, the tenant loses the protection afforded to a transferee of an occupancy holding by the provisions of the Orissa Tenancy Act.

This construction of sub-section (1) of section 34 is fortified by sub-sections (2) and (3) of the same section. Sub section (2) says that "if in any case, the landlord accepts the fee authorised by sub section (1), his consent to the transfer and to any distribution of the rent thereby rendered necessary shall be deemed to have been given". Sub section (3) provides that if the landlord refuses to accept the requisite fee the transferee or his successor may deposit such fee with the Collector, whereupon the landlord shall be deemed to have consented and the transfer to have been registered.

We have no doubt whatsoever that this action is maintainable and that the learned Judge was right in setting aside the order of the learned Deputy Collector and ordering a remand. This appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

October 29, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

Raja BRAJA SUNDAR DEB—APPELLANT

versus

Srimati SWARNA MANJERI DEI AND OTHERS—RESPONDENTS.

Hindu Law - Custom—Maintenance, suit for, by widow—Widow bound to reside in appointed residence—Absence due to just and reasonable cause, whether disentitles widow.

In defence to a suit for maintenance by a Hindu widow, it was alleged that by a special family custom the widow was bound to reside in a residence appointed by the head of the family and that by reason of her absence from such residence she had forfeited her right to maintenance:

Held, that the custom, even if it were assumed to be established, did not apply to a case of absence from the appointed residence due to just and reasonable causes. [p. 37, col. 1.]

Appeals from two decrees and a judgment of the Calcutta High Court, (Mr Justice Teunon and Mr. Justice Mullick), dated the 23rd March 1914.

Messrs *L. De Gruyther*, *K. C.*, and *B. Dube*, for the Appellant.

Messrs. *A. M. Dunne*, *K. C.*, and Sir *W. Garth*, for the Respondent.

JUDGMENT.

LORD BUCKMASTER.—The question that is raised in these appeals is whether Swarna Manjari Dei, the respondent in the first appeal, and her daughter, the respondent in the second appeal, are entitled to maintenance as of right from the appellant, who is the brother-in-law of the first named respondent.

On the 7th February 1905, Swarna Manjari Dei married Pitambar Deo, the Raja of Aul, who died on the 21st March of the same year, the appellant being his successor in the Raj. At the date of her husband's death Swarna Manjari Dei was *enciente*, and she was ultimately delivered of a child on the 23rd November 1905, who is the respondent in the second appeal. In May 1905, the widow ceased to reside in the appellant's Nahar at Aul Rajbari and she claims that she is, notwithstanding this fact, entitled to be maintained by him. In order to establish that right, she instituted the first of the two actions which have given rise to this appeal.

The second suit was brought by her infant daughter seeking similar relief.

These actions were tried together, and the Subordinate Judge who heard them made two decrees granting maintenance in each case. The High Court on appeal affirmed this judgment in principle, but by two decrees varied the amounts of maintenance allowed by the Subordinate Judge. From each of these decrees the appellant has appealed, his appeals being consolidated by order of the Board.

The real defence to the actions and the point argued in the appeal is this: that Killa Aul is an impartible Raj, succession to which is regulated by the Law of the Mitakshara as modified by special family customs which have the force of law, and it is said that the special family custom applicable is of such a character that unless the widow resides, after the death of her husband, where she is directed to

reside by the Raja, she forfeits her right to maintenance. That contention is based upon certain answers that were given to questions that were put in 1814 to the Rajas and Chiefs of the Regulation and Tributary Mahals of Orissa by the Superintendent. These questions and answers are embodied in a treatise called "Pachis Sawal," or "25 questions." The answer upon which the appellant relies is an answer to a question which runs in this form: "After the demise of a Raja and his son succeeding him, what are the sources from which the ex-Raja's Ranis and brothers and also brothers of the new Raja derive their maintenance and what are their respective rights and the positions they hold?" The answer to that is:—

"They receive food and clothing, and remain in subordination to the Raja. They have no rights."

It is the contention on the part of the appellant that the meaning of this is that the receipt of food and clothing is dependent and consequent upon subordination to the Raja, and refusing to live at the residence which he appoints is an act of insubordination which forfeits the right to maintenance. Their Lordships are not prepared to determine, because they think it is unnecessary, what the true meaning of that answer may be, because even assuming that it bears the interpretation for which the appellant contends, that does not, in their opinion, determine this appeal in his favour, because both Courts have found that the refusal of Swarna Manjari Dei to reside is a refusal which was based on reasonable grounds. It is unnecessary to define what those grounds are, and unnecessary to examine the evidence which was brought forward in their support. It is sufficient that she has been supported by the concurrent findings of both Courts in her refusal to reside in the Nahar. Consequently, if the custom is what the appellant asserts it to be, it has no longer any application to the case, for this custom does not, in their Lordships' opinion, deal with the question of an absence from the appointed residence due to just and reasonable causes. If the custom ceases to apply, the Mitakshara Law applies unmodified, and by that Mitakshara Law the widow and her daughter are entitled to maintenance. That maintenance has been assessed by the High Court, and Counsel for the appellant rightly apprehends that the fixing of that maintenance, which is a pure question of discretion, is a matter with which the Board would not interfere. It may, however, be pointed out, lest it be thought that residence away from the palace might throw an unfair burden upon the person upon whom the duty of maintenance was cast, that the question of determining the amount of maintenance is always a question for the discretion of the Court, and such discretion will be exercised having regard to all the circumstances affecting the case.

These appeals must, therefore, fail and their Lordships will humbly advise His Majesty that they be dismissed with costs.

Appeals dismissed.

Solicitors for the Appellant: Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the Respondents. Messrs. *Morgan, Price & Co.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 4058 OF 1913.

February 27, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

BHATTU RAM—DEFENDANT—APPELLANT

versus

GANGA PRASAD GOPE—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Vendor, duty of, to protect purchaser's title—Caveat emptor, *doctrine of, applicability of.*

Where a purchaser's title is impeached in a suit to which the vendor is a party and the latter makes an admission which renders a decision adverse to the purchaser inevitable, and the purchaser thereupon allows the suit to go against him, the vendor cannot subsequently, in a suit by the purchaser to recover the purchase-money from him, turn round and say that the abandonment of the defence by the purchaser which was brought about by his own admission was improvident. In such a case there is a failure of the consideration for the contract of sale without any fault on the part of the purchaser, and the vendor is, therefore, liable to refund the purchase-money. [p. 38, col. 2; p. 39, col. 1.]

BHATTU RAM *v.* GANGA PRASAD GOPE.

Appeal from a decision of the Subordinate Judge of Bhagalpur, dated the 18th September 1913, reversing that of the Munsif of Bhagalpur, dated the 15th August 1912.

Mr. *S. N. Dutt* (for Mr. *Ram Lal Dutt*), for the Appellant.

Mr. *P. K. Sen* (with him Mr. *Haribhusan Mukherji*), for the Respondent.

JUDGMENT.

Roe, J.—The facts of this case being somewhat peculiar need to be set forth in full.

A holding of about sixteen *bighas* belonged to one Karu Ram who died leaving a widow and a mother named Sampat; he had also a kept woman of the name of Bechni. The widow, as is common in the caste to which Karu Ram belonged, married again and left the village, with the result that her title to the property as Karu's heir was extinguished. That title passed to Sampat the mother. Sampat had a daughter who was married to the defendant Bhattu Ram. Bhattu Ram purchased the property in dispute from Sampat for Rs. 800. He sold it to the plaintiff for Rs. 935, and delivered possession of the property to him. Bechni was brought forward three years later and instituted a suit for recovery of the property on the allegation that she was lawfully married to Karu. In his written statement Bhattu Ram urged that this was entirely untrue and that she was a kept woman. When the parties actually came to trial Bhattu Ram, as the judgment of the learned Subordinate Judge shows, admitted in Court that Bechni was the lawfully married wife of Karu. On this admission being made, the plaintiff felt that it was impossible to go on with the case. He, therefore, allowed a decree to be passed against him for restoration of the property to Bechni. The plaintiff then sued Bhattu Ram to recover the amount of the purchase money. The learned Munsif decided that this being a case in which the doctrine of *caveat emptor* applied, the plaintiff should have been more careful in his investigation as to title. He also held that the suit was barred by limitation, inasmuch as the date on which the defendant's liability would run would be the date of the passing of the consideration. In appeal the learned Subordinate Judge held that though the decree in the title suit was not *res judicata*, it was certainly a weighty piece of evidence against the defendant and "besides it served no useful purpose to adduce any evidence to prove that *Musammat* Bechni was not the widow of Karu Ram". He held further that as the consideration had failed, the contract was void and that the plaintiff was entitled to recover all his money, provided that he brought a suit within three years from the date of the failure of the consideration, which might be said to be the date of the decree by which he was ousted from possession. The case came on appeal before a Divisional Bench of this Court and an order was made that there being no finding of fact as to Bechni's title, it was necessary to remand the case for an investigation of that title. A finding of fact has been returned to this Court that Bechni was in fact a concubine and not the wife of Karu Ram and that the suit by which the plaintiff lost possession was wrongly decided. On this finding of fact it is contended on behalf of the defendant-appellant that he had done all that was necessary for him to do. He had put the plaintiff into possession of the property, and that if thereafter the plaintiff had been so foolish as to lose that possession by allowing a suit to be decreed against him on an absolutely false claim that was no business of the defendant, and the plaintiff could not recover.

This is not the point of view from which the case should be regarded. There has been a failure of the consideration for the contract and that without any fault on the part of the purchaser. The only possible defence to a claim for damages for this failure of consideration would be that the vendor had no notice of the claim of Bechni or of the intention to admit it, and could have, had he known of it, made better terms than the purchaser. The position of the vendor becomes impossible if, with notice of the adverse claim, he declines or fails to remove or contest it himself. As Mookerjee, J., said in *Digambar Das* v. *Nishibala Debi* (1), the case before us is really much stronger than any to be found in the books. Here the

(1) 8 Ind. Cas. 91; 15 C. W. N. 655.

vendor was a party to the suit and not only jointly acquiesced in the adverse decision by the original Court but even made in the original Court the admission which rendered that decision inevitable. He cannot successfully now turn round and say that the abandonment of the defence, which took place in his presence in the original Court, was improvident. I was a party to the remand of the case for a finding on the issue whether the title set up by Bechni was a good title, but on further consideration am of opinion that the suit might have been decreed on the pleadings without the taking of any evidence at all.

I would dismiss the appeal with costs.

IMAM, J.—I am in complete agreement with the decision given by my learned brother. The defendant-appellant conveyed the property to the plaintiff-respondent with assurances of good title. He represented himself to be the exclusive owner and declared it to be *pak saf*, which is a common expression in vernacular conveyancing meaning the title to be flawless. His change of front in Bechni's suit clearly shows his collusion with her. Instead of defending the title which he had conveyed to his vendee, he did all that was in his power to destroy it. It will be against the equities of the case to allow him to take advantage of his own fraud. In the circumstances this appeal should be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2092 OF 1917.

April 18, 1918.

Present:—Mr. Justice Chevis.

GANGA RAM—PLAINTIFF—APPELLANT

versus

DEWA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact not based on evidence—Custom—Alienation—Necessity, proof of.

Where the finding of a lower Appellate Court on a question of fact is not based on evidence or proceeds on a wrong principle, it is open to question in second appeal. [p. 40, col. 1]

In deciding the question of legal necessity for an alienation the Court should take into consideration the circumstances of the alienor. [p. 40, cols. 1 & 2.]

Second appeal from the decree of the Additional Judge, Gurdaspur, dated the 16th November 1916, reversing that of the Subordinate Judge, 2nd class, Hoshiarpur, dated the 8th March 1916, decreeing the claim.

Mr. *Munkand Lal Puri*, for the Appellant.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—In this suit the plaintiff claims that the sale of 7 *kanals* and 16 *marlas* effected by Ghasita on 12th June 1915 shall not affect his reversionary rights. The only question is, whether the sale was for consideration and necessity. The details of the sale price, as given in the sale-deed, are:—

	Rs.	a.	p.
(*a*) to pay off prior mortgagee...	700	0	0
(*b*) due on bond, dated 20th June 1912, for Rs. 100, in favour of vendee ...	136	0	0
(*c*) on bond, dated 4th *Sawan* 1970 (19th July 1913), for Rs. 80, in favour of Achru Mal ...	97	8	0
(*d*) on bond, dated 15th July 1913, for Rs. 100, in favour of Abdulla Khan ...	123	0	0
(*e*) for costs of conveyance ...	24	8	0
(*f*) due to Dost Mohammad Khan ...	100	0	0
(*g*) cash paid to vendor ...	319	0	0
Total. ...	1,500	0	0

About item (*a*) there is no dispute. The land was already mortgaged with possession for Rs. 700. So it is, as the District Judge points out, a case of sale of the equity of redemption for Rs. 800.

The first Court, after going carefully through each item in turn, held that the only items for which necessity could be held to exist were items (*a*) and (*d*) and gave plaintiff a decree accordingly. Even as regards item (*d*) the first Court seems to hesitate, but says "taking a lenient view of things the item can be considered a just antecedent debt, and allowed."

The plaintiff did not appeal, but the vendee appealed to the District Judge who has held the alienation to be valid in its entirety and has dismissed the suit.

The plaintiff appeals to this Court.

For the vendee-respondent it is urged that the question whether the sale is for necessity is one of fact, and not open to attack in second appeal. But if the District Judge's findings are not based on evidence, or proceed on wrong principles, then I hold that a second appeal does lie.

I will first consider the item of Rs. 319, which was paid before the Sub-Registrar. This sum is spoken of in the sale-deed as wanted for bullocks and household expenses. The vendor has no land of his own left, so it is hard to see why he should have sold off his last bit of land to buy bullocks.

But the learned District Judge says he might well want bullocks in order to cultivate land as a tenant, and so the vendee was perfectly justified in advancing such a sum But if this alone is to be taken as sufficient proof of consideration, then it is enough for any man to buy land from an agriculturist and, when called on to prove that the latter had any necessity to sell, to point to the entry in the sale-deed "for purchase of bullocks" The facts of each case should be duly considered. It is not always necessary to show that any bullocks were actually bought, but at least, I think, there should be something to support the idea that the vendee had some reason to suppose that bullocks were really needed. In the present case so far from there being anything of the sort we find that the vendor, when questioned as to this item, merely speaks of wanting to buy a she-buffalo. The vendee, too, says the vendor said he wanted to buy a she-buffalo. Now a she-buffalo would not cost anything like Rs. 319. What the household expenses were, or what the vendor was going to do with the she-buffalo had he bought one, is not explained. He could hardly do much cultivation with one she-buffalo, and as for buying the animal for drinking the milk that would appear to be rather a luxury than a necessity in the case of a grown-up man earning Rs. 12 a month as manager for a landowner. As to the household expenses it is not shown that the vendor had wife, child or any one to keep but himself. He had his salary to live on. It is suggested that Dost Mohammad Khan may not have paid him his salary regularly; this, however, has never been stated, and other parts of the defence evidence are directed to show that, far from Dost Mohammad Khan owing money to the vendor, the vendor owed money to Dost Mohammad Khan. I am quite unable to hold that the mere entry in the sale-deed of 'bullocks and household expenses" is any sufficient ground for regarding this item as taken for necessity. I note that the sale having taken place as recently as 1915 the vendor and vendee should have remembered more about the matter had the money really been wanted for purchase of bullocks and should not have come out with a silly talk about a she-buffalo.

Next as to the item of Rs. 136. This was due on a bond for Rs. 100 in favour of the vendee. The learned District Judge, noting that the bond speaks of the Rs. 100 as having been taken for personal necessities, passes the item, simply remarking that all of the vendor's land was mortgaged and he had nothing to live upon except what he could earn in Dost Mohammad Khan's service. But was not Rs. 12 enough to keep him? It would not keep him in luxury no doubt, but a man cannot alienate his ancestral land to live in luxury. He has apparently been able to support himself by his own exertions of late, and it is not shown that he could not do so when the bond was executed in June 1912. I cannot regard the mere entry in the bond as any proof of necessity. It is debt due to the vendee himself, and it is for the vendee to show that the debt was for necessity, and I can find nothing which I regard as evidence that any such necessity existed.

The next item is Rs. 97-3-0 due on a bond for Rs. 80, dated 19th July 1913, in favour of Achru Mal. Here the bond is not in favour of the vendee himself but he was the surety and has since paid off Achru Mal, so it is said. So I am unable to see that this really ranks on any higher footing than if the vendee had himself advanced the money in the first place, and so I think it is for him to prove the

necessity. Here again we have nothing but the bare entry in the bond that the money is wanted for purchase of a buffalo; nothing to show that such a buffalo was either really needed or purchased.

The next item of Rs. 123 was allowed by the first Court, so it must stand.

The item of Rs. 100 is said to have been borrowed to pay off Dost Mohammad Khan. Here the only evidence is that of Dost Mohammad Khan, who says he was owed Rs. 150 and was offered Rs. 100 by the vendor but refused to accept it. This seems to me to be a very improbable version. I see that in another sale-deed executed by the vendor on the same date there is an item of Rs. 100 taken to pay off Dost Mohammad Khan and for *kharch khangi*. If the vendor had really borrowed two items of Rs. 100 each for this purpose, why should he, owing Rs. 150 to Dost Mohammad Khan, go to him with Rs. 100 only? Still if the learned District Judge had come to a clear finding that the vendor did owe Rs. 100 to Dost Mohammad Khan, that would be a finding of fact with which I could not interfere in second appeal. But all that the District Judge says is that it is probable that the vendor owed money to Dost Mohammad Khan seeing that he was his agent, and that the vendee was justified in advancing the sum on the vendor's representing that he owed money to Dost Mohammad Khan. Had the vendee made *bona fide* enquiries and come to the conclusion that the money was due, then no doubt he would have been justified. But it is not shown that any such enquiries were made, and I am not at all satisfied, merely from Dost Mohammed Khan's statement, that any such sum was due. If in addition to getting Rs. 12 per mensem as wages the vendor had really had Rs. 150 from Dost Mohammad Khan, it may well be asked what need he had to borrow Rs. 100 from the vendee in June 1912, and Rs. 80 from Achru Mal and Rs. 100 from Abdulla Khan in July 1913 The District Judge speaks of the vendor as a man who had been gradually drifting into debt, and so far I agree with him, but when he says he can find no evidence of extravagance on the vendor's part I can only remark that I can see no reason apparent for his drifting into debt other than extravagance, and I think the repeated loans are quite sufficient evidence of extravagance.

As to the item of Rs. 42-8-0 for registration expenses the whole sale seems to have been, with the exception of one doubtful item, unwarranted by any just necessity, so this item cannot be allowed.

I accept this appeal and reversing the decree of the District Judge dismissing the suit I restore the decree of the first Court. Costs in the first Court to be as ordered by that Court. The vendee will pay plaintiff's costs in this and in the District Judge's Court.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 367-B OF 1913.

August 22, 1914.

Present:—Mr Stanyon, A. J. C.

NARAYAN RAMRAO—PLAINTIFF—APPELLANT

versus

DEBIDAS NARSINGH AND OTHERS—DEFENDANTS RESPONDENTS.

Hindu Law—Adoption—Authority to adopt given to widow, when can be exercised

There is no limit of time during which a Hindu widow may act upon the authority given to her to adopt a son to her deceased husband [p 42, col 2.]

Where a Hindu son, whether natural or adopted, having inherited the property of his deceased father, dies leaving a son, or widow, or any other person as his heir other than the widow of his father, any power to adopt held by his father's widow comes to an end But this rule does not apply where the son dies leaving no heir other than his father's widow. [p. 44, cols. 1 & 2.]

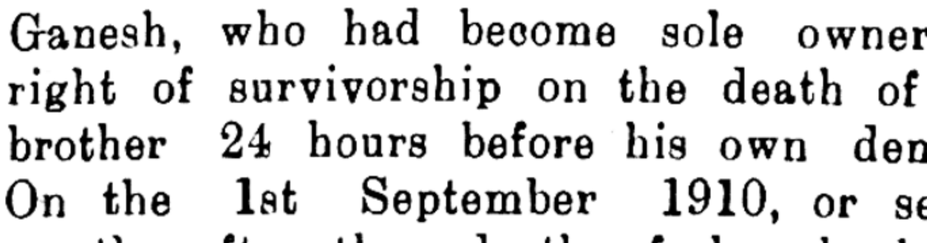
Appeal against the decree of the District Judge, Akola, in Civil Appeal No. 31 of 1913, dated the 30th June 1913, arising out of Civil Suit No. 390 of 1911, decided by the Munsif, Buldana, on the 2nd January 1913.

Mr. *G. P. Dick*, for the Appellants.

Mr. *J. G. Ghosh*, for the Respondents.

NARAYAN RAMRAO v. DEBIDAS NARSINGH.

JUDGMENT.—The following genealogical tree will help to make this judgment intelligible :—



The family is governed by the Bombay School of Hindu Law. Ramrao and Ganesh were members of a joint family. They never divided. Ramrao died of plague on the 29th January 1910 and was followed by Ganesh, a childless widower, on the 30th January 1910. Thus Kashibai was left as the sole survivor of the family and she inherited the estate as the heir of Ganesh, who had become sole owner by right of survivorship on the death of his brother 24 hours before his own demise. On the 1st September 1910, or seven months after the death of her husband, Kashibai adopted the plaintiff Narayan. It is alleged that authority to adopt was expressly given to her by her husband and assented to by Ganesh. These allegations have been controverted and have not yet been tried and decided, the plaintiff's suit having been dismissed on the ground that assuming that such authority and assent existed the adoption is nevertheless invalid, and the plaintiff has no title.

The defendants are persons to whom the estate would go by reversion on the death of Kashibai if the adoption of the plaintiff did not intervene; and upon the ground that they dispute the fact and validity of that adoption, the plaintiff instituted the present suit for a declaration that he is the adopted son of Ramrao, and entitled to the estate of Ramrao and Ganesh which is in his possession. The Courts below have concurred in dismissing the suit on the ground that the power of Kashibai to adopt had come to an end and become incapable of execution on the date when the adoption was made. In coming to this conclusion the Courts have been guided by the rulings of the Bombay High Court in *Ramkrishna* v. *Shamrao* (1) and *Datto Govind* v. *Pandurang Vinayak* (2). The plaintiff has made the present appeal. I have no doubt, after a careful consideration of the law and the arguments made before me, and of the available authorities, that the appeal must succeed, and the case must go back for a decision on the merits.

It seems expedient to go somewhat fully into the law and authorities bearing on the question at issue. It is not necessary to cite any texts of the Hindu Law. It is sufficient to say that it appears to be settled that there is no limit of time during which a Hindu widow may act upon the authority given to adopt a son to her deceased husband. Adoptions made fifteen, twenty, twenty-five, fifty-two, and even seventy-one years after the death of the husband have been supported: Mayne's Hindu Law, 8th Edition, page 151. Nor do the texts contain any express restrictions on the power of adoption in favour of third persons. The Hindu Lawgivers appear to have laid down that a man is as free to adopt a son as to beget one in the ordinary course of nature, provided the process is sanctioned by law. And an adoption by a widow, duly authorized, is recognized as equal in validity with the birth of a posthumous son for all purposes, spiritual and secular, including the inheritance of estate.

But the Privy Council have recognised the necessity of placing a limit upon what may be described as posthumous adoption. Nature places a time limit upon the coming into existence of a posthumous natural son: and the Judicial Committee have introduced a limit to posthumous adoption, in order to avoid the anomaly and injustice and difficulty which would ensue if a devolution of estate were upset by a belated adoption made to a long deceased ancestor. But so far only one set of circumstances has been provided for, and it is not permissible to apply the rule to any case which is not necessarily within the purview thereof.

The first case in which the point arose, was that of *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3).

(1) 26 B. 526; 4 Bom. L. R. 315.
(2) 32 B. 499; 10 Bom. L. R. 692.
(3) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

In that case one Gour Kishore died leaving a natural son, Bhowanee, and a widow, Chundrabullee, to the latter of whom authority was given to adopt one or more sons in case Bhowanee died. Not long after his father, Bhowanee died also, leaving a widow, in whom the estate vested as his heir. In course of time the mother-in-law and daughter-in law fell out, and then Chandrabullee adopted Ram Kishore. The Judicial Committee held the adoption to be invalid as made after the power to adopt had come to an end. Lord Kingsdown (who delivered the judgment of the Board), in discussing the deed of permission to adopt, said :—

"It must be admitted.....that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that Bhowanee had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the lifetime of Chundrabullee Debia. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied."

Later on, with reference to the extent of Gour Kishore's power to authorize the adoption, Lord Kingsdown observed:—

"The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

"This seems contrary to all reason and to all the principles of Hindu Law, as far as we can collect them."

It so happened that after the above decision Chundrabullee and Bhowanee's widow both died, and Chandrabullee's adoptee, Ramkishore, got into possession of the estate. He was sued for its recovery by a more distant relation, who claimed as the reversionary heir of Bhowannee. It was admitted that if Ramkishore's adoption by Chandrabullee was valid he could not be dispossessed. The Calcutta High Court decided in his favour, interpreting the decision in *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3) to be that though the adoption could not be used to divest Bhowanee's widow of her estate of inheritance it was valid for all other purposes: *Puddo Kumaree Debee* v. *Juggut Kisho-e Acharjee* (4). This erroneous interpretation was corrected by the Judicial Committee on appeal: *Padmakumari Debi Chowdhrani* v. *Court of Wards* (5). Their Lordships, construing their own decision in *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3) remarked:—

"The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowanee, the power of adoption was at an end, and incapable of execution. And if the question had come before them without any previous decision upon it, they would have been of that opinion. The adoption intended by the deed of permission was for the succession to the Zemindari and other property, as well as the performance of religious services and the vesting of the estate in the widow if not in Bhowanee himself, as the son and heir of his father, was a proper limit to the exercise of the power."

Both the above cases were again considered and followed in a subsequent case from Madras, where the facts were exactly similar, except that the widow acted upon an authority from her husband's *sapindas* given after the death of the natural born son but during the lifetime of the son's

(4) 5 C. 615; 2 Shome L. R. 229; 2 Ind. Dec. (N. S.) 999.

(5) 8 I. A. 229; 8 C. 302; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148; 4 Ind. Dec. (N. S.) 193 (P. C.).

widow: *Thayammal* v. *Venkatarama* (6). This case in its turn was followed in *Tarachurn Chatterji* v *Surashchunder Mukerji* (7). There has been a rigid adherence in this country to the rule laid down by the Supreme Tribunal in the above cases, as will be apparent from a perusal of the numerous decisions which have since been published, among which I may mention *Krishnarav Trimbak Hasabnis* v. *Shankarrao Vinayak Hasabnis* (8), *Ramkrishna* v. *Shamrao* (1), *Malikyanala Bose* v. *Nanda Kumar Bose* (9) and *Adivi Suryaprakasa* v. *Nidamarty Gangaraju* (10), in most of which the earlier authorities will be found collated The point is not dealt with in any published ruling of this Court

It will be observed that the doctrine laid down by the Privy Council, in cases where the widow derived her authority to adopt from express sanction given by her husband or by his *sapindas*, has equally been applied to a widow in Bombay whose authority is usually independent of any such sanction, and though the Calcutta High Court refused to apply it to a Jain widow in *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi* (11) upon the ground that her power of adoption was independent of permission from her husband, the soundness of that decision is open to question (*vide* Mayne's Hindu Law, 8th Edition, page 148) and with due respect, I am unable to assent to it. In *Amulya Charan Seal* v. *Kali Das Sen* (12) the widow of an adopted son has been placed in the same position as the widow of a natural born son. On the vesting in her of her husband's estate any power of adoption by the widow of his adoptive father comes to an end.

It may then be taken as settled that where a Hindu son, whether natural or adopted, having inherited the property of his deceased father, dies leaving a son or widow or any other person as his heir other than the widow of his father, any power to adopt held by his father's widow comes to an end. But it is also settled that this rule does not apply where the son dies leaving no heir other than his father's widow. In *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3) Lord Kingsdown said:—

"If Bhowanee Kishore had died unmarried, his mother, Chundraballee Debia, would have been his heir and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule."

This *dictum*, even if it be taken as *obiter*, has never been dissented from. On the contrary it has been expressly adopted as a binding decision: *Ram Soondur Singh* v. *Surbanee Dossee* (13), *Vellanki Venkata Krishna Rao* v *Venkata Rama Lakshmi* (14), *Verabhai Anubhai* v. *Bai Hiraba* (15), *Gavdappa* v. *Girimallappa* (16), *Venkappa Bapu* v. *Jivaji Krishna* (17).

It is clear from a consideration of all the Privy Council cases that no rule has been laid down to this effect that the mere vesting of the estate of a deceased Hindu in some heir, other than his widow, puts an end to his widow's power to adopt. That is clear from the repeatedly declared validity of an adoption made to replace a deceased son who has died unmarried after inheriting his father's estate. It would be difficult, if not impossible, to distinguish that case and the case of a son who died a childless widower, leaving as his only heir a mother possessed of a power to adopt. In some of the Indian judgments and in particular that in *Payappa Akkapa Patel* v. *Appanna* (18) this case of an adoption by a mother who has inherited to her son has been regarded as a mere exception to a general rule laid down by the Privy Council. With due respect I am unable to agree with this treatment of the subject. It seems to me clear, not only from a

(6) 14 I. A 67; 10 M. 205; 11 Ind. Jur 271; 5 Sar. P. C. J. 10; 3 Ind Dec (N s) 845 P. C.)
(7) 17 C. 122. 6 I. A 166. 13 Ind. Jur 289; 5 Sar. P. C. J. 379; 8 Ind Dec. N.s. 619 (P. C).
(8) 17 B 164 9 Ind. Dec N. s) 107.
(9) 33 C 30 ; 4 C. L J 357; 11 C. W N 12.
(10) 4 Ind Cas 386; 33 M. 228; 7 M. L. T. 236; (1910 M. W N. 251.
(11) 17 C. 518 at p. 536; 8 Ind. Dec. (N. s.) 885.
(12) 32 C. 861; 1 C. L. J. 270.
(13) 22 W R. 121.
(14) 11 A. at p. 9; 1 M 174; 1 Ind Jur. 63; 26 W R. 21; 3 Sar. P C J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. s) 116 (P C.).
(15) 30 I. A 234 27 B 402; 7 C. W. N. 746; 5 Bom. L R. 534; 8 Sar. P C J 598 (P C.).
(16) 19 B 331; 10 Ind Dec (N s) 224.
(17) 25 B 396 2 Bom L R 1101.
(18) 23 B. 337; 12 Ind Dec (N. s.) 217.

consideration of the whole matter, but from the words of Lord Kingsdown himself, that the case is one within the ordinary rule of Hindu Law to which the special restriction introduced by the Privy Council does not apply. There is no case in which the vesting of the estate in the heir of the husband has been held, *ipso facto*, to disable his widow from making an adoption to him. It is only where the estate has moved for the second time, so as to vest in some one who is not the widow herself, that the rule has been applied, *e. g.*, where it has vested first in a son and thereafter in his son, or his widow or heir other than his father's widow. The Full Bench decision of the Bombay High Court in *Ramkrishna* v. *Shamrao* (1) was in a case where the husband of the adopting widow predeceased his father, who on his death was succeeded by the son's son who died leaving a widow and son. The adoption was made after the death of all these, when there had been three devolutions of the estate. The case was obviously within the Privy Council restriction.

In *Datto Govind* v. *Pandurang Vinayak* (2), which has been followed by the Courts below, the following was the genealogical tree:—

FATHER,

Antaji.	Sadashiv married *Musammat* Parvati,
	Two daughters.

Antaji and Sadashiv were joint in food and estate. Sadashiv died in 1876 leaving his widow and two daughters. Antaji died in 1877 a childless widower. Parvati succeeded to the estate, and held it till her death in 1899. A few days before she died she adopted one Pandurang. It was held that the adoption was invalid. The rule was laid down that a Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder under the rule established by *Lallubhai Bapubhai* v. *Cassibai* (19) and in consequence of the absence of nearer heirs, cannot make a valid adoption. The learned Judges claim to find authority for this decision in the Privy Council cases and in *Ram Krishna* v. *Shamrao* (1) and they felt compelled to doubt *Amava* v. *Mahadgauda* (20) and *Payappa Akkapa Patel* v. *Apponna* (12).

The decision undoubtedly supports the view taken by the lower Courts in the present case. Except that Parvati had no authority from her husband, and consent by Antaji to her adoption of a son, and that she had two daughters, the facts were precisely similar to the facts of the present case (assuming for the sake of argument only that Kashibai did receive permission from her husband and the assent of his joint brother). But with due respect, I am unable to find any authority in any of the earlier cases for the very wide rule laid down in *Datto Govind* v. *Pandurang Vinayak* (2). There had been no vesting of the estate in any heir of the widow's husband's heir to which alone the Privy Council *dictum* has been applied. It has not been laid down that a widow's power to adopt is only capable of execution when she inherits as the heir of her husband and in no other case. It is not the nature of her estate but the rights of other persons which constituted the *ratio decidendi* in the Privy Council case. It was neither the existence of Bhowanee, nor the fact of his marriage, but the vesting of his estate in his widow after his death which deprived Chundrabullee of the power to adopt in *Musommat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3). If Bhowanee's widow had predeceased him leaving Chundrabullee as his heir, it is difficult to see how her adoption could have been taken out of the ordinary rule applicable to it in case of Bhowanee's death unmarried. Similarly if a Hindu died leaving no son but only a grandson as his heir and such grandson died unmarried or a childless widower, there seems to be no authority for the view that an adoption made by his widow to replace the deceased grandson would be valid. The Privy Council doctrine of limitation of the power to adopt turns upon a second vesting of the

(19) 7 I. A. 212; 5 B. 110; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 795; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. S.) 75 (P. C.).

(20) 22 B. 416; 11 Ind. Dec. (N. S.) 860.

the estate and upon nothing else: and where such second vesting is in the widow herself, her power to adopt will not be extinguished.

In the Bombay case last cited the decision was in accordance with Bombay precedents upon another ground altogether, namely this, that the widow was the widow of an undivided co-parcener, and had adopted without the sanction of her husband or of his surviving brother. It was so held by a Full Bench in *Dinkar Sitaram* v. *Ganesh Shivram Prabhu* (21) and there is no decision of the Bombay High Court in conflict with that rule. But so far as it seeks to extend the doctrine in *Bhoobun Moyee's case* (3) so as to apply it to a widow who has inherited property as a *sapinda*, I am unable to accept it as correct. If it is correct then no widow of an undivided co-parcener can ever make an adoption, even with the consent of the surviving co-parceners. In the Bombay case Sadashiv could clearly have made an adoption in his lifetime, even though he was joint with Antaji. It is also clear that what he could have done himself he could have got his widow to do for him, namely, to adopt a son in the lifetime of Antaji. How could that power be affected by the death of Antaji unless Antaji left some heir, other than Parvati, in whom the estate vested on his death. A mother who inherits to her son does so as a *sapinda*, at least in Bombay. As a *sapinda* different only in degree she inherits to her husband's brother. There is no reason or authority for distinguishing between the two cases with reference to her power to adopt. In the present case Ganesh having died a childless widower, his only chance of spiritual benefit lay in the adoption of a son to Ramrao. It is entirely opposed to the letter and spirit of the Hindu law that Ramrao should be deprived of the spiritual benefit which the adoption of a son would confer on him because his undivided brother died on the day after him. I need not labour the argument. That the Judicial Committee will not extend the doctrine in *Bhoobun Moyee's case* (3) by any analogy seems clear from the very recent decision in *Bachoo Hurkisondas* v. *Mankorebai* (22).

(21) 6 B. 505; 3 Ind. Dec. (N. S.) 792 (F. B.).

(22) 34 I. A. 107; 31 B. 373; 9 Bom. L. R. 646; 11 C. W. N. 769; 6 C. L. J. 1; 17 M. L. J. 343; 2 M. L. T. 295 (P. C.).

In that case two Hindu brothers *H.* and *B.* constituted a joint family, governed by the Mitakshara law as in force in Bombay, and as such they held large ancestral property. In September 1900 *H.* died without male issue, but leaving his widow pregnant. In November 1900 *B.* made a Will by which, *inter alia*, he directed his widow to adopt a son. *B.* died in December 1900, and the day after his death *H.'s* widow gave birth to a son, Bachoo, who became the sole owner of the joint estate. In February 1901 the widow of *B.* adopted one Nagurdas as son to her deceased husband. It will be observed that on the death of *H.* his brother *B.* became sole owner of the estate by the law of survivorship. On *B.*'s death his widow became owner for a few hours, until disinherited by the birth of Bachoo in whom the estate vested, still by the law of survivorship, because he was already *in esse* when his father died. The principal question before their Lordships of the Privy Council was whether the adoption made by *B.*'s widow after Bachoo's birth was valid. They held that it was valid and that it divested Bachoo of half the estate; or rather that Nagurdas became, by virtue of the adoption, jointly entitled with Bachoo to the family property. All the cases from *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3) downwards werequoted to support the argument that the vesting of the estate in Bachoo, and the fact that *H.* and *B.* were joint in property, went to invalidate the adoption. But their Lordships held the matter to be concluded by the decision in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishore Patta Deo* (23).

It cannot be disputed that if the present plaintiff had been naturally born as a posthumous son of Ramrao on the 1st September 1910, he would have become *the* sole owner of the once joint estate of Ramrao Ganesh, and Kashibai would have been divested thereof. Under Hindu Law a valid adoption gives the adoptee all the available rights of a natural born son. By making such adoption Kashibai divested no estate but her own: and previous to the devolution thereof on her it had not vested in any person so as to put an end to her power of

(23) 3 I. A. 154; 1 M. 69; 11 Mad. Jur. 188; 25 W. R. 291; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 263; 1 Ind. Dec. (N. S.) 45(P. C.).

adoption under the limitation introduced by the Privy Council. It had vested only in Ganesh, if succession by survivorship can be called a vesting of estate. That such succession did not terminate the power of adoption is clear from the admission made before me that Kashibai, *qua* widow, could have made a valid adoption in the lifetime of Ganesh. The death of Ganesh could not destroy that power since its only effect was to vest the estate in Kashibai herself. The learned District Judge falls into an elementary error in calling it a "life-estate" and "only a temporary obstacle between the expired full estate of Ganesh and the coming full estate of his reversioners". It has been pointed out repeatedly that a widow is full owner subject to a restricted power of alienation over immoveable property. The learned District Judge held that Kashibai had no power by making an adoption "to jeopardize the estate of Ganesh's reversioners". I am not sure that I quite understand what this means, but it has to be observed that every valid adoption made by a widow extinguishes a reversionary expectancy. There is no *dictum* of the Privy Council which modifies the Hindu Law of adoption so far as the adoption in the present case is concerned, and if that adoption is valid under that law the plaintiff must succeed.

This appeal is, therefore, allowed. The decrees of the Courts below are reversed, and the case will be sent down for a trial and decision on the merits. The appellant will be given the usual refund certificate. Other costs here and hitherto will abide the result.

Appeal allowed;
Case remanded.

PATNA HIGH COURT.

CUTTACK CIRCUIT.

APPEAL FROM ORIGINAL ORDER No. 8 OF 1917.

December 7, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

KRUPASINDHU ROY—APPELLANT

versus

Mahanta BALBHADRA DAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 141, 144, O. II, r. 2—Limitation Act (IX of 1908), Sch. I, Art. 188—Restitution, application for, nature of—Restoration of possession—Application, subsequent, for mesne profits, maintainability of—Limitation.

An application for restitution under section 144 of the Civil Procedure Code is neither a suit nor an execution proceeding; it is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. Section 141 of the Civil Procedure Code does not apply to an application for restitution, and such an application is not, therefore, subject to the provisions of Order II, rule 2, of the Code. [p. 48, col. 2.]

Article 181 of Schedule I of the Limitation Act prescribes that the period of limitation for making an application for restitution shall be three years from the date when the right to apply accrued. But the Article does not in any way control the period during which mesne profits shall be allowed to accumulate, and whatever the number of years during which the opposite party has been in possession, the applicant is entitled to be compensated in respect of the whole of that period, provided he applies within three years of the date on which the right to relief accrues. [p. 49, col. 2.]

On the 22nd March 1909 plaintiffs got a decree for recovery of possession of some immoveable property. In pursuance of that decree they took possession on the 24th September 1910. The defendant appealed against that decree to the High Court and succeeded in getting it reversed on the 4th June 1913. The defendant then took possession of the property on the 4th of December 1913. On the 2nd of June 1916 the defendant applied, under section 144 of the Civil Procedure Code, for restitution of mesne profits in respect of the property for the period during which the plaintiffs were in possession, namely, from the 24th September 1910 till the 4th December 1913:

Held, (1) that the defendant was not debarred from claiming mesne profits by reason of the provisions of Order II, rule 2, of the Civil Procedure Code; [p. 48, col. 1.]

(2) that the right to apply having accrued to the defendant on the date of the High Court's judgment *viz.*, 4th June 1913, the application was within time and the defendant was, therefore, entitled to mesne profits for the whole of the period from 4th September 1910 to 4th December 1913. [p. 49, cols. 1 & 2.]

Appeal from an order of the Sub-Judge, Cuttack, dated the 7th March 1917.

KRUPASINDHU ROY v. BALBHADRA DAS.

Mr. *Subodh Chandra Chatterjee*, for the Appellant.

Messrs *Sarat Chandra Mukherjee* and *J. N. Bose*, for the Respondent.

JUDGMENT.

MULLICK, J.—On the 22nd March 1909, plaintiffs got a decree for recovery of possession of some immoveable property. In pursuance of that decree they took possession on the 24th September 1910. The defendant appealed against that decree to the High Court and succeeded in getting it reversed on the 4th June 1913. The defendant then took possession of the property on the 4th of December 1913. On the 2nd of June 1916 the defendant applied, under section 144 of the Civil Procedure Code, for restitution of mesne profits in respect of the property for the period during which the plaintiffs were in possession, namely, from the 24th September 1910 till the 4th December 1913.

The learned Subordinate Judge has held that inasmuch as the defendant in applying for restitution of the property did not apply for restitution of mesne profits, he is now debarred from claiming mesne profits by reason of the provisions of Order II, rule 2, of the Civil Procedure Code. His view is that when the defendant took possession on the 4th December 1913, he should have insisted upon his right to restitution of mesne profits also and having declined to claim that relief at that time he is, according to the principles of constructive *res judicata*, no longer competent to claim it by a subsequent proceeding under section 144. The learned Subordinate Judge has accordingly dismissed the defendant's application and against that order, which is a decree under the definition of decree contained in section 2 of the Civil Procedure Code, the defendant prefers the present appeal before us.

In our opinion the learned Subordinate Judge's order cannot be maintained. It is conceded by the learned Vakil, who appears on behalf of plaintiffs before us, that a proceeding, under section 144 of the Civil Procedure Code, is not a proceeding in execution. This must clearly be so, because the relief which the defendant claims in the present proceeding is not a relief founded upon any decree giving him such relief. It is a relief which used to be granted previous to 1859 under the inherent powers of the Court and which in the subsequent Civil Procedure Codes has been recognised by express statutory provision. The Code of 1882 prescribes it in section 583 and the present Code of 1908 reproduces substantially the provisions of that section in section 144. The proceeding in which the relief is claimed is neither a suit nor an execution proceeding, it is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. In this connection it is to be noticed that section 583 of the Code of 1882 contains words expressly prescribing that the Court in proceeding to grant relief under that section is to proceed according to the rules prescribed for the execution of decrees in suits. That Code nowhere stated that the proceeding was an execution proceeding, nor does the present Code prescribe anything to this effect. Although the words above referred to have been omitted from section 144 of the present Code, the law in this respect is still substantially the same. Therefore the question arises whether section 141 of the present Code requires that all the provisions of the Civil Procedure Code and therefore also of Order II, rule 2, should be applied to the miscellaneous proceeding before us.

In my opinion the answer is in the negative. It has been held in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1), following a decision of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir-ullah* (2), that section 141 is not applicable to an execution proceeding. And if it is not applicable to an execution proceeding, I fail to see why it should be made applicable to a proceeding which is only of the nature of an execution proceeding.

The learned Vakil for the respondents has strenuously contended that though the proceeding is miscellaneous it is in the nature of an original suit. In my opinion this argument fails, for a suit must always be based on a cause of action. Here the defendant petitioner has no cause of action on which he can claim relief from the plaintiffs. If it is urged that the cause of action is a trespass, then the reply is

(1) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.
(2) 17 A. 10; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393.

that the plaintiffs were put in possession by a decree of Court and were not trespassers. Nor does the decree of the Appellate Court *per se* constitute a cause of action. In my opinion the defendant had no cause of action on which he could have based a suit against the plaintiffs, even if the law had not expressly forbidden him to proceed by suit. His only remedy was to apply to the Court to proceed against the plaintiffs in exercise of its special powers. Therefore the rule applicable to several reliefs arising out of the same cause of action cannot be applied here. Finally, even if we were to accede to the learned Vakil's argument that this proceeding is a suit, in my opinion the claim for mesne profits cannot be said to arise from the same cause of action as a claim for recovery of possession and, therefore, Order II, rule 2, is no bar.

We are fortified in the view we take by *Somasundaram Pillai* v. *Chokkalinga Pillai* (3). In that case their Lordships of the Madras High Court, following a previous decision of their own, expressly held that Order II, rule 2, of the present Civil Procedure Code does not cover restitution applications.

Therefore, the result is that the learned Subordinate Judge's order holding that the defendant's application was barred by reason of Order II, rule 2, must be set aside.

The learned Vakil for the respondents has taken another ground before us, namely, limitation. The learned Subordinate Judge has not gone into this point, but as it has been taken by the learned Vakil and argued, we will proceed to give our decision on it, which will be binding on the parties.

The learned Vakil contends that the Article applicable to this case is Article 181 of the Limitation Act of 1908, Schedule I, and that as the defendant made his application for restitution on the 2nd June 1916, he can only obtain as mesne profits that amount which became due within three years from that date. In that case the defendant would be entitled only to mesne profits from the 3rd June 1913 to the 4th December 1913. Now Article 181, which is admittedly the Article applicable to the present proceeding, prescribes that the period of limitation for making an application for restitution shall be three years from the date when the right to apply accrued. Here the right to apply accrued on the date of the High Court judgment, namely, 4th June 1913, and the application for restitution, having been made on the 2nd June 1916, was within three years of that date and, therefore, was within time. But Article 181 does not in any way control the period during which the mesne profits shall be allowed to accumulate and whatever the number of years during which the plaintiffs were in possession, the defendant was entitled to be compensated in respect of the whole of that period provided he applied within three years of the date on which the right to relief accrued. Here the defendant will be entitled to such mesne profits as the Subordinate Judge may find to be due for the period from the 4th September 1910 to the 4th December 19 3. The result is that the case will go back to the learned Subordinate Judge in order that it may be decided according to law. The appeal is allowed with costs.

ATKINSON, J.—I agree.

Appeal allowed.

(3) 38 Ind. Cas. 806; 40 M. 780; 5 L. W. 267.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 68, 69 AND 70 OF 1914.

August 28, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

BIPRADAS PAL CHOUDHURY AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, MANMATHA NATH PAL CHOWDHURI AND OTHERS—DEFENDANTS—APPELLANTS IN ALL

versus

IN No. 68 OF 1914

MONORAMA DEBI WIDOW OF BRAJENDRA NATH SEN—PLAINTIFF—RESPONDENT.

IN No. 69 OF 1914

CHARU CHANDRA MUKHOPADHYAYA—PLAINTIFF—RESPONDENT.

IN No. 70 OF 1914

GOBINDA LAL MUKHERJEE AND OTHERS—PLAINTIFFS NOS. 2, 3 AND 4—RESPONDENTS.

Evidence, admissibility of—Parganah Registers,

BIPRADAS PAL v. MONORAMA DEBI.

Kanongo Registers, General and Mouzawari Registers under Bengal Land Registration Act (VII of 1876) —Thak map, probative value of—Omission of entries of Lakheraj, effect of—Bengal Tenancy Act (VIII B. C. of 1885), s. 103 A—Presumption, rebuttal of—Long possession without payment of rent, presumption arising from.

Where in the Record of Rights an entry was made in respect of a land that no rent was actually paid for it but that the occupant was not entitled to hold without payment of rent:

Held, that proof of long possession free from payment of rent was sufficient to rebut the presumption arising under section 103A of the Bengal Tenancy Act that the land was liable to be assessed to rent. [p. 54, col. 1.]

Held, also, that the mere fact that the land in question, which did not exceed 50 *bighas* in area, was not shown as Lakheraj in the Parganah Register, prepared under sections 2 and 3 of Bengal Regulation VIII of 1800, or in the Kanongo Register or account kept under the provisions of Bengal Regulation I of 1819, read with section 7 of Bengal Regulation V of 1816, or in the General and Mouzawari Register kept under the Bengal Land Registration Act or in the Thak maps and statements of 1852, was not sufficient to prove that the land was the *mal* land of the Zemindari and as such liable to be assessed to rent. [p. 53 col. 2]

Appeals against the decrees of Mr. Justice Teunon, dated the 1st of June 1914, in Appeals from Appellate Decrees Nos. 620, 622 and 722 of 1912, reversing those of the District Judge of Nadia, dated the 29th of March 1911.

FACTS of the case appear from the following judgment of

TEUNON, J.—These four appeals arise out of proceedings under section 106 of the Bengal Tenancy Act.

It appears that on the 2nd October 1899 the defendant-respondent, Mr. Bipradas Pal Chowdhuri, became the purchaser of a Patni Taluq comprising the 38 *mouzas* of Taraf Santipur, a permanently settled estate bearing No. 474 on the Revenue Roll of the Nadia Collectorate. The purchase was made at a sale held under the provisions of the Bengal Tenancy Act for arrears of rent and after the purchase proceedings were taken under Chapter X of that Act. In respect of the *mouzas* with which we are now concerned, the Record of Rights was finally published on the 19th April 1909.

In this record the entry in respect of the lands in question is that no rent is actually paid but that the occupants, *i.e.*, the plaintiffs-appellants, are not entitled to hold without payment of rent.

The plaintiffs thereupon instituted these several suits under section 106 of the Act to have it declared that the lands in question are their rent free Brahmattar and that the entries in so far as they state that the lands are liable to be assessed to rent, are incorrect. The decision of the Settlement Officer in their favour has been reversed on appeal by the Special Judge and the plaintiffs now appeal to this Court.

In each suit the case of the plaintiffs was that the lands in question had been granted to their predecessor-in-title by Maharaja Krishna Chandra Roy of Nadia to be held exempt from the payment of revenue, that the grant, being non Badshahi grant in each case of a date prior to the 12th of August 1765, had been duly registered in the manner provided in sections 22 to 25 of Regulation XIX of 1793, and that from the dates of the grants they and their predecessors had been in continuous possession without payment of rent or revenue and that the lands in question were therefore no part of the *mal* assests of the *zemindari* and so did not appertain to the Patni purchased by the defendant.

It may be here observed that owing to the recusancy of the Maharaja of Nadia, Taraf Santipur was not permanently settled until the year 1207/1799 or 1800, when it was settled with Maharaja Tej Chandra Roy Bahadur of Burdwan, who created the Patni tenure in or about 1214/1807.

From the Periodical Register or the draft thereof prepared apparently in the year 1202/1795 to 1796 under section 29 of Regulation XIX of 1793, and spoken of in these proceedings as the "Taidad Register", the plaintiffs have in each case produced the extracts referring to the grant on which they rely.

In Appeal No. 620, which relates to plot No. 234 of the Survey and Settlement Papers of *mouza* Malipota measuring 1 *bigha*, 12 *cottahs*, 1 *chittack* the entry or Taidad No. is 7248, being the record of a grant of 2 *bighas* "Bastu" in Malipota and of 50 *bighas* in 3 other villages.

In Appeal No. 621, in which we are concerned with plot No. 2/464 of the Record of Rights, measuring 1 *bigha*, 3 *cottahs*, 9 *chittacks*, the Taided No. is 318, being the entry of a grant of 5 *bighas*, 5 *cottahs* in Malipota and of 4 *bighas*, 18 *cottahs* in an adjoining village Satpukhuria.

In Appeal No. 622, the area in question, 13 *cottahs*, 5 *chittacks*, has been shown in the Record of Rights of Malipota as plot No. 228/451 and the Taidad relied on is No. 5932, which purports to comprise 150 *bighas*, 16 *cottahs* in five (5) villages, 28 *bighas*, 16 *cottahs* being in Malipota.

Appeal No. 722 relates to plot No. 310 of the Record of Rights of *mouza* Pumulia, a village adjoining Malipota on the south, and the Taidad is No 2247, the entry of a grant comprising 35 *bighas* in Pumulia, 18 *bighas* in Malipota, and 34 *bighas* in two other villages.

The learned District Judge has found that the plaintiffs have failed to identify the lands in suit with the lands comprised in the Taidads on which they rely, and that they have also failed to show a continuous line of descent (by inheritance or purchase) from the original grantees of the *sanads* and that they have therefore failed to rebut the presumption arising against them under section 103B (3) of the Bengal Tenancy Act.

He has further found that inasmuch as the lands or tenures in question are not shown as Lakheraj in (1) the Perganah Register prepared under sections 2 and 3 of Regulation VIII of 1800, (2) the Kanungo Register or account kept under the provisions of Regulation I of 1819 read with section 7 of Regulation V of 1816, (3) the General and Mouzawar Register kept under the Land Registration Act (Bengal Act VII of 1876) and (4) the Thak maps and statements of the *mouzas* in question, which have been produced by the defendant, the defendant has succeeded in showing affirmatively that the lands in suit are the *mal* lands of the *zemindari* and of the defendants' Patni.

The contentions of the appellants then are (1) that the District Judge has wholly misconceived the probative effect or value of the registers and maps to which he refers, and (2) that he has wholly overlooked the presumption arising from long and uninterrupted possession.

We may consider the several registers one by one.

For translations of extracts from Part II of the Parganah Register I have been referred by the parties to pages 25 to 28 of the paper book in Second Appeals Nos. 1717 and 1719—21 of 1909.

No doubt the intention of Regulation VIII of 1800 (*vide* Section 2) was that the Perganah Register should be exhaustive in both its parts (Malguzari and Lakheraj). But the preamble and also sections 18 and 19 of the Regulation show plainly that the provisions of Regulation XIX of 1793, and of the corresponding Regulation XXXVII of 1793, applicable to Badshahi grants had not been duly observed, and that the preparation of the Periodical Registers therein prescribed was in arrears. There is no reason to suppose that the work of preparing the Perganah Register which was to supersede the Periodical Register was more punctiliously carried out, and that the Perganah Registers were in fact incomplete is recognised in the Land Registration Act of 1876, see, for instance, the preamble and section 20. Moreover, the 4th clause of section 3 of Regulation VIII of 1800 provides that the entries in the Register or Registers prepared under sections 29 and 30 of Regulation XIX of 1793 or the essential portions of such entries should be repeated in the Perganah Register. The Register itself shows that this was not done, and the only entries in the Lakheraj part appear to be entries of land released as valid Lakheraj as the result of resumption proceedings taken at the instance of Government in or about the years 1840—1843; of the omission of other "Taidads", for instance, the Taidad relied on in the present proceedings, we have no explanation and there is no suggestion in the evidence that any proceedings to have these Taidads declared invalid or for the resumption of the lands comprised therein were at any time taken either by Government, the Zemindar, or the Patnidar.

It follows that the Lakheraj portion of the Perganah Register was never duly prepared, and that the omission from it of the lands or tenures now in question is of no evidentiary value.

The next Register is the so-called Kanongo Register, apparently of the year 1825/1232, and for a translation of this Register I have been referred to the same paper-book, pages 4 to 18. By Regulation V of 1816, applicable to the

District of Cuttack, and some portion of the District of Hidjli, Kanongoes were to be appointed in every Perganah and by the 2nd clause of section 7, the Kanongoes were required "to keep an account of all lands held under rent free tenures, and to report to the Collector all escheats of such lands to Government."

By Regulation I of 1819 the provisions of Regulation V of 1816 were extended to the Province of Bengal in general, and it would seem that under this Regulation a Kanongo was appointed for Perganah Taraf Santipur or for the whole district of Nadia, but as to the manner in which he performed the duties laid upon him by the 2nd clause of section 7 of Regulation V we have no information. It is by no means clear that the word "account" implies a register or that the section requires the Kanongo to prepare and maintain a complete register of rent-free tenures. The appointment was intended primarily to facilitate the collection of the public revenue and in the case of lands held rent or revenue free not exceeding 100 *bighas* in area (*vide* Regulation XIX of 1793, section 6) the revenue could be benefited only when from failure of heirs or otherwise the tenures escheated or were forfeited to Government. It was sufficient then that the Kanongo should report any such occurrence. To enable him to do this, copies of the register kept at Headquarters would be more appropriate than an independent register. Moreover, the column in the Kanongo's "account" or register headed "name of Lakherajdar as entered in the Sherista of the Zemindar", though this column appears to be blank, possibly suggests that he took notice only of such tenures as the Zemindar had chosen or been induced formally to recognise. It is in any case quite clear that from his "register" or "account" he omitted the great bulk of the grants registered in the Periodical or Taidad Register, and in the absence of any evidence of resumption proceedings, whether from records or from the Intermediate Registers prepared, if they were prepared, under Regulation XIX of 1793, section 33, or Regulation VIII of 1800, section 5, these omissions remain unexplained. In this state of things it appears clear that the omission of the lands or tenures in question from the Kanongo's account is also of no value to the defendant.

We have next the registers of revenue-free lands maintained under Bengal Act VII of 1876, and with regard to these registers it is sufficient to say that the District Judge has wholly misapprehended the provisions of sections 10, 33 and 89 of the said Act. It is not suggested that the grants or tenures in question have ever been up to now the subject of judicial proceedings or of any report to the Board of Revenue or declared valid by competent authority. Obviously, therefore, they could not find a place in the register of revenue-free lands and their omission, therefore, is of no significance.

We then come to the Thak map of 1852 and the statements endorsed thereon.

In this connection I have been referred to the "Thakbust and Khasreh Rules", issued by the Board of Revenue to Commissioners with their Miscellaneous No. 829 of 8th October 1850 and reproduced in Appendix X to James Henry Young's Revenue Handbook published in the year 1855 and also reproduced in part in Appendix B at page 81 of Captain Hirst's Notes on the "Old Revenue Surveys of Bengal." The 10th Rule (*vide* Young's Handbook) requires that in future the Thakbust is to embrace not merely the village boundaries but also the demarcation of the boundaries of each independent Mahal in the village. Rule 11 then provides that the independent Mahals entitled to distinct entry on the Thakbust map are *inter alia* "4th, confirmed Lakheraj tenures, *i.e.*, tenures confirmed on trial and tenures not subjected to trial, the title being considered good" and "6th, Blocks of land relinquished under the orders not to assess holdings under 50 *bighas*."

It may be here observed that except in Appeal No. 622, the Taidads or grants relied on comprise each an area not exceeding 100 *bighas*, and that in each case the area within Malipota (or Pomulia) is less than 50 *bighas*. Under the Regulations (*vide* sections 6, 7, 10 and 11 of Regulation XIX of 1793 and sections 3 and 30 of Regulation II of 1819), the right to resume and recover the revenue assessed on grants not exceeding 100 *bighas* was with the Zemindar (or Putnidar) and not with Government.

Moreover, the orders of Government, dated 26th January and 28th April 1841 (*vide* Young's Handbook, page 67), directing the discontinuance of resumption proceedings in the case of grants of less than 50 *bighas*, extended also to grants exceeding in the aggregate 50 *bighas*, but made up of parcels of land each of which was less than 50 *bighas*.

It was never intended that the Thakbust authorities should enter into questions between Zemindars and tenants, and Government could not impose upon Zemindars its opinion as to title or its orders as to grants of small areas.

It is then important to observe how rule 11 of the Thakbust Rules was understood and acted upon by the Thakbust Officers. From the Thak statement we find that a number of questions were put to the agents of the Zemindars and Putnidars, and of these the 2nd runs thus:—'To which Perganah does the above-mentioned village appertain.....Besides these (*a*) are there within these boundaries (*i.e.*, the village boundaries) any Bajyapti (*i.e.*, resumed) lands either *char* or Lakheraj which have not been included in (any) Touzi up to this date, or (*b*) are there any lands of the above description (*i.e.*, *char* or Lakheraj) which have been released from the claim of Government for rent (revenue) or (*c*) is there any Lakheraj land in the village which has been exempted from the payment of Government revenue and the time of resumption and settlement because it is less than 50 *bighas*, if there be any what is the number of the suit, and date and year of the decree; (*d*) besides these within these boundaries are there any Lakheraj lands.....covered by a *sanad* and measuring more than 100 *bighas* against which no claim by Government has been preferred up to this date.....".

Of this question or series of questions the portion which I have marked (*a*) refers to the 3rd class of rule 11, *i.e.*, resumed tenures; the 2nd marked (*b*), to the tenures confirmed on trial in the 4th class; the 3rd marked (*c*) to the 6th class, *i.e.*, blocks of land relinquished under the orders not to assess holdings under 50 *bighas* and the 4th marked (*d*), apparently to the tenures in the 4th class "not subjected to trial, the title being considered good."

It will be observed that in each case the question refers to Government demands and to lands which had been or (in the case of the 4th) might appropriately have been the subject of litigation with Government. Moreover, where area is considered, the question is as to the area within the village. In the result in the map of Malipota, a plot of land measuring 8 *bighas*, 8 *cottahs* released in Suit No. 447 by the order of the special (*i.e.*, resumption) Deputy Collector, dated 24th December 1840, was measured as Lakheraj and delineated in Chak No. 1, and as to the rest the Zemindar's or Patnidar's *amla* said, as they might be expected to say, that there was no other Lakheraj in the village. No reference was made to the Taidad Register, though there is no suggestion in the evidence that lands comprised in the Taidads had been at any time resumed, and the representatives of the original grantees were not treated as concerned or called upon to sign the Thakbust (*vide* rule 24) or state their objections. In other words, any lands held as Lakheraj or rent-free which the Zemindar might possibly seek to resume, even those shown in the Kanungo's "account", were included within the limits of the estate.

It follows that in the determination of the questions arising in these present proceedings the omission from the Thakbust maps of any indication of Lakheraj lands (other than lands which had been the subject of litigation) is also of no evidentiary value.

It follows that the District Judge's finding that the defendant has succeeded in proving affirmatively that the lands in question are the *mal* lands of his Patni is based on no evidence.

The defendant is then left with the presumption arising in his favour from section 103 B (3) of the Bengal Tenancy Act and the fact that the lands are within the ambit of his Patni and of the superior estate.

The 2nd question that arises in these appeals then is whether the plaintiffs have succeeded in rebutting the presumption created by section 103B of the Bengal Tenancy Act.

The learned District Judge has found that the plaintiffs have failed to show that the lands in question are comprised within

the several grants or Taidads on which the plaintiffs rely. He has also found that they have also failed to trace their descent or succession-in-interest from the orignal donees. But being apparently under the impression that a Lakheraj title could be established only by production and proof of a grant or title-deed, he has omitted to consider or discuss the evidence of possession and come to any finding as to the duration in each case of the possession of the plaintiffs free from payment of rent. To avoid the necessity of a remand, with the assent of the parties, I, therefore, decided to proceed under section 103 of the Code of Civil Procedure, and to determine in this Court the necessary issue of fact. For this purpose the whole evidence as to possession in each case has been placed before me.

In Appeal No. 620 two witnesses, one a man of 53 and one a man of 82, were examined, though in a very cursory manner, for the plaintiffs. From their evidence it appears that the plaintiff and her father before her have been in possession at least from 1891, when the plot was purchased in the name of one Pramanik as the Brahmattar property of certain Mukherjees. Moreover the witnesses prove that the homestead plot in question is known as "Lakhi Kanta's homestead" and the Taidad (7248) shows the 2 *bighas* in Malipota as "Bastu" and one Lakhi Kanta Banerjee as the person in possession at the time (1790-92) when the grant was registered (1795 96).

In Appeal No. 621 the only oral evidence is that of a youngman of 24. Two *kabuliyats* produced refer to a different and not adjoining village named Fulia. In the deed of sale exhibited, the year 1227 in words and figures has been obviously altered from 1225, yet the stamped paper on which the document is written was sold in 1820 (=1227). Moreover, the first 3 lines are in one ink; the remainder in a different ink; the original 1225 is in the first ink; the altered "seven" and "7" in the latter ink. Clearly this document is a forgery.

In Appeal No. 622 we have 3 witnesses, namely, Dinanath Mukherjee aged 52, Moti Lal Roy aged 75, and Panchu Chamar, a man of 30. All these witnesses speak of the possession by the plaintiff and his ancestors of this Lakheraj homestead for the period to which the memory of each witness extends, in the case of Moti Lal Roy, 50 years. Moreover, the 1st two witnesses prove the descent of the plaintiff from Bhabasankar, one of the persons named in the Taidad (5932) as in possession when the grant was registered. In this case therefore the observation of the District Judge that "there is a total absence of evidence to establish the complete chain from the donees to the present holders" is wholly erroneous.

In Appeal No. 722 Dinanath Mukherjee, 52 years of age, and one of the plaintiffs Gobinda Lal Mukherjee, a man of 41, have been examined. The plaintiff produces a sale-certificate (Exhibit I), by which in 1835 his grandfather Badan Chandra purchased in execution of a decree against one Ram Prasad Bhattacharjee (the original grantee in Taidad 2247 being Ram Kanai Tarkabagis, *i.e.*, Bhattacharjee). He next produces a sub-lease of the year 1279/1872 (Exhibit 2), identifies the garden or orchard now in question with the Lakheraj garden referred to in the sale-certificate and in the sub-lease, and says that it has been in the hands of his family from the year 1835 to the present day. In these statements he is corroborated by the witness Dinanath Mukherjee who speaks of a period of 40 years

In none of the appeals has the defendant adduced any oral evidence.

On the evidence thus reviewed, I find that the plaintiffs have succeeded in proving possession free from payment of rent, in Appeal No. 722 from the year 1835, in Appeal No. 622 for a period of 50 years before suit, and in Appeal No. 620 from the year 1891. In Appeal No. 621 no evidence of possession for any definite period has been given, and in this appeal, therefore, it cannot be said that the presumption arising under section 103B of the Bengal Tenancy Act has been rebutted. In the other appeals the proved possession free from payment of rent is in my opinion sufficient to rebut the presumption arising from the second portion of the entry in the Record of Rights to the effect that the lands are liable to be assessed to rent.

It is then for the defendant to give evidence that the lands in question were

at one time *mal*. As pointed out in the case of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (1), he may do this by proving by documentary or other evidence that the lands in question formed part of the *mal* assets of the estate at the Decennial Settlement or at the time when the estate was permanently settled (in this case 1800) or by proving payment of rent at some time since that date. By the production of registers and Thak maps discussed in the first part of the judgment, he has attempted to prove that the lands in question were in 1799-1800 part of the *mal* assets of the estate. In this attempt, in my opinion, he has failed. He has made no attempt to prove payment of rent at any time. It is said that he could make no such attempt because he is an auction-purchaser. But he has examined no one to explain his difficulties, if any, or even to tell us who the defaulting Patnidars or their predecessors-in-interest were. From the written statements in fact it would seem that the defendant accepted the position that owing to the laches of the previous Patnidars rents in respect of the lands in suit had never been realised. In any case from the positive evidence that the lands in question are and have been held free from payment of rent, and the failure on the part of the defendant to make any attempt to prove payment of rent at any time, we may safely conclude that in respect of the lands in question in the 3 appeals with which I am now dealing no rent has ever been paid either to Zemindar or Patnidar.

I, therefore, hold that the lands in suit in Appeals Nos. 620, 622 and 722 are Lakheraj and no part of the *mal* assets of the Zemindar or of the defendant's Patni.

I have lastly to notice an objection taken by the respondent in Appeal No. 722. It appears that the appeal was filed within time on the 10th July 1911. On the 1st March 1912 the officer of the Court reported that the Court-fee paid was insufficient, and thereupon, for payment of the deficit, on the 13th day of March 2 days' time was allowed. The deficit was in fact not paid till the 16th, that is one day too late. It is, therefore, contended that the appeal is barred by limitation, but it is open to the Court to enlarge the period and accordingly granting the necessary extension, I accept the payment of the 16th March 1912 as within time.

In the result Appeal No. 621 is dismissed with costs. In Appeals Nos. 620, 622 and 722 the plaintiffs will have in each case a declaration that the lands in suit are rent-free Brahmattar and that the entry to the contrary in the Record of Rights is incorrect. These appeals are accordingly decreed with costs.

Babus *Mahendra Nath Roy* and *Amarendra Nath Bose*, for the Appellants.

Babu *Rupendra Kumar Mitter*, for the Respondents.

JUDGMENT.—We see no reason to differ from Mr. Justice Teunon in the view that he has taken of the rights of the parties in these cases. The appeals are, therefore, dismissed with costs.

Appeals dismissed.

(1) 14 M. I. A. 152; 8 B. L. R. 566; 20 W. C. 459; 2 Suth. P. C. J. 484; 2 Sar. P. C. J. 713; 20 E. R. 743.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 38 OF 1916.

July 9, 1918.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

Rani KESHOBATI KUMARI—DEFENDANT No. 1—APPELLANT

versus

Kumar SATYA NARAYAN SINHA—PLAINTIFF AND GAJADHAR SINGH AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Hindu Law--Adoption by widow—Agreement between adoptive mother and natural parents of adopted child, whether binding on minor—Minor, benefit of.

A minor can only act through a guardian, and contracts entered into by a guardian on behalf of the minor are binding on the minor, provided they have been properly entered into and are for his benefit. [p. 58, col. 2.]

Where a Hindu widow adopts a minor son to her deceased husband and an agreement is entered into between her and the parents of the adopted child acting on the latter's behalf, whereby a life-interest in the estate of her deceased husband is reserved to the widow, the agreement is binding on the minor, provided at the time it was entered into it was a fair and reasonable agreement which to any reason-

KESHOBATI KUMARI v. SATYA NARAYAN SINHA.

able man would have appeared for the benefit of the minor. [p. 59, col. 1.]

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 6th October 1915.

Messrs. *Pugh*, *S. N. Sahay*, *Naresh Chandra Sinha*, *Dwarkanath Chackerbatty* and *Rajendra Prasad*, for the Appellants.

Messrs. *Hasan Imam*, *S. P. Sen*, *Sarat Chandra Mukherjee*, *Surendra Mohan Das*, *Satish Chandra Rai*, *Haribhushan Mukherji* and *L. K. Jha*, for the Respondents.

JUDGMENT.

COUTTS, J.—This was a suit brought by the guardian of a minor Kumar Satya Narain Singh for a declaration that he is the adopted son of Udit Narain Singh, called by courtesy Raja, the last male holder of a large estate about 600 square miles in area known as the Handwa Estate, and for immediate possession of the property. The suit was brought against the Raja's widow Rani Keshobati Kumari, who claims a life-interest in the property and who has been in possession since the Raja's death.

This extract from the genealogy of the family is necessary to show the relationship of the parties:—

TEJAN SINGH *alias* KESAR SINGH,

- Raja Porandar Singh,
  - Girdhari Singh (died childless in father's lifetime).
- Raja Jhaban Singh,
  - Raja Madho Singh,
    - Raja Udit Narain Singh. Died on 10th April 1896 leaving his widow the defendant Keshobati.
- Moti Singh,
  - Gobind Singh.
  - Balbhadoor Singh,
    - Ram Charan Singh,
      - Gajadhar, defendant.
    - Guru Charan Singh,
      - Hari Prasad Singh (Plaintiff).
      - Biswa Nath Singh.
    - Mahaprasad Singh (alive).

The material facts of the case are shortly as follows:

Raja Udit Narain Singh executed a Will on the 7th April 1896 and died three days later. Shortly after his death Ram Charan Singh, father of the defendant No. 2 and head of what is known as the Barkope branch of the family, claimed the succession and on the 23rd April 1897 he filed a suit in which he attacked the Will of the Raja as not genuine and claimed the property as the eldest male member of the family, asserting that as the family was governed by the Mithila Law, the Rani had no right to succeed. About a year after the suit had been instituted, a compromise was arranged between the parties. Under the Will of the Raja his widow had been given the power of adoption and also a certain interest in the property had been reserved to her. It will be necessary to discuss later what this interest was, but in order to effect the compromise it was arranged that the widow should adopt the plaintiff, the grandson of Ram Charan's younger brother Guru Charan who was then dead; and it was further arranged that the Rani was to retain a life-interest in the property. The contest in regard to the genuineness of the Will was dropped and the Rani took out Probate.

On the 8th March 1898 the plaintiff was actually adopted and the two deeds were

drawn up embodying the agreement. To one of these deeds Ram Charan Singh, the Rani, the plaintiff's father Hari Prasad, Maha Prasad, the only surviving brother of Ram Charan, and Biswa Nath Singh, the brother of Hari Prasad were parties. The parties to the other deed were the plaintiff's father and mother, Ram Charan and the Rani. In December 1900 the settlement proceedings, which had been going on for some time in the Handwa Estate, were completed, and, after consideration of the Will and the agreement which had been entered into, Mr. McPherson, the Settlement Officer, recorded the Rani as proprietor. Meanwhile the management of the estate was unsatisfactory, several managers and Receivers were appointed and dismissed by the Rani, and finally in 1909 the Court of Wards took charge. They were only in charge for a short time, however, and in 1910 the estate was released. After this there were disputes between the Rani and the plaintiff and an attempt was made to settle these by giving the management to the plaintiff. This arrangement, however, was not a success; the disputes went on and this suit was eventually brought in 1912 on behalf of the plaintiff, who was then a minor, by his guardian.

In the plaint he alleged that by his adoption he had become vested with all the rights of a son born of Raja Udit Narain Singh, that he was entitled to immediate possession and was not bound by the agreement of the 8th March 1898. He also alleged that the tenure was a Ghatwali tenure and that he as the adopted son took the property in his own right. There was an allegation that even if the Rani had a life interest in the estate, she was liable to be removed for waste and mismanagement. The suit was contested by the Rani, who pleaded that she had been recorded as proprietor in the Record of Rights; that the suit was not maintainable; that under the terms of the Will she had a life interest, and that even apart from the Will under the agreement of the 8th March 1898 she was entitled to a life-interest. She also contended that the plaintiff had no right as an adopted son, as the adoption was not valid. In regard to the claim as Ghatwal she contended that if the tenure were a Ghatwali tenure, the property had been vested in her as a Ghatwal on the death of her husband and that having become possessed of the property in that right she could not be ousted by the plaintiff. The suit went to trial on the following issues :—

1. Does the plaint disclose any cause of action and is the suit maintainable?

2. Is the suit barred under the special law of limitation provided in Regulation III of 1872?

3. Is it open to the defendant No 1 to plead that she adopted the plaintiff without power from her husband and is she estopped by her acts and conduct from denying that the plaintiff is the duly adopted son of Raja Udit Narain Singh?

4. If the defendant No. 1 be not estopped as above, is the plaintiff's adoption by her invalid on the ground of want of authority from her husband?

5. Was Udit Narain Singh competent to dispose of or to give any valid directions to the future management of the Ghatwali properties, mentioned as properties Nos. 1, 2 and 3 of the Schedule A annexed to the plaint, by his Will?

6. What are the respective rights of the plaintiff and the defendant No. 1 in the property in suit upon a true construction of the Will of Udit Narain Singh, dated the 7th April 1896?

7. Whether the plaintiff's succession to the aforesaid Ghatwali properties immediately on his adoption could be defeated by an agreement between his natural father and mother and defendant No. 1?

8. Are the agreements dated the 8th March 1895 binding on the plaintiff, in so far as they purport to curtail his rights in any of the properties in suit?

9. Was the defendant No. 1 divested of all right to possession of the estate of her deceased husband either as a Hindu widow or as a legatee under her husband's Will immediately upon the adoption of the plaintiff by the said defendant No. 1, Rani Keshobati Kumari?

10. What are the properties, moveable and immoveable, belonging to the estate left by the said Udit Narain Singh, including subsequent acquisitions?

11. Is the defendant No. 1 wasting and mismanaging the said estate; if so, whether

such wasting and mismanaging are sufficient in law to render her liable to removal from its management even if the plaintiff's right be subject to her life-interest in it?

12. Is the defendant No. 1 liable to render accounts to the plaintiff of her management of the said estate from the 8th March 1898? What sum of money, if any, is due by the defendant No. 1, or any of the defendants upon the taking of such accounts?

13. Is the plaintiff entitled to a decree for possession of the said estate by ousting the defendant No. 1?

14. Is the plaintiff entitled to the appointment of a Receiver or to a permanent injunction as prayed for by him?

15. To what relief or reliefs, if any, is the plaintiff entitled?

The learned Subordinate Judge has found all the issues in favour of the plaintiff and has decreed the suit. The Rani has appealed.

The first point argued before us is that under the agreement of the 8th March 1898 the Rani was given a life-interest in the property and that the plaintiff is not entitled to resile from that agreement. The portions of the agreement which relate to the matter of life-interest are as follows:—

"And whereas the said Srimati Rani Keshobati Koeri has applied to the parties hereto of the first party to give her their said son Babu Dwarka Nath Singh to be adopted by her in the *dattaka* form as a son unto the said Raja Udit Narain Singh and herself, but on condition that she the said Srimati Rani Keshobati Koeri shall remain in the possession of the whole of the said property, moveable and immoveable, with all their appurtenances of which the said Raja Udit Narain Singh died possessed as aforesaid and enjoy the rents, issues and profits thereof during the term of her natural life in accordance with the true meaning of the said Will, whereby as the said parties hereto of the first and second parts believe and admit the said Raja Udit Narain Singh intended to give her such life-estate, but whether he so intended or not the said Srimati Rani Keshobati Koeri shall in any case be entitled to remain in possession and to enjoy the rents, issues and profits of the said immoveable property during the term of her natural life.....she shall remain in possession and enjoyment thereof during the term of her natural life in such manner and exercise such powers over the same as the Benares School of the Hindu Law entitled a Hindu widow in the possession of her husband's moveable property to do... That during the lifetime of the said Srimati Rani Keshobati Koeri the said Babu Dwarka Nath Singh shall not, nor shall his male issue, have any sort of title or interest in the estate of the said Raja Udit Narain Singh, except a vested interest in the remainder subject to a life-estate therein of the said Srimati Rani Keshobati Koeri."

I may note here that the name of the plaintiff before adoption was Dwarka Nath Singh. By this agreement then the Rani was given a life-interest in the property. The question is whether the agreement is binding on the plaintiff. It was entered into on behalf of the plaintiff, who was then an infant, by his father as his guardian. A minor can only act through a guardian, and contracts entered into by a guardian are binding on a minor, provided they have been properly entered into and are for his benefit. Now it has been frankly admitted by Mr. Hasan Imam that at the time the agreement was entered into the arrangement must have appeared to the father a most attractive one, and that in entering into the agreement he honestly thought that he was doing the best possible for his son, and it cannot be doubted that any reasonable man would have thought the same, because from being a co-sharer in a minor branch of the family the boy became entitled to this very large estate. It is contended, however, that the arrangement has not in fact turned out to be as advantageous for the minor as it at first sight must have appeared. Mr. Hasan Imam says that there is in the agreement no proper arrangement for maintenance allowance for the minor and that if he had remained in his own family, he could have demanded a partition and would have had an income of about Rs. 5,000 a year. It is exceedingly problematical whether the plaintiff would have got Rs. 5,000 a year because even assuming that the income from the Barkope estate was as much as it is said to have been, there was, as the evidence shows, an encumbrance of 3½ lacs upon the pro-

perty. As it is, the plaintiff is entitled by the agreement to an estate worth over 3 lacs a year subject to the life interest of the Rani. Moreover in the agreement it is provided that "the said Dwarka Nath Singh shall henceforth live with and under the guardianship of the said Srimati Rani Keshobati Koeri as his mother and be supported, maintained, educated and trained in every way befitting his position as the *dattaka putra* or adopted son of the said Raja Udit Narain Singh and of herself". There is, therefore, no force in the argument that no proper arrangement was made for the maintenance of the minor and there is every reason to believe that even now the plaintiff is in a better position than he would have been if he had been in his own family. This, however, is not the question. The question is, whether at the time the agreement was entered into it was a fair and reasonable agreement which, to any reasonable man, would have appeared for the benefit of the minor, and that it was such an agreement is not only certain but is practically admitted. Nor was this agreement entered into without legal advice, for it was submitted to Mr. W. C. Bonnerjee in Calcutta. and it is certainly binding on the plaintiff unless it is contrary to Hindu Law that such an arrangement should be entered into or for some other reason. Now an adoption once made cannot be unmade, and the question of the binding force of such agreements has often been before the Courts in India. In Bombay such agreements have been held to be binding, *Ravji Vinayakrav Jaggannath Shankar Sett* v. *Lakshmibai* (1) and *Pirsab Kasimsab Itagi* v. *Gurappa Basappa Kadigi* (2), which is the last case in Bombay on this point. In the case reported as *Bhaiya Rabidat Singh* v. *Indar Kunwar* (3), however, Lord Macnaghten said: "It is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son which could only arise when his parental control and authority were determined. The ceremonies of adoption are unimpeached, the deed of adoption is open to no objection, and the second deed is admittedly inoperative. No conditions, therefore, were attached to the adoption. Had it been otherwise, the analogy, such as is presented by the doctrines of the Court of Equity in this country relating to the execution of powers of appointment, to which Mr. Arathoon appealed, would rather suggest that even in that case the adoption would have been valid and the condition void". In that case, however, the agreement was previous to the adoption and was not embodied in the adoption deed or referred to at the time of the adoption, and the suit was not to enforce the agreement but to annul the adoption. This case was referred to in the Full Bench case reported as *Visalakshi Ammal* v. *Sivaramien* (4), where the whole matter was very fully discussed. In the judgment of Mr. Justice Benson he said: "Then the question in each case would be whether the agreement so made by the natural father should or should not be upheld, and this I take it would depend on whether the agreement in regard to the property was in itself a fair and reasonable one and one which, taken as part of the contract for the adoption, was for the minor's benefit as being a condition on which alone the adoption would be made". Again he says :—"But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu Law, or the purposes for which the adoption is allowed and is nowhere forbidden by that law. Such dispositions are commonly made and are upheld by the authority of the caste and the consciousness of the people. In these circumstances I think that the Courts ought not to refuse to recognise them as binding on the minor, for whose benefit the adoption coupled with the agreement as to the disposition of the property was really made. It may be assumed that the natural father would not have agreed to the adoption coupled with the disposition of the property, unless it was for the benefit of his son to do so: nor

(1) 11 B. 381; 6 Ind. Dec. (N. S.) 250.
(2) 24 Ind. Cas. 716; 38 B. 227; 16 Bom. L. R. 111.
(3) 16 C. 556; 16 I. A. 53; 13 Ind. Jur. 98; 5 Sar. P. C. J. 505; Rafique & Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367 (P. C.).

(4) 27 M. 577; 14 M. L. J. 310 (F. B.).

would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside and to set aside the condition which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy". This, in spite of the doubt expressed by their Lordships of the Privy Council in the case of *Bhaiya Rabidat Singh* v. *Indar Kunwar* (3) which is clearly distinguishable from the other cases referred to, would appear to be the correct view of the law, and in this view the agreement in the present case is binding on the plaintiff. It is contended, however, by Mr. Hasan Imam that the agreement, in so far as it gives a life-interest to the Rani, is in contravention of the terms of the Will and that this being so, it is not binding on the plaintiff. It is necessary to consider the question in some detail. The portion of the Will which deals with the life-interest of the Rani is as follows:—

"*Magar ta hin hayat Rani mausufa hakiat mokarrari istimrari wa kul mal mankula wa ghair mankula wa asasulbait wagairah ka intizam wa ikhtiyar kulli hasil rahega*".

As I understand it the nearest translation of this is as follows :—

"But as long as the said Rani is alive she shall enjoy the management and she shall have absolute right in the *maliki istimrari* right and in all moveable and immoveable properties and goods, etc."

On the one hand it is contended by Mr. Dwarka Nath Chakrabarty that this is to be interpreted as giving a life-interest to the Rani. On the other hand it is argued by Mr. Hasan Imam that these words give nothing more than a perpetual power of management. My view of the meaning of the clause is that it gives the Rani a life-interest in the property, but I do not propose to elaborate the point because in my opinion whether this be so or not, the plaintiff is bound by the terms of the agreement.

In the Will there are two portions which are open to different constructions. One of these is this clause which I have quoted, and the other is that portion in which power is given to the Rani to 'adopt a son, that is, a *kartaputra* according to her own decision and liking.' I deal with this latter clause first. According to the strict interpretation of the word *kartaputra*, the adoption which the Rani was allowed by the Will was an adoption in the *kritrima* form. This is an adoption to herself. It is clear, however, from the rest of the Will that the intention of the Raja was not that the Rani should adopt to herself but that she should adopt to him, for in the preamble to the Will he says that his object in making it is "to preserve the property and for preservation of the Raj Gaddi". What he intended then was certainly not an adoption in the *kritrima* form but an adoption in the *dattaka* form. Handwa is situated in the Santal Parganas in a very backward part of the country, and we find from the evidence that neither the Raja nor his priests knew the difference between a *kartaputra* and a *dattakaputra*, thus in the agreement *kartaputra* was very properly interpreted as meaning *dattakaputra*. This interpretation was given after consultation with Counsel in Calcutta and the words of the agreement are: "And whereas the said Raja Udit Narain Singh lived under and was governed by the Benares School of the Hindu Law and the power of adoption hereinbefore mentioned was, as the parties to these presents believe, intended by him to be carried out in the *dattaka* form, the word *kartaputra* used in the said Will meaning in the popular acceptance of that term in that part of the country the *dattakaputra*". On this construction the adoption was actually made in the *dattaka* form.

At the same time and by the same Counsel the meaning of the clause in the Will which gave an interest to the Rani was considered and in the agreement we find the following words :—

"But on condition that she the said Rani Keshobati Koeri shall remain in the possession of the whole of the said property moveable and immoveable with all the appurtenances of which the said Raja Udit Narain Singh died possessed as aforesaid and enjoy the rents, issues and profits thereof during the term of her

natural life in accordance with the true meaning of the said Will, whereby as the said parties hereto of the first and second parts believe and admit the said Raja Udit Narain Singh intended to give her such life-estate, but whether he so intended or not the said Srimati Rani Keshobati Koeri shall in any case be entitled to remain in possession and to enjoy the rents, issues and profits of the said immoveable properties during the term of her natural life."

It was on this construction of the Will that the agreement was made and the plaintiff adopted in the *dattaka* form. Mr. Hasan Imam contends that this construction is wrong. Even assuming that this is so and putting the case in its most fovourable light for the plaintiff, it has to be admitted that there was, at least at the time of the execution of the agreement, a *bona fide* doubt as to the meaning of these clauses of the Will. The Will was construed by competent legal authority in Calcutta as giving a life-interest to the Rani, and this interpretation was accepted as a condition of the adoption and was incorporated in the agreement which was drawn up. It is not, in my opinion, now open to the plaintiff to contend that this construction was wrong. We have been told that parties cannot be allowed to read into a Will a wrong construction which happens to suit themselves, and we are asked to interpret the Will without reference to the agreement. I agree that parties cannot be allowed to import into a solemn document, such as a Will, a construction which it cannot bear, but I am not prepared to agree that the construction which was put on the Will was wrong, and in any case where there has been a doubt as to the proper construction and where the parties have endeavoured to the best of their ability to discover the proper construction and have entered into an agreement of which this construction is the very basis, it is not open to either of them afterwards to repudiate this construction and ask that the agreement be set aside. What the plaintiff in fact wishes to do in this case is to be allowed to approbate that part of the agreement which construes the Will in his favour and to reprobate that portion which construes the Will as giving the Rani a life-interest. He cannot be allowed to do this and he is, in my opinion, bound by the agreement. This being so, it is hardly necessary to consider the other pleas of the plaintiff. I need only remark that so far as the claim as Ghatwal is concerned, if this is a Ghatwali tenure and if Raja Udit Narain Singh was a Ghatwal, his interest as a Ghatwal became vested in his widow when she took possession of the property and she is not competent to divest herself of this status. It is unnecessary to discuss the question of limitation, though on this ground also the plaintiff's suit for possession must fail.

The only question which remains to be considered is the 11th issue:—"Is the defendant No. 1 wasting and mismanaging the said estate? If so, whether such wasting and mismanaging are sufficient in law to render her liable to removal from its management, even if the plaintiff's right be subject to her life-interest in it". This issue is loosely worded and it is not quite clear whether the Subordinate Judge means legal waste, nor is it very clear what his finding as to waste is. He finds that the Rani has given *dar mokarrari* leases, has made rent-free Brahmottar grants and that she has caused an area of 309 *bighas* of *khas kamat* lands to be converted into *raiyati* lands. He also finds that she has contracted debts. None of these come into the category of legal waste. As to the first two the leases and grants are not binding on the reversioner, as to the conversion of the *khas kamat* lands into *raiyati* lands there is nothing to show that this is waste as rent will presumably be got from these lands; and in so far as the debts are concerned they are all personal. The learned Subordinate Judge, however, has clearly shown that she has mismanaged the property, and this is in fact not denied. She is a *pardanashin* lady evidently in the hands of dishonest servants and if the estate is to be preserved, a Receiver must be appointed. To this extent only, therefore, I would uphold the Subordinate Judge's decree. In other respects the suit should be dismissed; each party should bear its own costs.

ROE, J.—I agree that the plaintiff is bound by the agreement which settled the dispute

between the Rani and the Barkope branch of the Handwa family. The position was that if the Will was valid, the Rani might have adopted any Kshetari boy and barred the Barkope succession for ever. In the Santhal Parganas the practice of the secular law is discouraged and the priests, in their cross examination in the case before us, betray universal and complete ignorance of the scriptural law. The result of this was a Will by which a son was to be adopted in a form which would defeat the testator's own intention and an interest reserved to the adopting mother by a condition, of which the exact interpretation gives rise to a difference of opinion between my learned brother and myself. It was clearly to the interest of the Handwa family as a whole that the Will should be amicably interpreted. In Volume XIV of Halsbury's Laws of England, section 1223, are quoted many cases of good family settlements of disputes arising on the construction of ill-made Wills. The dispute in this case was one between the Lagwan and the Barkope branches of the Handwa family. The plaintiff was before his adoption and is still a member of the Handwa family. He cannot challenge the Handwa family settlement without showing that it was against his interest. Mr. Hasan Imam concedes that the terms of the settlement offered at the time most attractive prospects. Apart from any consideration of the Hindu Law of adoption, this concession ends in my view the question of the position of the plaintiff.

I also agree with the order proposed in regard to the appointment of a Receiver. We are happily relieved of the task of entering in detail into the question of the plaintiff's right to the relief asked for in paragaph 27 (*g*) of the plaint. Mr. Dwarka Nath Chackerbatty consents to the granting of this relief. I would, therefore, make a decree for the appointment of a Receiver for the preservation and management of the Handwa Estate and custody and control of the documents and moveable properties of that Estate. I would also direct that the Receiver be appointed under the decree of this Court, not under the decree of the Subordinate Judge, and that the Receiver be directly under the control of this Court. This Divisional Bench will consider in Chambers the question who shall be appointed as the Court's Receiver. In conclusion I would direct that in view of the substantial causes of doubt as to the rights of the parties, the costs both of the Rani and of the Kumar be met from the estate in the hands of the Receiver.

I would further order that notice be issued to the Courts of the Santhal Parganas and Bhagalpur that the Handwa Estate is in the hands of a Receiver to be appointed by this Court, and that no attachment of any asset of the estate be made without the sanction of this Court.

Decree modified.

CALCUTTA HIGH COURT.

CIVIL RULE No. 219 OF 1918.

June 24, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

CHARU CHANDRA BHATTACHARJEE —APPELLANT—PETITIONER

versus

HEM CHANDRA MOOKERJEE AND ANOTHER—RESPONDENTS—OPPOSITE PARTY.

Provincial Insolvency Act (III of 1907), s. 22—"Aggrieved," meaning of—Application under section—Limitation.

Where a Receiver in insolvency at the instance of a creditor attaches and takes possession of a property as the property of the insolvent, a third person claiming to be the owner of the property becomes "aggrieved" within the meaning of section 22 of the Provincial Insolvency Act; so that an application by him under that section should be made within 21 days from the date of the act of the Receiver in taking possession. [p. 63, col. 2.]

Rule against the order of the District Judge of the 24-Pergannahs, in Appeal No. 16 of 1918.

FACTS appear from the judgment.

Babu *Dhirendra Nath Mukerjee*, for the Petitioner.—The only question involved is one of limitation. The lower Court held that under the proviso to section 22 of the Provincial Insolvency Act the application is barred by limitation.

Under section 22 of the Provincial Insolvency Act the aggrieved party can bring the suit within 21 days from the date of the order of decision of the Court or Receiver. Therefore the 21 days will be counted from the date of the report of the Receiver, and hence I am within time. The question is whether 21 days will be counted from the date of the report or of the act of the Receiver, *viz.*, the actual seizure of my client's property, the boats.

The only Calcutta case in point is *Hanseswar Ghosh* v. *Rakhal Das Ghose* (1). The definition of aggrieved person is given in *Lalji Sahay Singh* v. *Abdul Gani* (2), which has been followed in *Hanseswar Ghosh* v. *Rakhal Das Ghose* (1).

[TEUNON, J.—*Lalji Sahay Singh* v. *Abdul Gani* (2) is not under section 22 of the Insolvency Act.]

Time will be counted not from the act of the Receiver but from the decree or order of the Receiver, but here there is no order of the Receiver.

Babus *Karunamoy Bose* and *Bankim Chandra Mukherjee*, for the Opposite Party.—*Thakur Prasad* v. *Funno Lal* (3) is the case in point and is followed in *Mool Chand* v. *Murari Lal* (4). The lower Court, relying upon the case reported as *Thakur Prasad* v. *Funno Lal* (3), is right in holding that the application is barred by limitation.

Babu *Dhirendra Nath Mukherjee* in reply.

JUDGMENT.—The present Rule is one issued under the provisions of the proviso to section 46 (1) of the Provincial Insolvency Act, 1907. It appears, and it has been found, that at the instance of one of the creditors and after the taking of evidence on the 27th of November 1917 the Receiver appointed in certain insolvency proceedings took possession of certain boats as the property of the insolvent. It has further been found that the attachment and the taking of possession were to the knowledge of the petitioner. Thereafter on the 19th December the petitioner before us made an application to the Court of the Subordinate Judge having jurisdiction in the insolvency proceedings in question, and therein prayed that the Court should reverse the act or order of the Receiver and return the boats to him as being his property. The Subordinate Judge held that under the terms of the proviso to section 22 the application was barred by limitation. On appeal the District Judge confirmed that order.

The argument of the petitioner before us is that limitation should run not from the date of the act of the Receiver in taking possession but from the date, namely, the 14th December, on which he reported his action to the Court. On the facts found in this particular case we are unable to accede to that contention. It is quite clear that the attachment by the Receiver and his taking of possession are acts by which, within the meaning of section 22 of the Provincial Insolvency Act, a third person claiming to be the owner was, if the real owner, aggrieved. He should, therefore, have made his application under section 22 within 21 days from that date,

In support of his contention before us the petitioner refers us to the case decided by this Court and reported as *Hanseswar Ghosh* v. *Rakhal Das Ghose* (1). But that decision may, we think, be distinguished, as it is quite clear that by the act of the Receiver in the present case the applicant if the true owner was deprived of the possession of his property. In support of the view we take we may further refer to the decision of the Allahabad High Court reported as *Thakur Prasad* v. *Punno Lal* (3) and a subsequent decision reported as *Mool Chand* v. *Murari Lal* (4).

For these reasons we discharge this Rule with costs, one gold *mohur*, to be paid to the creditor who has appeared and one gold *mohur* to be paid to the Receiver.

Rule discharged.

(1) 20 Ind. Cas. 683; 18 C. L. J. 359; 18 C. W. N. 366.
(2) 7 Ind. Cas. 765; 12 C. L. J. 452; 15 C. W. N. 253.
(3) 20 Ind. Cas 673; 35 A. 470; 11 A. L. J. 603.
(4) 21 Ind. Cas. 702; 36 A. 8; 11 A. L. J. 979.

EMPEROR *v.* RAJENDRA ROY.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 46 OF 1917.
January 9, 1918.

Present :—Justice Sir Charles Chitty, Kt., and Mr. Justice Smither.

EMPEROR—PROSECUTOR
versus
RAJENDRA ROY—ACCUSED.

Criminal Procedure Code Act V of 1898, ss. 234, 235—Misjoinder of charges Criminal misappropriation —Retrial -Penal Code Act XLV of 1860, ss 209, 210.

Where to three charges of criminal misappropriation, alleged to have been committed by the accused within a year, was added another charge of an offence under section 210 of the Penal Code not committed within the same year:

Held, that there was a misjoinder of charges, as the last offence charged did not form one transaction with the other three offences.

Criminal Reference made by the Additional Sessions Judge, Hooghly, dated the 18th October 1917.

Babus *Manmathanath Mukherjee*, *Narendra Kumar Bose* and *Jatindra Nath Sen*, for the Accused.

Mr. *Orr*, for the Crown.

JUDGMENT.—This case comes before us on a reference by the Additional Sessions Judge of Hooghly under section 307, Criminal Procedure Code. On 23rd July 1917 the accused Rajendra Roy was committed for trial in the Court of Session on three charges of criminal misappropriation committed on different dates in the year 1915. In the Sessions Court on 1st October 1917, an additional charge was added of an offence under section 210, Indian Penal Code, in respect of a sum which was connected with the first of the three charges of criminal misappropriation. At the trial the Jury disagreed, a majority of three being in favour of an acquittal. Disagreeing with that majority and thinking their verdict to be perverse, the Additional Sessions Judge has referred the matter to this Court. On reading the letter of reference it appears to us that there was in this case a misjoinder of charges. In that view, it is unnecessary to go into the merits of the case, as the only fair course will be to direct a retrial of the accused on charges properly framed and properly joined. The three charges of criminal misappropiation related to three separate sums. The accused was the manager appointed by the District Judge of Hooghly of an idol, Brindaban Chandra Thakur, of Guptipara; and was as such manager entrutsed with the funds belonging to the idol. It is of portions of these funds that the alleged misappropriations took place. The first item was one of Rs. 1,441-9-3 said to be costs of the High Court decree in Regular Appeal No. 290 of 1909, to which the idol was a party. The second item was of a sum of Rs. 135 said to have been improperly retained by the accused on the 23rd July 1915. The third was one of Rs. 5-12-3 also misappropriated by the accused as such manager between 14th December 1915 and 8th January 1916. These three charges could, no doubt, have been properly tried together in one trial. The added charge was that the accused, on or about 16th December 1914, fraudulently obtained an order from the District Judge of Hooghly for a sum of Rs. 1,841-9-3, which sum was not due to him or which was larger than was due to him from the estate of the idol. The date of this offence, it will be seen, was not within the year within which the three alleged offences of criminal misappropriation fell. We are of opinion that the accused could not legally be tried on this fourth charge along with the three charges of criminal misappropriation. It was not an act forming one transaction with them. It had some relation to one of the three charges of criminal misappropriation but not to the other two; and, in part, it referred to matters not included in any of those three charges, because it appears from the letter of reference that the accused was said to have committed criminal misappropriation of a further sum of Rs. 200 out of the Rs. 1,841-9-3. This being so, we think that the case must go back to the Court of Session for a retrial of the accused. We need not here specify exactly on what charges he should be tried. That will be for the prosecution to consider and the Court to decide. We need only say that they must be charges which can be properly dealt with in one trial. The accused will remain on the bail at present subsisting.

Retrial ordered.

KANIZ AMINA *v.* EMPEROR.

PATNA HIGH COURT.
CRIMINAL REVISION No. 5 : OF 1918.
March 1, 1918.
Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.
Musammat KANIZ AMINA AND OTHERS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 144, 145, scope of—Proceedings under s. 145, when should be instituted.

The provisions of section 145 of the Criminal Procedure Code were enacted with the specific intention of definitely settling a quarrel after a fair hearing of each side, and proceedings under section 144 of the Code should not be substituted for proceedings under section 145 in order to evade the provisions of law which require an inquiry into the question of possession with reference to the evidence adduced by the parties. [p 66, col. 1.]

The use of section 144 of the Criminal Procedure Code is a suitable method of avoiding a breach of the peace only if it is clear, upon a reading of the Police reports, that the claim of the party creating the disturbance is not a claim made in good faith. Where, however, the facts on the record clearly indicate that a proceeding under section 145 is necessary, the Magistrate has no jurisdiction to take action under section 144. [p. 66, col. 2.]

Criminal revision against an order of the Sub-Divisional Magistrate, Gaya, dated the 13th January 1918.

Mr. *M. N. Huda*, for the Petitioners.

Mr. *Sultan Ahmad* (Government Advocate), for the Crown.

JUDGMENT.—We are asked in this case to set aside proceedings under section 144 and to direct that the Deputy Magistrate take proceedings under section 145 of the Criminal Procedure Code. The learned Government Advocate has put before us the facts of the case and the case-law bearing thereon. The facts are that the Police received information that there was a likelihood of a breach of the peace with regard to possession of standing crops in two villages and also with regard to the Mokarrari rights over a considerable area in those villages. A head constable of Police made a report on the 19th December 1917 to his superior officer recommending that orders under section 144 be issued upon both parties. Upon this the Inspector reported that proceedings under section 144 alone were not sufficient in such a case and that action under section 145 should be taken. In the meantime one of the parties had appeared before the Court and had reported to the Magistrate that the enquiry before the Police was going on and had urged that it was advisable that an officer superior to the head constable should be deputed to superintend the investigation and also that suitable action should be taken to prevent a breach of the peace. Upon these reports the learned Magistrate passed orders, purporting to be under section 144, *ex parte* against both parties, at the same time intimating that he would consider on the date fixed whether proceedings under section 145 should be taken. The question whether proceedings under section 145 should be taken was not further considered. On the date fixed the parties appeared and filed written statements and a mass of documents. Upon a consideration of the written statements and one document on each side out of the mass filed, the learned Magistrate made absolute the order under section 144 against one party and cancelled the order as against the other There is authority in the case of *Parkar Mahton* v. *Ram Khelwan* (1) for the proposition that the Magistrate had no jurisdiction to act under section 144 where the facts on the record clearly indicated that procedure under section 145 was necessary. It was held that the words of the latter section left no other course open to the Magistrate than to take proceedings under section 145, when he had information that a dispute existed regarding land within his jurisdiction likely to result in a breach of the peace. The whole case-law bearing on the distinction between proceedings under section 107 and section 145 was clearly set forth in the order of reference to a Full Bench made by Caspersz, J., and Ryves, J. in the case of *Emperor* v. *Abbas* (2). The Full Bench were not prepared to lay down any hard and fast rule on the subject. All that was said was that there was no conflict between section 107 and section 145 of the Criminal Procedure Code, but that the question whether after proceedings under section 107 had been taken it would be proper

(1) 11 C. W. N. 271; 5 Cr. L. J. 76.
(2) 12 Ind. Cas. 833; 39 C. 150; 16 C. W. N. 83; 14 C. L. J. 429; 12 Cr. L. J. 569.

for the Magistrate to act under section 145, must depend on the circumstances of each case as it arises. It might be that after an order under section 107 no likelihood of a breach of the peace would continue. There was no question in this case, nor in the decisions quoted in the order of reference, of the Magistrate's powers under section 144, but the decision seems to have been since regarded as justifying Magistrates in declining to take action under section 145 until it has been ascertained that proceedings under section 144 have been insufficient to allay the dispute. Had the matter rested there we should see no reason to interfere. But it has gone further and, as we think, too far. In order to avoid the taking of evidence and the making of a definite order under section 145 a summary procedure under section 144 has been substituted in very many cases in which without possible doubt proceedings under section 145 should have been taken. We have noticed the practice growing in this province. After a series of such cases in Darbhanga, we ascertained that the then Magistrate of that District had issued a circular order to the officers subordinate to him directing them to refuse to take action under section 145 on the ground that the procedure therein involved was tedious and unprofitable. We now find something of the same sort happening in Gaya. One such case from Gaya was recently before the Court in Criminal Revision No. 352 of 1917 [*Bansi Singh* v. *Emperor* (3)]. This case comes from Gaya and there is another case from Gaya pending. The matter seems to us to be one of great importance. The provisions of section 145 were enacted with the specific intention of definitely settling a quarrel after a fair hearing of each side. In order that the settlement of the quarrel might be without doubt permanent, it was further enacted that if the decision under section 145 be not contested in the Civil Courts within three years, the party declared to be in possession shall remain in possession for ever. The substitution of proceedings under section 144 for proceedings under section 145 appears to us to have no logical object whatever, save to avoid the labour of taking oral evidence of possession. The learned Government Advocate accepts as incontrovertible the following propositions :—*firstly*, that the Magistrate is not required to take proceedings under section 145 if he is satisfied that by other methods he can avoid a breach of the peace: *secondly*, that the use of section 144 is a suitable method of avoiding a breach of the peace only if it is clear, upon a reading of the Police reports, that the claim of the party creating the disturbance is not a claim made in good faith. This is certainly the view taken in *Mahadeo Kunwar* v. *Bisu* (4) and *Emperor* v. *Ram Baran Singh* (5). There can be no doubt but that in the case before us the dispute between the parties is a genuine dispute, and, as we understand the decision of the Full Bench in Calcutta already quoted, not one which could be settled by an order under section 107 or section 144. In spite of the proceedings under section 144 the dispute still subsists. The Magistrate was required by law in the first instance, and is still required by law, to settle the dispute by an order under section 145 or section 146.

It is suggested by Mr. Khurshed Husnain for the opposite party that our power of superintendence does not extend to a direction to a Magistrate to take action which it is within his discretion to refuse to take. In this connection the case of *Permessar Singh* v. *Kailaspati* (6) is quoted. Chamier, C. J., in that case said, at page 340*: "A High Court can and will interfere where there has been a material irregularity which amounts to a refusal to exercise or an usurpation of jurisdiction." We may refer also to the quotation made at page 348* from Blackstone's Commentaries: "It is the peculiar business of the Court to superintend all inferior Tribunals and therein to enforce the due exercise of their judicial and ministerial powers with which the Crown or Legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice," and from Bacon's Abridgment: "The superior

(3) 43 Ind. Cas. 401; 3 P. L. W. 353; 19 Cr. L. J. 113.

(4) 25 A. 537; A. W. N. (1903) 102.

(5) 28 A. 406; A. W. N. (1906) 61; 3 Cr. L. J. 323.

(6) 35 Ind. Cas. 801; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1; 1 P. L. J. 336.

*Pages of 1 P. L. J.—*Ed.*

Courts having a superintendence over all inferior Courts may in all cases of innovation award a prohibition."

When we come to examine the proceedings now before us, it is obvious that they are in reality proceedings under Chapter XII. The notices issued to the parties state that there is a dispute between them regarding land, the boundaries of that land are given, and the parties are given an opportunity to make a statement before the Court on a date fixed. They are ordered not to go near the land meanwhile. The notices are in effect the notices contemplated in the last clauses of section 145 (1) and (4). In response to the notices the parties appeared and filed written statements and documentary evidence precisely in the manner indicated by section 145 (1). But under the pretence that the proceedings were under section 144, the Magistrate did not proceed under the first clause of section 145 (4) but decided, upon summary inspection of the documents before him, that one of the parties should remain in undisturbed possession for two months. It would have been but little less ridiculous to issue a notice in the form required by section 488 of the Code, and deal with it under section 144 on the ground that prompt payment of a maintenance would tend to prevent danger by starvation to human life. In the exercise of our power of superintendence we are required to prohibit this innovation, and by quickening the negligence of the inferior Court to obviate a denial of justice. The Magistrate has issued an order which, having regard to the action taken by the parties upon it, was an effective order under section 145, clause (1), read with the third part of clause (4). He will now proceed to complete the proceedings instituted by this action. Written statements and documentary evidence have been filed. All that is required to be done is to hear such oral evidence as the parties may adduce and make an order under section 145 (6) or under section 146, in accordance with his finding upon the question, which of the parties was in possession upon the date of the notices issued, that is, the 29th December 1917.

Case sent back.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 261 OF 1915.

January 26, 1916.

Present:—Sir Henry Drake Brockman Kt., J. C.

GANPATI AND OTHERS—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110 (f), 117 (3)—Security proceedings—Evidence of general repute, admissibility of.

The provision in section 117 (3) of the Criminal Procedure Code must be strictly construed and is, therefore, inapplicable where the charge is under clause (*f*) of section 110 of the Code. [p. 68, col. 2.]

Clause (*f*) of section 110 of the Criminal Procedure Code is one of highly special character: evidence of general repute is not sufficient to bring a case within it, but specific acts showing that the accused recklessly disregards the safety of the persons or the property of his neighbours and actually causes danger thereto must be proved. [p. 68, col. 2.]

Criminal application for revision against the order of the Sub Divisional Magistrate, Wardha.

Mr. *S. K. Barlingay*, for the Applicants.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—This is an application for revision of an order made by the Sub-Divisional Magistrate, Wardha, binding each of the applicants Ganpati, Jagannath and Udaji down to be of good behaviour for one year in a sum of Rs. 500 with one surety in like sum, on the ground that they are so desperate and dangerous as to render their being at large without security hazardous to the community. Their joint appeal to the District Magistrate was dismissed.

The early history of the case is given in my order of the 20th January 1915 in Miscellaneous Petition No. 1 of 1915, which was an application by Jagannath for transfer of the case from the Court of Mr. G. B. Lothey, the Magistrate who eventually passed the order now sought to be revised. In the concluding paragraph of that order I drew the District Magistrate's special attention to the representation made by the Prosecuting Inspector to the effect that the Police were not prepared to make out a case under section 110 (*f*), Criminal Procedure Code, and praying that action under section 107 *ibid.* be substituted. I pointed out that more harm than good might result from a preliminary order demanding proof which the Police were unable to support by ade-

quate evidence. No notice appears to have been taken of that remark. On the contrary in his final order the Sub-Divisional Magistrate gave his reasons for taking action under section 110 (*f*), rather than under section 107, Criminal Procedure Code, and these were endorsed by the District Magistrate in appeal.

The first point raised by the Rule issued to the District Magistrate is that neither the allegations summarised in the Sub-Divisional Magistrate's preliminary order under section 112, Criminal Procedure Code, nor those of Sub-Inspector Roshan Ali on whose deposition the said order is based, suffice as foundation for a case under section 110 (*f*) of the Code. In this connection it is necessary to consider the grounds assigned by the Sub-Divisional Magistrate in his final order and by the District Magistrate in appeal. The Sub-Divisional Magistrate refers to an oral inquiry made by himself at Sonegaon Bai in the absence of the applicant Jagannath between the 25th and 28th November 1914, on the latter of which days Roshan Ali's deposition was recorded. He then proceeds thus :—

"My oral inquiry had led me to form an opinion that the party of the tenants was the party of violence and that party had driven the Malguzar into the necessity of appointing 2 *pardeshis* at least for the protection of person and property. It is on this opinion that I took action under section 110 against the 3 accused. Preference was shown to section 110, Criminal Procedure Code, over 107. I think that section 110, Criminal Procedure Code, was best suited to the facts of the case, as petty crimes of mischief and assault had already been committed several times in the village. Habitual mischief is mentioned in 110 (*d*) and assaults on men and women are offences involving breach of peace and fall under section 110 (*e*). Clause (*f*) is a general clause. It includes all other clauses (*a*) to (*e*), which are special illustrations or rather specifications of clause (*f*) and I preferred the general clause (*f*) in framing my order under section 112 read with section 110, Criminal Procedure Code."

The learned Standing Counsel for the Crown candidly confesses his inability to support this view of clause (*f*). As a matter of fact, clause (*f*) is a re-enactment of part of sections 505 and 506 in the Criminal Procedure Code of 1872, omitted from the Code of 1882 on account of its vagueness which caused inconvenience in practice. The old section 505 enabled a Magistrate to require security from a person who from evidence of his general character appeared to be by repute "of notoriously bad livelihood" or to be "a dangerous character." Section 506 was yet more similar in terms to clause (*f*) of section 110 in the present Code. In section 117 (3) of the present Code it is provided that the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise, but it may be taken as settled by authority that this provision must be strictly construed and so is inapplicable where the charge is under clause (*f*) of section 110; see *Kalai Haldar* v. *Emperor* (1), *Emperor* v. *Budhya Pati* (2), *Wahid Ali Khan* v. *Emperor* (3) and *Muthu Pillai, In re* (4). Clause (*f*) in fact is one of a highly special character : Evidence of general repute is not sufficient to bring a case within it, but specific acts showing that the accused recklessly disregards the safety of the persons or the property of his neighbours and actually causes danger thereto must be proved In *Akhoy Kumar Chatterjee* v. *Queen-Empress* (5) it was held that persons who habitually annoyed fellow-villagers by knocking at their doors at night, throwing brick-bats on their roofs and insulting the modesty of respectable women did not come within the clause, and in *Emperor* v. *Kallu* (6) section 107 was pronounced to be more appropriate than section 110 where violence against a particular individual or his partisans was, as in the present case, apprehended.

Turning to the reasons given by the District Magistrate I observe, to begin with, that he goes considerably further than the Sub Divisional Magistrate in attributing to the applicants certain fires which took place in Sonegaon Bai early in

(1) 29 C. 779.
(2) 25 A. 273; A. W. N. (1903) 33.
(3) 11 C. W. N. 789; 6 Cr. L. J. 1.
(4) 8 Ind. Cas. 493; 34 M. 255; 21 M. L. J. 488; 8 M. L. T. 347; (1911) 1 M. W. N. 34; 11 Cr. L. J. 663.
(5) 5 C. W. N. 249.
(6) 27 A. 92; 1 A. L. J. 495; A. W. N. (1904) 195; 1 Cr. L. J. 710.

1912. As to these he writes in paragraph 4 of his appellate judgment :—

"I cannot regard the fires as pure accidents: they were too numerous and followed too closely on acts regarded as hostile to the appellants to be regarded as mere coincidences."

The first took place on the night of the 11th March 1912 at the threshing floor of the Malguzar Yado Rao (P. W. No. 1), the applicant's principal opponent, and destoyed wheat worth some Rs. 2,500 according to the report (Exhibit P-7) taken to the Police by the *kotwar* on the 13th *idem*. The Sub-Divisional Magistrate found that the applicants as well as Yado Rao were attending a marriage at Narsala, a distant village, when the fire occurred, but assumed it to have been the work of an incendiary because the threshing floor is remote from the *basti* and agriculturists take all possible precautions to avoid accidental fires and because Yado Rao had sued Udaji in the preceding January. In this connection Yado Rao's own evidence is important. He deposed that on his way back to Sonegaon Bai from Narsala he was met by a man bringing news of the fire:

"He told me that a heap of wheat was on fire; it was being extinguished but it was not extinguished. I asked him the cause of fire but he could not explain the cause. He did not suggest the way in which fire took place. He said it was inexplicable to him. There were two heaps of wheat. But one only was burnt as the wind was in another direction."

And in cross-examination he said:—

"I had not mentioned the names of any one in reporting the fire of my wheat. I did not tell Police that possibly my servants had negligently caused fire. None told that accused set fire to my wheat but our suspicions go to accused's party."

Now there is no sort of evidence to establish beyond reasonable doubt that the fire was the work of an incendiary at all. The fact that the applicants were far away at the time is manifestly a strong point in favour of their innocence, and it must also be borne in mind that the suit against Udaji was not decided till December 1912. The precautions taken by a well-to-do Malguzar like Yado Rao would doubtless include the posting of a strong guard over the threshing floor and on the 11th March 1912 there was a half moon. The probabilities then are to my mind against incendiarism.

As to the other fires, which took place inside the *basti*, the Sub-Divisional Magistrate in his paragraph V (5) evidently meant to find that they may quite well have been due to accident. On the 16th March 1912 a single house was burnt and on the next day 13 houses, 11 *kothas*, 5 *bangals* and a shrine. On the last metioned occasion a house and *kothas* belonging to the applicant Udaji were destroyed, a circumstance which cannot but be regarded as telling strongly against the theory that he had any hand in bringing about the conflagration. All the applicants had houses in the *basti* and, as substantial persons, must know perfectly well that as the District Magistrate has pointed out an entire village may easily be burnt to the ground if a fire starts in dry weather and a bigh wind. That there was a high wind on the 17th March 1912 is stated by Yado Rao himself.

Apart from the fires, the acts attributed to the applicants or their adherents are distinctly trivial in nature and could not possibly be treated with any show of reason as indicating the doers to be desperate and dangerous to the community.

For the Crown the Standing Counsel has conceded the impossibility of applying clause (*f*) of section 110. His contention is that clause (*e*) is applicable and that in any case the order to furnish security should be maintained as one under section 107. The acts here relied on are those described in sub-paragraphs (13), (16), (17), (20) and (24) of paragraph V in the Sub-Divisional Magistrate's final order. The first three incidents are all of a petty nature and any violence alleged is said to have been used by Ganpati alone; each is spoken to by one witness only and in 2 at least the real cause of quarrel may have been independent of the split between the 2 factions in the village. Of the two assaults dealt with in paragraph V (20) one occurred in March 1914 and the other some 5 years earlier, while in both Jagannath alone was the offender. In the case of Dajiba (P. W. No. 2) the assault had no sort of connection with Sone-

gaon Bai, having taken place on the road between Kapsi and Ambora, the latter being the village where Dajiba lives. Sakhu, P. W. No. 13's affair is an extremely stale one and she expressly stated that she was never molested by either Udaji or Ganpati. The Crown is unable to point out any evidence establishing the employment by the applicants of *pardeshis* for the purpose of doing violence to Yado Rao and his partisans. Bahena Warthi (D. W. No. 23), who figures as the actual assailant in several of the incidents reported to the Police as stated by Sub Inspector Roshan Ali, does not appear to be a *pardeshi* at all and at any rate denied siding with either of the opposing parties.

I have read the evidence and consider it quite insufficient to establish against any of the applicants habitual commission, attempt at commission or abetment of commission of offences involving a breach of the peace. The Sub-Divisional Magistrate's decision is evidently based to a considerable extent on what he heard in the village before he recorded Sub-Inspector Roshan Ali's deposition, though there is no express indication of this in his preliminary order, and his final order shows that he started the inquiry proper with a persuasion that the applicants were responsible for the disturbed state of the village and were generally dangerous and desperate, apart from their relations with Yado Rao. As I have said, the recorded evidence is far from establishing the soundness of that preconceived opinion.

The applicants' bonds have already been in force nearly 8 months. Jagannath and Ganpati have left Sonegaon and the risk of collision between them and Yado Rao has, therefore, been greatly diminished. As to Jagannath's departure the Sub-Divisional Magistrate writes:—

"The leaving of the village was a tactical move. It was to create an artificial agitation against the Malguzar and his party."

There appears to be no evidence justifying this suggestion, and it seems to me at least equally probable that Jagannath's motive was that of preventing the occurrence of disputes as far as in him lay. A period of 14 months has elapsed since the applicants appeared in response to the preliminary order, and altogether I am of opinion that even if the appropriate course of proceeding under section 107, Criminal Procedure Code, had been taken, any bond which might have been exacted from them would probably have ceased by this time to operate. The order under section 110 (*f*) cannot be maintained; it is accordingly set aside. The bonds executed will be cancelled and the parties thereto discharged.

Order set aside.

PATNA HIGH COURT.
CUTTACK CIRCUIT.
CRIMINAL REVISION No. 30 OF 1917.
December 5, 1917.
Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

SADHU CHARAN RAY—PETITIONER
versus
BALEI SWAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 200, 203, 437—Petition of objection, whether complaint—Dismissal, irregular—Revisional jurisdiction of Magistrate, whether can be exercised.

A charged *B* with house-breaking, and *B* lodged an information against *A* for theft of his gun. The Police reported *B*'s case to be false, and *B* filed a petition of objection asking the Magistrate to make an investigation and to summon the accused. *B*, in the meantime, was tried on the charge of house-breaking and acquitted, and the Magistrate passed the following order on his petition of objection: "Judgment of counter-case, record and Police report gone through. Enter false." Against this order *B* made an application to the District Magistrate, who, acting under section 437, Criminal Procedure Code, held that it was premature to call the theft case false, and sent the case back to the Magistrate:

Held, (1) that the petition of objection filed by *B* was a complaint within the meaning of section 4 (*h*) of the Criminal Procedure Code; [p. 71, col. 2.]

(2) that the order of the Magistrate entering the theft case as false, was in substance an order under section 203 of the Criminal Procedure Code dismissing the complaint; [p. 71, col. 2.]

(3) that where the final order is in fact one under section 203 of the Criminal Procedure Code, the revisional jurisdiction of the District Magistrate can be exercised even though there may have been some irregularity on the part of the officer taking cognizance of the complaint lodged under section 200 of the Criminal Procedure Code. [p. 72, col. 1.]

SADHU CHARAN RAY *v.* BALEI SEVAIN.

Section 437 of the Criminal Procedure Code contemplates that where a complaint has in fact been dismissed under section 203 of the Criminal Procedure Code, the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal. [p. 72, col. 1]

It is absurd to hold that a Magistrate is competent to revise the dismissal of a complaint legally dismissed but that he is not so competent to revise in the case of a complaint illegally dismissed. [p. 72, col. 1.]

Criminal revision against an order of the District Magistrate, Puri, dated the 17th October 1917.

Messrs. *Biswa Nath Sinha* and *S. N. Gupta*, for the Petitioner.

Mr. *Brajraj Choudhury*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—One Amareswar Biswal laid an information before the Police charging one Balei with house-breaking. He alleged that Balei had been caught on the premises with a gun. Balei was put upon his trial upon that charge and was acquitted. His defence in that trial was that he did not go to the *katcheri* in which Amareswar was living on the night of the occurrence, but that the gun had been forcibly snatched from him by Amareswar as he was passing the *katcheri* on his way to shoot a crocodile.

After the acquittal of Balei the Sadr Sub Divisional Magistrate of Puri, who had taken cognisance of the information lodged by Balei before the Police, passed the following order: "Judgment of counter-case, record and Police report gone through. Enter false under section 379, Indian Penal Code. No prosecution."

Against that order Balei made an application for revision on the same day, namely, the 17th of October 1917, to the District Magistrate, who acting under section 437, Criminal Procedure Code, passed the following judgment:—

"I have heard the judgment in the counter-case. This makes it clearly premature to describe as false the present case. Let a charge sheet be called. To Sub-Divisional Officer for orders."

Amareswar now comes before us in revision and prays that the order of the District Magistrate may be set aside.

The first contention urged by the learned Vakil for the petitioner is that the District Magistrate had no jurisdiction to set aside the order of the Deputy Magistrate of the 17th October 1917. It is urged that the only way in which the District Magistrate could have interfered was to transfer the case to his own file under section 528, Criminal Procedure Code.

Now it appears that after the Police reported Balei's case to be false, Balei filed a petition of objection before the Sub-Divisional Magistrate asking that an investigation might be made and that the offenders might be summoned.

It is clear upon the authorities that this petition was a complaint within the meaning of the Criminal Procedure Code, and it is also clear upon the authorities that the order of the Sub-Divisional Magistrate declining to put the accused upon their trial and directing that the case might be entered false under section 379 of the Indian Penal Code was in substance an order under section 203 of the Criminal Procedure Code, dismissing the complaint. The learned Vakil, however, contends that the Sub-Divisional Magistrate not having examined Balei when he made his petition of objection on oath in accordance with the terms of section 200, Criminal Procedure Code, the order was not an order of dismissal under section 203 of the Criminal Procedure Code. He contends that if it had been a legal dismissal in accordance with the terms of the Criminal Procedure Code, then the District Magistrate would have been competent to interfere under sections 435 and 437 of the Code of Criminal Procedure, but in the case of an illegal dismissal or a dismissal without conforming to the provisions of the Code, the Magistrate has no power to exercise his revisional jurisdiction. Reliance is placed upon the case of *Lokenath Patra* v. *Sanyasi Charan Manna* (1). That case, however, is not exactly in point. There the Magistrate ordered the prosecution of a complainant under section 211 of the Indian Penal Code, without dismissing his complaint under section 203 of the Criminal Procedure Code. The Court held that in order to justify a prosecution under section 211 of the Indian Penal Code, it was necessary that the dismissal under section 203 of the Criminal Procedure Code should be a legal dismissal. That, however,

(1) 30 C. 923; 7 C. W. N. 525.

is not the case before us. Here we have to consider whether the revisional jurisdiction of the District Magistrate could have been exercised in a case where, in respect of a complaint lodged under section 200 of the Criminal Procedure Code, there had been some irregularity on the part of the officer taking cognisance, but where the final order was in fact one under section 203 of the Criminal Procedure Code. As I read section 437, it contemplates that where a complaint has in fact been dismissed under section 203 of the Criminal Procedure Code irrespective of the consideration whether the dismissal was legal or illegal, the revisional jurisdiction of the Magistrate can be invoked. To hold otherwise would lead to the absurdity that whereas the Magistrate is competent to revise the dismissal of a complaint legally dismissed, he is not so competent to revise in the case of a complaint illegally dismissed The learned Vakil has also relied upon *Moul Singh* v. *Mahabir Singh* (2). In that case after a number of accused persons had been convicted, an application was made by the prosecutor to summon the remaining accused, including three against whom warrants had already been issued by the Sub-Divisional Magistrate. The High Court of Calcutta in revision held that the District Magistrate in exercise of his revisional jurisdiction was competent to revise the order of the Sub-Divisional Magistrate refusing to summon those accused in respect of whom warrants had been issued, but that he was not so competent in respect of those against whom no warrants had been issued. It appears from the judgments of their Lordships that there were facts in that case leading to the inference that the Sub-Divisional Magistrate, in refusing to summon the accused against whom no warrants had been issued, had not passed any final order of dismissal or discharge.

In the present case, upon the facts before us, it is quite clear that a final order of dismissal had been passed and, therefore, in our opinion, the learned District Magistrate had full jurisdiction to revise that order in exercise of his powers under section 437.

On the merits, too, we think it is desirable that the charge made by Balei should be investigated now that he has succeeded in defeating the charge made by Amareswar against him in the counter-case. It is true the learned District Magistrate has not given any detailed reasons, but from the fact that the judgment in the counter-case was in favour of Balei it is desirable that Balei's complaint should now be investigated.

The application is rejected.

ATKINSON, J.—I agree.

Application rejected.

(2) 4 C. W. N. 242.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 154 OF 1918.

May 9, 1918.

Present:—Justice Sir George Knox, KT.

JAGUJI RAI AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 107, 112—Notice under s. 112, contents of—Jurisdiction of Magistrate to proceed under s. 107.

Section 112 of the Criminal Procedure Code should be read along with section 107 of the Code. [p. 73, col. 1.]

Where a Magistrate of the first class is informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts and the Magistrate considers the information to have come from a reliable source, he has jurisdiction to make an order under section 112 of the Criminal Procedure Code. In such a case it is not necessary to specify in the order any definite acts which the person intends to commit. [p. 73, cols. 1 & 2.]

Criminal revision from an order of the Magistrate, First Class, Azamgarh.

Mr. *W. Wallach*, for the Applicants.

Mr *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—Jaguji Rai and Inderjit Rai have been bound over to keep the peace for a year. They are to furnish each of them a reliable surety for Rs. 100 and to execute a personal bond in the same amount for this purpose. They were bound over by a Magistrate of the first class of Azamgarh. They do not appear to have gone to the District Magistrate and asked him to cancel this bond, as they might have done under

section 125 of the Code of Criminal Procedure. When a person bound over to keep the peace does not adopt this procedure, I always have considerable doubt as to his general reputation in the district, and it is open to the applicants at any time hereafter to satisfy the District Magistrate that there is no necessity any longer for this bond being kept in existence. They have come to this Court with the contention (1) that the evidence on the record does not justify an order under section 107 of the Code of Criminal Procedure, (2) that if they had committed a substantive offence as alleged by some of the witnesses for the prosecution, the proper procedure against them would be to proceed against them for the said offences and not to proceed under section 107 of the Criminal Procedure Code. The learned Counsel for the applicants took exception to the notice which had been issued to them under section 112 of the Code. Now section 112 has to be read along with section 107. Section 107 lays down that whenever a Magistrate of the first class is informed that any person is likely to commit a breach of the peace or to disturb the public tranquillity, or to do any wrongful act which may occasion a breach of the peace, or disturb the public tranquillity, he may require that person to show cause why he should not be ordered to execute a bond. As I read this section, there may be cases in which a Magistrate of the first class is merely informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts. The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received. In this case we are not told that the Magistrate has received any information of definite acts intended Apparently from the information he received he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars, he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by section 112. Anyhow in the present case the matter has gone far beyond the stage of the order under section 112. Certain information was given. The order calling upon the applicants to show cause was duly communicated to them. They questioned the reliability of the information. Evidence was offered and recorded at considerable length. Some of it is hearsay evidence. Some of it is evidence of actual acts, not of a peaceful nature, committed in the past. Some of it is words or expressions which, if true, point to the fact that a breach of the peace would be a probable result unless some strong hand was put upon the persons in question. The evidence of the two Chaukidars, Sheoraj Ahir and Chiraghan, was read to me at full length, and I have glanced at the other evidence given in the case. A perusal of that evidence certainly leaves an impression upon my mind that an idea prevailed in Deohatta that a breach of the peace would take place. I have also glanced through the evidence given to rebut the evidence for the prosecution. It is of a very vague description and some of the witnesses in cross-examination had to admit that they very seldom came to Deohatta, and one who said that no quarrel had taken place had also to confess that he had not been in the village for the last two years. It is not said that the terms are too severe. I see no reason for interfering and dismiss the application.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 208 OF 1918.

June 20, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

PHATALI SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal trial—Complainant's story disbelieved in essential details—Conviction based on part of story, propriety of.

DURRELL *v.* KUMUD KANTA CHAKRABARTY.

Where a party comes into Court with a story which cannot be believed as to its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused.

Application against the order of the Sessions Judge, Monghyr, dated the 27th April 1918, affirming that of the 1st class Deputy Magistrate, Monghyr, dated the 25th March 1918.

Mr. *Sushil Madhab Mullick*, for the Petitioners.

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown.

JUDGMENT.

MULLICK, J.—The case for the prosecution was that on the evening of the 5th September last the petitioners Chottoo Singh and Phatali Singh came to the house of one Somar and demanded some milk. Somar refused and thereupon the two petitioners, accompanied by the third petitioner Udho Singh, returned about 9 P. M. and assaulted Somar, his son Borham and his daugther Jagia with *lathis*. It is also alleged that they snatched away a *hasuli* which Jagia was wearing and then carried off seven buffaloes belonging to Somar to a pound in a distant village. Somar and Borham both had a number of injuries, which are said to have been caused by *lathis*, and the evidence in regard to the fracture on the left arm of Somar is that it might have been caused either by a *lathi* or by a fall.

On the side of the petitioners, Chottoo had a scratch on the left shoulder, which might have been caused by a *lathi*, and which is said to have been in a region which is pronounced to be dangerous by the Medical Officer.

The Deputy Magistrate, who tried the case, disbelieved the whole story as to the visit to Somar's house early in the evening and the subsequent return of the petitioners for the purpose of assaulting Somar. He found that the story told by the defence was true, namely, that the occurrence took place on the 6th September when Chottoo was driving some buffaloes to the pound, which had trespassed into Chottoo's field. He also found that the three petitioners exceeded the right of private defence in assaulting Somar, Borham and Jagia so severely, although they were in the wrong in attempting to rescue the cattle.

The learned Sessions Judge in appeal has written a very unsatisfactory judgment. He does not come to any finding as to which version is true, and he has affirmed the convictions merely because the complainant and his companions were severely beaten.

In my opinion upon the findings of the trial Court, the conviction cannot be sustained. The complainant comes into Court with a story which is disbelieved in its most essential details, and it is impossible to rely merely upon the injuries inflicted upon Somar and his party to say that the petitioners have committed the offence with which they are charged. The learned Deputy Magistrate seems to think that the petitioners must have exceeded the right of private defence, but he does not say upon what evidence he comes to this conclusion. It may well be that if the story as to the attempted rescue is correct, then the resistance offered by the complainant and his party was such that it was necessary to inflict those injuries in order to secure the retention of the cattle. In any event, it is a recognised principle that where a party comes into Court with a story which cannot be believed as to its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused.

The convictions and sentences will be set aside and the accused will be released. The fines, if paid, will be refunded.

THORNHILL, J.—I agree.

Convictions set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 193 OF 1917.

December 7, 1917.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

L. S. DURRELL—COMPLAINANT—APPLICANT

versus

KUMUD KANTA CHAKRABARTY—ACCUSED - OPPOSITE PARTY.

Railways Act (*IX of* 1890), *s.* 122—*Unlawful entry upon Railway premises—Offence, essence of.*

The essence of the offence under both the clauses of section 122 of the Railways Act is unlawful entry. Mere unlawful entry makes the offender liable to a fine of Rs. 20 but if after the unlawful entry he refuses to leave the Railway, on being requested to do so, his offence becomes aggravated and he renders himself liable to a fine of Rs. 50. [p. 75, col. 1.]

DURELL *v.* KUMUD KANTA CHAKRABARTY.

If the original entry is lawful, a subsequent refusal to leave on being requested to do so would not make the original entry unlawful or bring it under clause (2) of section 122 of the Railways Act, which is but an aggravated form of the offence under clause (1). [p. 75, col. 2.]

Reference made by the 2nd Additional Sessions Judge, Mymensingh, dated the 30th October 1917, under section 438, Criminal Procedure Code.

FACTS of the case appear from the following extracts from the report of the 2nd Additional Sessions Judge, Mymensingh, dated the 31st October 1917:—"The petitioner is a Pleader of the Courts here. He was prosecuted for trespass under section 447, Indian Penal Code, and section 122, Railways Act, at the instance of Mr. Bagley, Chief Engineer and Agent of the M. B. Railway. The case for the prosecution was that on the afternoon of July 15th, the petitioner had unlawfully entered upon the Railway and persisted to remain there inspite of being asked to leave. The defence was that the petitioner was not a trespasser as he was going to see Mr. Mukherji, the confidential clerk of Mr. Bagley, who had opened a Business School in the Railway premises with the permission of Mr. Bagley, to consult him regarding the admission of a relation of his into the said Business School. The Deputy Magistrate has convicted the petitioner under section 122 of the Railways Act and has sentenced him to pay a fine of 4 annas.* * * *

"In my opinion the conviction is wrong. The petitioner has been convicted under section 122 of the Railways Act, which runs as follows:—

(1) If a person unlawfully enters upon a Railway he shall be punished, etc.

(2) If a person so entering refuses to leave the Railway on being requested to do so by any Railway servant, etc., he shall be punished, etc.

The essence of the offence under both the clauses of this section is unlawful entry. Mere unlawful entrance makes the offender liable to a fine of Rs. 20. The entrance being unlawful, if the offender refuses to leave on being requested to do so, his offence becomes aggravated and he renders himself liable to a fine of Rs. 50. The word "unlawful" has not been defined in the Act. It has its ordinary meaning, which in the present case is entering against the will or without the permission of the owner. There is no finding that the accused had entered unlawfully. The Deputy Magistrate seems to think that though the entry was lawful, it became unlawful when he refused to leave. The use of the word 'so' in clause 2 makes such a conclusion untenable. It is unlike criminal trespass as defined in section 441, Indian Penal Code. There if a person having lawfully entered unlawfully remains with intent to intimidate, insult or annoy or to commit an offence, he is guilty of criminal trespass."

Here under the Railways Act criminal intent has no place. The unlawful entry constitutes the basis of the offence under both the clauses. If the entry was lawful, his refusal to leave on being desired to do so would not make his original entry unlawful nor would make him guilty under clause (2), which is but an aggravated form of the offence under clause (1).

Even conceding that the word unlawful means, as the Deputy Magistrate thinks, "remaining on being asked to leave," the facts as disclosed by the evidence adduced do not justify the conviction. It is clear from Mr. Mukherji's evidence that the petitioner was coming to see him about the admission of his nephew in the Business School which Mr. Mukherji had started in the Railway premises with the permission of Mr. Bagley the Agent. So a person going to see Mr. Mukherji on business in connection with his school must have express or implied permission of Mr. Bagley to come upon the Railway. So the petitioner's going there cannot be said to be unlawful. He was, as he alleges, assaulted on the way by one Mr. Bignold. He was complaining of this to Mr. Novis, an Assistant Engineer of the Railway. Mr. Novis brought to his notice that he was a trespasser and showed him the notice board. The petitioner said that he was not a trespasser and was arguing the matter with Mr. Novis, when he, the latter, peremptorily wanted to know whether he would leave or not. The petitioner accordingly went away (*vide* Novis' deposition). This does not show that he refused to desist from the trespass, if he had committed any. The conviction is, therefore, wrong in law and is further not borne out by the facts admitted by the pro-

secution. I would, therefore, recommend that the conviction and sentence be set aside.

The Deputy Magistrate said that he had nothing to add to the remarks he had made in his judgment."

Babus *Dasarathi Sanyal*, *Gobinda Chunder Dey Roy* and *Birendra Kumar Dey*, for the Accused.

JUDGMENT.—In this case we think that the Second Additional Sessions Judge is clearly right and that the conviction and sentence on the accused Kumud Kanta Chakrabarty were wrong. We accordingly accept the reference and set aside the conviction and the sentence passed on the accused. The fine, if paid, will be refunded.

Conviction set aside.

PATNA HIGH COURT.
CRIMINAL REVISION No. 50 OF 1918.
March 8, 1918.
Present :—Mr. Justice Roe and Justice Sir Ali Imam, KT.
GANPAT SINGH—APPLICANT
versus
EMPEROR—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 144 (4)—District Magistrate, power of, to alter order made by Magistrate subordinate to him, extent of.

Clause (4) of section 144 of the Criminal Procedure Code contemplates only a change in the nature of the order made, and not a change in the party against whom it is made. A District Magistrate has, therefore, no power under this clause to set aside an order made by a Magistrate against one party and to substitute therefor a similar order against the other party. [p. 77, col. 1.]

Criminal revision against an order of the District Magistrate, Gaya, dated the 11th January 1918, reversing that of the Sub-Divisional Magistrate, Jahanabad, dated the 4th December 1917.

Mr. *Jalgovind Prasad Singh*, for the Applicant.

Mr. *Sultan Ahmad* (Government Advocate), for the Crown.

JUDGMENT.—The facts of this case are as follows:—

On the 17th November 1917, the Sub-Divisional Magistrate of Jehanabad acting upon a Police report issued notices upon Aotar Singh and his party, only requiring them "not to put obstruction with regard to the said *kasht* land in any way; if you have any objection to make you can do so in this Court on 4th December 1917." The boundaries of the land were then given. On the 4th December 1917, Aotar Singh and his party appeared in Court and the learned Subordinate Magistrate in some fifteen lines disposed of his claims to the land as being a mere pretence, and recorded: "I make the notice under section 144, Criminal Procedure Code, absolute against the second party."

Aotar Singh being dissatisfied with this decision took it to the District Magistrate under the 4th clause of section 144. The learned Magistrate, after examining the claims of the parties, came to the conclusion that the claim of Aotar Singh's party was not a mere pretence but was the real truth and that Ganpat Singh had no claim to cut the crop which was in dispute. He, therefore, cancelled the order made by the Sub-Divisional Magistrate, and substituted an order of his own, forbidding Ganpat Singh's party to cut the crop.

The proceedings of the learned Sub-Divisional Officer were not, in our opinion, *ultra vires*. As we said in the case of *Kaniz Amina* v. *Emperor* (1) if it is clear upon a perusal of the Police papers that the claim of the disturber of the peace is a mere pretence, a breach of the peace may often be avoided by making it clear to him that the Court will not permit the disturbance which he has wantonly created. In such circumstances it is not expedient that the party entitled to peaceful possession be harassed by proceedings under section 145. In that sense the case as dealt with by the Sub-Divisional Magistrate is distinguishable from that of *Kaniz Amina's case* (1), but the subsequent proceedings of the District Magistrate appear to us to be an even greater innovation than that which we set ourselves to prohibit in the case of *Kaniz Amina* v. *Emperor* (1). An order has been made establishing the claim of Aotar Singh's party which had been stigmatised by the Sub-Divisional Magistrate as a mere pretence, and keeping Ganpat Singh, who had been held to have a genuine claim, out of possession for two months. The learned Govern-

(1) 47 Ind. Cas. 65; 3 P. L. J. 243; 4 P. L. W. 354.

ment Advocate has not been able to find any case upon this point, and indeed, we imagine, it would be impossible to find any precedent upon which the proceedings of the District Magistrate could be supported. Clearly clause 4 of section 144 contemplates only a change in the nature of the order made, and not a change in the party against whom it is made. The learned Magistrate's views on this point, as expressed in his letter to the Assistant Registrar dated the 22nd February, conveniently ignore the existence of Chapter XII of the Code of Criminal Procedure. We set aside the order of the District Magistrate against Ganpat's party, as being without jurisdiction. We do not think it necessary to interfere with his order setting aside the Sub-Divisional Officer's order against Aotar Singh's party, for the reason that it was clearly within the Magistrate's jurisdiction to set aside that order if he thought that it was unnecessary or unjust. The position will, therefore, be that both orders are set aside.

We note that on the papers coming back to the Sub Divisional Magistrate he, on the 20th December, issued notices against both parties restraining them from cutting the disputed crops. On the 3rd January, on it being represented to him by both parties that the paddy had been cut and removed, he was of opinion that no action was called for and the notices issued were cancelled. Had they not been cancelled, we should have been obliged to say that the notices issued on the 20th December 1917 were in no degree distinguishable from notices under section 145, clauses (1) and (4), but inasmuch as the Magistrate has taken action cancelling the proceedings on the ground that no further dispute exists, we may say that the proceedings taken on the 20th December by the Sub-Divisional Magistrate have been ended by an order which might have been made under section 145, clause (5), and that it is not necessary for us to re-open that part of the case.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 180 OF 1915.

September 29, 1915.

Present :—Mr. Stanyon, A. J. C.

EMPEROR—APPLICANT

versus

DHANTUA LODHI—ACCUSED—RESPONDENT

Penal Code (Act XLV of 1860), ss. 447, 497, 511—Criminal Procedure Code (Act V of 1898), s. 199—Criminal trespass with intent to commit adultery—Criminal trespass with intent to commit adultery—Complaint by husband, whether necessary—Intent and attempt, distinction between.

Where the object of a trespass is to commit an offence, such offence must be possible on the part of the person to be convicted of the trespass. [p. 79, col. 1.]

An intent to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such offence. It exists before the attempt is begun. A mere intent is not by itself an offence: therefore, where it is used as essential to bring a particular act within the category of criminal offences, and proof has been given that such an act accompanied by such an intent has been committed, the offence is complete, even though the further act intended may not have been committed or even attempted. [p. 79, col. 1.]

Where an offender enters the premises of his neighbour on his way to the private apartments occupied by that neighbour's wife with intent to commit adultery, the offence of criminal trespass is complete long before the stage of an attempt to commit the adultery is reached. [p. 79, col. 2.]

Therefore, the complaint of the husband is not necessary for proceedings in respect of house-trespass to commit adultery [p. 79, cols. 1 & 2.]

Case reported by the District Magistrate, Damoh.

ORDER.—This case has been reported by the District Magistrate of Damoh. The complainant Sarjoo Pershad is a Malguzar residing in a village in the Damoh District. He is a Kurmi by caste and 25 years old. His wife Ganeshi (P. W. No. 2) is probably younger, though in the record her age is also put down as 25 years. The accused Dhantua is a Lodhi, 20 years old, who was in the service of Sarjoo Pershad as a ploughman when this case occurred.

On the 2nd September 1915 the complainant went out after supper to attend a reading at the house of a neighbour, leaving at home his wife, his brother and sister-in-law. The two latter slept on the ground floor, and *Musammat* Ganeshi upstairs. The accused, as an attendant, had his bed in the front verandah. After the household had retired but before Sarjoo Pershad came home, his brother raised an

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outcry of thief, which brought Sarjoo Pershad home in time to see the accused running away from the house. The turban of the accused was with his bedding in the verandah, and having obtained possession of it Sarjoo Pershad tied some silver ornaments in one corner of it, reported the case to the Police as one of lurking house trespass with intent to commit theft, and after the Police had refused to take cognizance, filed a complaint to the same effect before a Magistrate. The only witnesses examined for the prosecution were Sarjoo Pershad and *Musammat* Ganeshi. The former said that attracted by the cries at his house he hurried there and saw the accused running away, and that he subsequently found the turban of the accused with the ornaments tied in it. *Musammat* Ganeshi said that while she slept upstairs she was awakened by a call from her brother-in-law that there was some one in the house, but saw no one herself. She asserted that she had no illicit intimacy with the accused and had not invited him to her room.

The defence of the accused was that he had carried on an intrigue with Ganeshi for two years—that on the night in question he slept as usual on his master's premises in the front verandah downstairs—that after Sarjoo Pershad went out and the household retired to rest, he joined Ganeshi in response to her invitation—that he was detected in the act of sexual intercourse with her by Sarjoo Pershad's brother and sister-in-law, who raised an outcry in consequence of which he ran away—that his turban and other things were at his sleeping place, and the turban was used to bolster up a false charge of theft against him.

The complainant made no attempt to support his story of the turban and ornaments by calling his brother and sister in-law or any of the persons who, according to his testimony, had assembled at the house before he found the bundle, and the Magistrate held that story to be false and the version given by the accused to be true. The accused pleaded guilty to a charge of house-trespass with intent to commit adultery, an offence punishable with imprisonment, and the Magistrate convicted him under section 451, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for one week and to pay a fine of one rupee or in default to undergo simple imprisonment for another week. This was an absurd sentence, and the learned District Magistrate has properly brought the case to the notice of this Court, with the remark that either the Magistrate should have refused to convict the accused at all for want of a complaint of adultery from Ganeshi's husband, or he should have inflicted a heavier sentence.

First as to the legality of the conviction. Section 199 of the Criminal Procedure Code, 1898, enacts that no Court shall take cognizance of an offence punishable under section 497 or 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, or, in his absence, by some person who had charge of such woman on his behalf at the time when such offence was committed. Accordingly it has been held that a complaint of rape made by the husband of the woman concerned does not give jurisdiction to try a charge of adultery: *Empress of India* v. *Kallu* (1), *Chemon Garo* v. *Emperor* (2), *Bangaru Asari* v. *Emperor* (3). In *Emperor* v. *Khushal Singh* (4) at page 106* I wrote: "A husband who brings a charge under section 363, Indian Penal Code, in order to commit which offence, force or deceit is necessary, does not thereby sanction the imputation upon the conduct of his wife which necessarily attaches to a charge under section 498, Indian Penal Code."

It is thus clear that the accused Dhantua could not be tried and convicted for adultery on the complaint made by Sarjoo Pershad in the present case. It is also unquestionable that his trespass inside the house of Sarjoo Pershad is only a criminal offence if it was committed with any of the intents specified in section 441 of the Indian Penal Code. The intent in the present case was adultery and nothing else. The husband has elected not to empower the Magistrate to punish the accused for adultery, and I think it stands to reason that a charge of an attempt to commit adultery would also be governed

(1) 5 A. 233; A. W. N. (1883) 1; 3 Ind. Dec. (N. S.) 205.

(2) 29 C. 415; 6 C. W. N. 677.

(3) 27 M. 31; 2 Weir 236; 1 Cr. L. J. 281.

(4) 17 C. P. L. R. 105; 1 Cr. L. J. 763.

*Page of 17 C. P. L. R.—*Ed.*

by section 199 of the Criminal Procedure Code, 1898. Therefore, the question whether the Magistrate could use an uncomplained of adultery or attempted adultery as an essential of the offence of criminal trespass is one that is not altogether free from difficulty. I think, however, that it is correct to say that the complaint of the husband is not necessary for proceedings in respect of house-trespass to commit adultery. It must be remembered that an *intent* to commit an offence punishable with imprisonment is not the same thing as an *attempt* to commit such offence. It exists before the attempt is begun. A mere intent is not by itself an offence: therefore where it is used as essential to bring a particular act within the category of criminial offences and proof has been given that such an act accompanied by such an intent has been committed the offence is complete, even though the further act intended may not have been committed or even attempted. No doubt, where the object of a trespass is to commit an offence, such offence must be possible on the part of the person to be convicted of the trespass. In *Brij Basi* v. *Queen-Empress* (5) it was held that if the prospective offence is adultery, it must be shown that there was no consent or connivance on the part of the husband of the woman in question; and in *Crown* v. *Sheikh Mungli* (6), where the trespass was for adultery on the invitation of the wife, it was held that she could not be legally convicted of abetment of the trespass because she was legally incompetent to abet the adultery as an offence. But in this same case it was rightly held that the trespass and adultery were distinct offences separately punishable; and though, under earlier Codes of Criminal Procedure, a different view at one time prevailed where the intent of the trespass was theft, *e. g.*, *Queen* v. *Tonaokoch* (7), it is now accepted that trespass with intent to commit theft, and a theft committed in pursuance of the intent, are distinct offences: *Queen-Empress* v. *Sakharam Bhau* (8) and *Queen-Empress* v. *Zor Singh* (9). It is clear that where an offender enters the premises of his neighbour on his way to the private apartments occupied by that neighbour's wife with intent to commit adultery, the offence of criminal trespass is complete long before the stage of an attempt to commit the adultery is reached. It would strain the law considerably to hold that a mere entry by an invited lover into a private part of the house occupied by an adulterously inclined wife would amount to an attempt to commit adultery; but allowing that to be the case, it could not under any circumstances be claimed that the entry through the front gate or into an outer verandah in prosecution of an adulterous intrigue, though a completed trespass, is punishable under sestions 511 and 497, Indian Penal Code.

In a case reported as *High Court Proceedings*, 1*st June* 1868, No. 795A (10) it was held that the complaint of the husband is not necessary for proceedings in respect of the offence of house-trespass to commit adultery. In another case, reported as *High Court Proceedings*, 15*th November* 1869 (11), it was held that the Magistrate had rightly refused, in the absence of a complaint by the husband, to convict for a trespass found to have been committed for the purpose of adultery only. In *Crown* v. *Subz Ali* (12) two out of three Judges ruled that a charge of house-trespass with intent to commit adultery can be entertained without a complaint by the husband or the person having the care of the woman. In a case reported as *High Court Proceedings*, 26*th February* 1875 (13), where a prisoner had been convicted of house-breaking, his object being to have sexual intercourse with the complainant's wife, it was held that the conviction was valid.

For the above reasons I hold that the conviction of the accused in this case was valid, even though the Magistrate had no jurisdiction to try the accused for the prospective offence with intent to commit

(5) 19 A. 74; A. W. N. (1896) 178, 9 Ind. Dec. (N. S.) 49.
(6) 5 P. R. 1871 Cr.
(7) 2 W. R. Cr. 63.
(8) 10 B. 493; 5 Ind. Dec. (N. S.) 717.
(9) 10 A. 146; A. W. N. (1888) 5; 6 Ind. Dec. (N. S.) 98.
(10) 2 Weir 235.
(11) 5 M. H. C. R. App. v.
(12) 2 P. R. 1877 Cr.
(13) 8 M. H. C. R. App. vi.

which he admittedly entered the bed room of the complainant.

I agree with the learned District Magistrate that the sentance was inadequate. It was open to the Magistrate, as soon as he found that the offence alleged by the complainant, namely, lurking house-trespass with intent to commit theft was not proved, to have discharged the accused; and that would have been the most proper course to follow, as was pointed out in *High Court Proceedings*, 15*th November* 1869 (11). But the law allowed the Magistrate to frame a charge based on the admissions of the accused, and his procedure to that end must be accepted as valid. I have considered whether I should interfere with the sentence. In the Madras case last referred to the High Court remarked: "the Magistrate was right under the circumstances in refusing to convict on a charge which the husband refused to make."

In the Punjab case Plowden, J., wrote: "In my opinion a purely nominal sentence ought to be passed when, as in this case, the only intent is to commit adultery, and the husband is not prosecuting for adultery." With due respect I am not able to agree with this view wholly, and the dissentient view of Lindsay, J., on this point, who observed that in such cases "it is not only the interests and feelings of the injured husband that are involved but the welfare of the community at large", seem to me to be a more correct appreciation of the matter. Nevertheless the circumstances (1) that the husband made a wilfully false charge of theft in consequence of which the accused might have been discharged; (2) that, except for the admission of the accused, there is unreliable evidence of any trespass whatever, his presence in the outer part of the premises being lawful; and (3) that he is still liable to prosecution for adultery, have decided me not to interfere. I, therefore, return the papers and direct that execution of the sentence, if stayed, be completed.

Interference refused.

PATNA HIGH COURT.

CRIMINAL REVISION No. 328 OF 1917.

December 17, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

SOUKHI CHAND SAO—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860*)*, s. 380—*Theft from railway godown—Criminal Procedure Code (Act V of* 1898*)*, s. 439—*Revision—Conviction under wrong section—High Court, power of interference of.*

The accused went to a railway godown with a carter. The latter removed a bag from the godown and the accused accompanied the carter to his house and there took delivery of the bag. The bag consisted of pilferings from a number of bags consigned to different persons:

Held, that the bag being in the possession of the railway as bailee until it left the godown, the actually taking it out of the godown was theft and that the accused and the cartman were jointly guilty of theft [p. 81, col 1.]

It is for the Courts below to find the facts and if they convict under a wrong section in a case in which no charge is framed, it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings. [p. 81, col. 1.]

Criminal revision against an order of the Sessions Judge of Monghyr, dated the 20th July 1917, rejecting an application for a reference to the High Court of an order of the Sub-Divisional Magistrate of Jamui, dated the 30th June 1917.

Mr. *Gour Chandra Pal*, for the Petitioner.

Mr. *Muhammad Fakhruddin* (Government Pleader), for the Crown.

JUDGMENT.—The facts found in this case are that the petitioner Soukhi Chand went with a carter to a railway godown, that the carter removed a bag from the godown and that Soukhi Chand accompanied the bag to his house and there took delivery of it. The bag was not goods that had been consigned to Soukhi Chand but consisted of pilferings from a number of bags, consigned to others. On these facts Soukhi Chand and the cartman have been convicted under section 411. The cartman is not before us. Soukhi Chand applies that this conviction and sentence be revised on the ground, *firstly*, that the manner in which the bag was made up was a pure surmise on the part of the Court below and, *secondly*, that the property, not having been identified as stolen from a particular person, cannot be

held in law to be stolen property. On these two points we can see no reason for interfering with the conviction. The property was in the possession of the railway as bailees until it left the godown. The actually taking it out of the godown was theft, and it is clear that Soukhi Chand and the cartman were jointly guilty of theft. The learned Vakil suggests that this was not a case made against him in the Court below and that he is, therefore, entitled to a retrial. We are of opinion that it is for the Courts below to find the facts and if they convict under a wrong section in a case in which no charge is framed, it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings. We, therefore, alter the conviction of Soukhi Chand to a conviction under section 380 and direct that the sentence of three months' rigorous imprisonment be maintained. The petitioner will, therefore, surrender to his bail and serve out the remainder of the sentence.

Conviction altered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 101-B OF 1917.

November 22, 1917.

Present:—Mr. Mittra, A. J. C.

BAPUJEE—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Habitually bringing false cases in Civil Courts—Evidence of general repute, admissibility of.

Section 110 of the Criminal Procedure Code does not apply to a person who has the reputation of habitually bringing false claims in Civil Courts. Such a person may be punishable under section 209 of the Indian Penal Code, but he does not by so doing commit the offence either, if he succeeds, of extortion or, if he fails, of attempting to commit extortion.

Ganeshi v. *Empress*, 25 P. R. 1884 Cr, followed.

In proceedings against such a person, although evidence of general repute is admissible, it cannot be allowed to override the findings arrived at by the Civil Courts after trial.

Revision of the order of the District Magistrate in Criminal Appeal No. 29 of 1917 decided on 17th July 1917.

The Hon'ble Mr. *M. R. Dixit*, for the Applicant.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

ORDER.—This is an application for revision of an order passed under section 110 of the Criminal Procedure Code. There were various charges against the applicant, but the trying Magistrate with extreme fairness has disbelieved most of these allegations. His finding may be summed up in his own language: "The man appears to be a gambler in civil litigation, he has the reputation in his village of being a perjurer, a forger and is notorious for instituting suits against poor illiterate people on false claims."

There is some reference to a criminal case but sufficient details have not been brought out. There is a reference to an application to the Police by P. W. No. 5 which, however, is explained in the deposition of P. W. No. 8, from which it appears that the accused was merely the writer of the application at the instance of other people. The curious feature of the case is that the accused has been successful in most of his claims, and these claims are held to be false claims upon the opinion of villagers. In such proceedings, although evidence of general repute is admissible, it cannot be allowed to override the findings arrived at by Civil Courts after a trial. As pointed out in *Ganeshi* v. *Empress* (1), section 110 of the Criminal Procedure Code does not apply to an accused person who has the reputation of habitually bringing false claims in Civil Courts. Such a person may be punishable under section 209 of the Indian Penal Code, but he does not by so doing commit the offence either, if he succeeds, of extortion or, if he fails, of attempting to commit extortion.

Although the period for which the applicant has been bound over has expired, he is entitled to have the order set aside and I accordingly set aside the order of the Sub-Divisional Magistrate, dated the 15th May 1917, and direct the bond for good behaviour to be cancelled.

Order set aside.

(1) 25 P. R. 1884 Cr.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 45 OF 1918.

May 27, 1918.

Present: -Mr. Justice Mullick and Mr. Justice Thornhill.

RAM BHAGWAN AND OTHERS—ACCUSED —APPELLANTS

versus

EMPEROR--RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 298—Trial by Jury—Judge's charge—Duty of Judge—Misdirection and non-direction—Document admitted without objection—Execution, proof of, whether necessary—Failure to draw attention of Jury to presumption arising under Statute—High Court, power of, to weigh evidence after exclusion of inadmissible matter.

Where a document, which is not *per se* inadmissible, is admitted by the Court in a criminal trial without formal proof of execution, and the accused having sufficient opportunity at the trial to call for formal proof omits to take any objection, he cannot afterwards, in appeal, impeach the verdict of the Jury on the ground that the document had been admitted without formal proof. [p. 83, col. 2; p. 90, col. 2.]

A *parcha* slip granted in the course of survey proceedings is not a public document and is not in any way recognised by law. It is, therefore, inadmissible in evidence to prove title or possession. In a criminal trial, however, the Judge is competent to draw the attention of the Jury to the fact that the *parcha* slip was granted to a particular person as a fact relevant to the question of possession. [p. 83, col. 2.]

The omission to draw the attention of the Jury to the provisions of section 103-B of the Bengal Tenancy Act and the presumption arising therefrom does not constitute a serious error on the part of the Judge, where the point has been thoroughly discussed by Counsel and the Jury are under no misconception regarding it. [p. 84, col. 1; p. 91, col. 1.]

Where there is no evidence of a particular matter, it would be an error on the part of the Judge to lay down the law to the Jury on that matter, which is not a matter legally and properly before the Jury. [p. 86, col. 2.]

The ability of the Counsel engaged in the defence does not relieve the Judge of his task, which the law imposes upon him, of fully and fairly charging the Jury. At the same time it is reasonable that the Judge should take into account the elaboration and the skill of Counsel. [p. 89, col. 1.]

Per *Thornhill, J.*—If in a criminal trial evidence has been admitted which should have been rejected, it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict. [p. 91, col. 1.]

Appeal from a decision of the Sessions Judge of Patna, dated the 28th February 1918.

Messrs. *Hasan Imam*, *P. C. Manuk* and *Indu Bhusan Biswas*, for the Appellants.

The Government Advocate, for the Crown.

JUDGMENT.

MULLICK, J.—The appellants have been convicted under sections 148, 326 and 149, Indian Penal Code, for committing a riot with deadly weapons in Mauza Khairatoli, in prosecution of the common object of which, namely, to assault the prosecutor Jauhar Ali and to forcibly carry away his paddy, severe injuries were caused to Jauhar Ali and one Makdum Bux, who came to his assistance, was killed on the field in dispute, which is said to be plot No. 35 and to be situated to the west of the village and to measure 16 *cottahs*.

The evidence is that Jauhar Ali, having cut part of the paddy on this plot on Thursday, the 8th November last, and on the morning of the 9th November and stored the same in the house of Makdum Bux, returned to the field about 3 P. M. of that day with four labourers; that after cutting had been resumed the appellants, with a mob numbering 50 or 60 headed by one Indra Dewan and Ram Bhagwan and armed with spears, swords and *lathis*, came and objected to the cutting on the ground that Indra Dewan had purchased the plot; that they attacked the prosecutor's men and that after killing Makdum Bux cut and carried away the remainder of the paddy.

A telegram announcing the riot reached the Sub-Inspector of Phulwari Thana at 11 P. M.

Meanwhile in consequence of information given by Rameswar, one of the Chaukidars of the village, at 6-30 P. M. at the Phulwari Police Station, Sub-Inspector Ali Hosain had deputed Sub-Inspector Kuldip Narain Singh and some constables to proceed to the spot. This Sub-Inspector arrived at the place at 10 P. M. and at 11-45 P. M. recorded the information given by Jauhar Ali.

Sub-Inspector Ali Hosain took up the investigation on the following day with the result that Indra Dewan, his Gomastha Ram Bhagwan and Rafiq, from whose father Jauhar claims to have bought plot No. 35, and 13 others were sent up for trial.

In the Sessions Court the accused, who were defended by Mr. Hasan Imam, declined to give any explanation for the injuries to Jauhar Ali and Makdum Bux, but suggestions were made in cross-examination

that the occurrence took place on plot No. 111, which is to the north of the village and in respect of which there is a dispute between Jauhar and Salim on the one side as owners and Indra Dewan on the other who claims as Ijaradar. In support of this reliance was placed on the information given by Rameswar Chaukidar at 6-30 P M. and by Dalsinger Chaukidar at 7 P. M. The case of the prosecution was that these informations were lodged after the riot in order to make a case for the defence.

The Jury appear to have accepted the case put forward by the prosecution and while acquitting Indra Dewan and seven others, found the appellants before us guilty.

The present appeal is preferred by the appellants on the ground of improper admission of evidence and non-direction and misdirection on the part of the Sessions Judge in his charge to the Jury.

The complaint on the ground of improper admission of evidence relates to a sale-deed alleged to have been executed on the 27th March 1906 by Amanat Ali, the father of the accused Rafiq, in favour of Jauhar Ali's son Sadrul Huq in respect of plots Nos. 35 and 40. It does not appear that the document was formally proved. It is alleged to have been tendered by the prosecution on the 18th of February in the Sessions Court and marked by the presiding Judge on the 19th. It was referred to by the learned Judge in his charge to the Jury on the 28th of February, on the footing that there was no objection to its admission.

It is contended by Mr. Hasan Imam, who appears for all the appellants before us except Ram Bhagwan, that the document was marked by the Court without his knowledge and consent and that though present at the time of the delivery of the charge to the Jury, he did not notice that the learned Judge was referring to this document. The list of the exhibits contains an entry to the effect that the document was admitted without objection, and it is asserted by the learned Government Advocate who appears on behalf of the Crown that formal proof was waived by the defence. In my opinion it was the duty of the defence to discover between the 18th and the 28th Eebruary that the Court had admitted this document and marked it as an exhibit although it had not been formally proved, and the omission to make any objection appears to me to support the allegation that the defence did not consider it worthwhile to demand legal proof. It is unfortunate that during the delivery of the charge, while the Judge was referring to this document for the purpose of drawing an inference as to the possession of Jauhar Ali, no one on behalf of the defence considered it necessary to make any protest. In my opinion the circumstances under which the document was admitted by the Court establish that the accused had sufficient opportunity at the trial to call for formal proof and that having omitted to raise any objection then it is not open to them now, the document not being *per se* inadmissible, to impeach the verdict of the Jury on the ground of any formal defect.

The second error of law complained of is that as the Record of Rights shows the name of Amanat as the tenant of the plots Nos. 35 and 40, the Sessions Judge should have drawn the Jury's special attention to the provisions of the Bengal Tenancy Act, which require that the Court shall presume the entry to be correct until the contrary is shown.

It appears that a *parcha* slip was given to Jauhar Ali showing an entry in his favour, but for some reason or other the finally published Record of Rights was in Amanat's favour. The learned Judge drew the attention of the Jury to the *parcha* slip and in regard to the Record of Rights the only observation he made was "that no evidence of possession of Rafiq had been given except the finally published record". Now the *parcha* slip was clearly inadmissible in evidence in proof of the title and possession of Jauhar Ali. It is not a public document and is not in any way recognised by law, but what the learned Sessions Judge appears to have done was to draw the attention of the Jury to the fact that the *parcha* slip was granted to Jauhar Ali. This he had every right to do. It was a fact relevant to the question of possession. It does not seem that the slip was admitted by the learned Judge as a document of title.

As regards the finally published record, namely, the *khatian*, it is true that the

learned Sessions Judge did not in terms tell the Jury of the presumption raised by the law, but we have been told by the learned Government Advocate that the law was in fact fully explained to the Jury and that the Jury were under no misconception on this point. The case of *Brij Behari Singh* v. *Sheo Sankar Jha* (1) was fully discussed by the prosecution in the course of the trial. The judgment of the High Court in that case in clear terms lays down the proposition that a Record of Rights, though not creating or extinguishing any title, is good evidence of possession, which requires to be rebutted and I observe from the cross-examination of Jauhar Ali by Mr. Hasan Imam that Jauhar Ali understood that legal position in this sense. Having regard to the constitution of the Jury, which consisted of the Principal of the Law College at Patna, a non-practising Vakil and three other educated gentlemen, I am satisfied that the omission to draw the attention of the Jury to the provisions of section 103 of the Bengal Tenancy Act did not in this case constitute a serious error on the part of the Judge.

The third error as regards the documentary evidence is said to lie in the Judge's not drawing the attention of the Jury to Exhibit 11, which was a decree obtained by Musa, the superior landlord, against Amanat for rent.

It is urged that the Judge should have also drawn attention to the fact that Jauhar had produced no rent receipts, although he had said in his evidence that he had receipts at home. It is also urged that the Judge was wrong in telling the Jury that there was no evidence of Rafiq's possession except the Record of Rights.

Now with regard to Exhibit 11, the document was before the Jury and they were at liberty to draw any inference they liked from it. Jauhar Ali had in his cross-examination said that the decree was a collusive decree between Musa and Amanat and that he had been throughout in possession for 11 years and had been paying rent to Musa. The Jury were aware also that Jauhar Ali had produced no documentary evidence to support his possession except Exhibit 9, the deed of sale. Having regard to the fact that the case was in the hands of so able an Advocate as Mr. Hasan Imam, it does not seem to me that the omissions complained of were of prime importance.

As to the omission to tell the Jury that Rameshwar Chaukidar had in his evidence stated that Amanat Ali's field had come into Rafiq's possession, it appears that Rameshwar Chaukidar's information was based upon hearsay and the learned Judge was right in not treating it as a a piece of evidence in favour of the defence

With regard to the occurrence itself various grounds of non-direction and misdirection have been taken, with which I will now proceed to deal.

Grounds Nos. 8, 13 and 14 relate to the cutting of the paddy which is alleged to have been standing on plot No. 35 on the day of occurrence. The case for the defence as suggested in the cross-examination is that there was no paddy on plot No. 35 and that there was paddy on plot No. 111 and that the occurrence took place on an attempt by Jauhar Ali to cut the latter.

It is urged that the learned Judge should have brought to the attention of the Jury the evidence of Rameshwar Chaukidar, prosecution witness No. 19, to the effect that the paddy of plot No. 35 was cut 4 or 5 days previously. In my opinion the omission was not material. Rameshwar was a thoroughly unreliable witness. He was declared hostile by the prosecution and his evidence in regard to the information laid before the Police was discussed by the Sessions Judge at page 15 of his charge in the paper book.

The learned Sessions Judge also put before the Jury the evidence of prosecution witness No. 21, and discussed the question whether from the appearance of the field it was possible to state with any degree of certainty whether the crop was cut within 2, 3 or 4 days, and he left them to draw their own conclusions.

A similar objection is taken in regard to the Judge's omission to tell the Jury that no paddy was found on the way by which the rioters were alleged to have returned. This is also a minor matter.

(1) 39 Ind. Cas. 85; 2 P. L. J. 124; 1 P. L. W. 134; (1917) Pat. 108.

It is next urged that the Judge should not have told the Jury that the occurrence took place at 4-30 P. M. It seems that what the Judge did tell the Jury was that according to the prosecution story the riot took place at 4-30 P. M. (see page 12 of the charge). He also refers to the fact that in the first information the riot is entered by the Police as having taken place at 4-30 P. M. The learned Judge told the Jury that Jauhar Ali and his labourers arrived at 3 P. M. and that according to Jauhar Ali the assault took place at 4-30 P. M. He asked the Jury to consider whether or not the cutting of the paddy took place during the interval. In my opinion there was no non-direction or mis-direction in regard to this point.

Grounds Nos. 9, 10, 11, 12, 15, 16, 18 25 and 26 relate to the place of occurrence.

It is contended by Mr. Hasan Imam that the Sub-Inspector Kuldip Narain Singh has been guilty of tampering with the diaries and that when he set out from Phulwari at 7 P. M. on the 9th November, he made an entry in his diary to the effect that the occurrence had taken place in a field on the north side of Khairatoli, but that at 11-45 after recording Jauhar Ali's statement he made an interpolation by adding the words "in Gahua Khanda." The Sub-Inspector states that what the Chaukidar told him was that the place of occurrence was on the north side of Khairatoli in Gahua Khanda. As plot No. 111 is not and plot No. 35 is in Gahua Khanda the interpolation, if it was an interpolation, would to some extent favour the prosecution. In this connection it is not quite clear what the defence is. Is it suggested that the Sub-Inspector went on that night to plot No. 111, and that it was there that he found Jauhar Ali and Makdum Bux's corpse and that the Sub-Inspector caused a case to be manufactured on plot No. 35 after removing Jauhar Ali and the corpse of Makdum Bux to that plot? Or is it suggested that the Sub-Inspector did not go to plot No. 111 at all but that a false case had been manufactured before the Sub-Inspector arrived and that he was taken to plot No. 35 immediately upon his arrival? In my opinion, the whole evidence was before the Jury and the learned Judge seems to have discussed it in connection with the two informations given by the two Chaukidars and in connection with the suggestion that the riot took place on plot No. 111. The omission to draw the Jury's special attention to the evidence given by Kuldip Narain with regard to the entry in his diary does not appear to me to be serious. The same may be said with regard to the point that the Jury's attention was not called to the fact that in the map prepared for the purpose of this case no mention is made of the fact that blood was found on plot No. 35. The evidence in the case is that there were copious marks of blood on this plot and the condition of the ground was such as to be consistent with the theory put forward by the prosecution. The omission of any entry in the map as to the place where blood was found does not seem to me to be very material.

Then as regards the fact that there was paddy on plot No. 111, it was unnecessary to tell the Jury this, but it is contended that the learned Judge should have asked the Jury to consider why the paddy of plot No. 35 should have been stored in Mukdum Bux's house. The explanation given by Jauhar Ali was that this was done because Jauhar Ali's house had fallen down. In my opinion it was not necessary to draw the Jury's special attention to this explanation, or to the fact that only 16 bundles were found in Mukdum's house. The explanation may have been false, but it was open to the Jury to believe it or not as they liked.

Then it is contended that the learned Judge in drawing attention to the fact that Mukdum Bux though dead was found lying on a *khatia* with a pillow under his head should have suggested the inference that the whole case for the prosecution was false.

It is suggested that the placing of a pillow under the head of a dead man is a clear sign of a concocted case. Attention was drawn to this point in cross-examination and the Jury were in full possession of the facts. The evidence is that two pillows were brought, one for Jauhar Ali and the other for Mukdum Bux, and the person who brought the pillow for Mukdum says that if he had known that Mukdum was dead he would not have brought it. In my opinion the learned Judge was not guilty of any error

in leaving the evidence to the Jury and in omitting to suggest the inference that the occurrence took place on plot No. 111. I find he did make mention of the circumstance about the pillow and there was sufficient compliance with the law in leaving the Jury to draw their own conclusion in these circumstances.

Ground No. 12, which is to the effect that there was an omission in not telling the Jury that the foot-prints on plot No. 35 might have been caused by the reapers, ground No. 15, which relates to an incident connected with a man called Surju Saran, who told the Police during the enquiry that he was inspecting plot No. 111, because that was the place of occurrence, and ground No. 26, which relates to the delay of the Police in inspecting the place of occurrence, have not been pressed before us.

In my opinion, therefore, so far as the above grounds are concerned, the learned Judge has not been guilty of any serious error either of non-direction or misdirection.

But it has been very strongly urged by Mr. Hasan Imam that the learned Judge should have told the Jury in clear terms what the consequences would be of a finding that the occurrence took place not upon plot No. 35, but upon plot No. 111. It is suggested that the Jury may have thought that although the occurrence took place on plot No. 111, still as one man had been killed and another had been severely injured it was immaterial where the occurrence took place. It is contended that the right of private defence would have arisen in regard to plot No. 111, assuming that Indra Dewan was in possession, and therefore the charge that the accused were members of an unlawful assembly could not have been supported.

Now the reply to this is that the case for the prosecution was clear and simple. It was that the occurrence took place on plot No. 35, that Jauhar Ali was in possession and that the appellants in trying to take forcible possession of that plot committed the various offences with which they were charged. The accused at no stage of the case raised the explicit defence that a fight took place on plot No. 111, or that there was a right of private defence. The case for the prosecution was that if the Jury refused to believe that the occurrence took place on plot No. 35, then the accused were entitled to an acquittal. There was no alternative case that even if the occurrence was found to have taken place on plot No. 111, the accused would be guilty of one or other of the offences charged. In this connection it is only necessary to draw attention to the case of *Emperor* v. *Upendra Nath Das* (2), where their Lordships held that where there was no evidence of a particular matter, it would be an error on the part of the Judge to lay down the law to the Jury on that matter, which was not a matter legally and properly before the Jury, and their Lordships cited with approval the following observations in *Jamsheer Sirdar's case* (3): "No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases. It must be by proof of actual facts." Therefore in this case if there was no direct and legal evidence of the occurrence having taken place on plot No. 111, and in my opinion there was not, the learned Judge was perfectly right in omitting to discuss the consequences of the occurrence having taken place in connection with that plot. In my opinion the Jury were fully aware of the fact that if they found that the occurrence took place in the latter plot, then the accused would be entitled to an acquittal. It becomes immaterial, therefore, to consider Mr. Hasan Imam's further objection that the learned Judge should have discussed in greater detail the contents of Exhibit D, which was a plaint lodged by one Chota Jabbar in respect of plot No. 111 against one Fasiuddin and others. This document was admissible for the purpose of showing that there was a dispute with regard to plot No. 111, but as a matter of fact the learned Sessions Judge has clearly drawn the attention of the Jury to the unsatisfactory evidence given by Jauhar Ali in connection with this plot. In some places Jauhar Ali has claimed the plot and in others he has not, and the learned Judge has been guilty of no error in respect of this part of the case. The Jury were in full possession of

(2) 30 Ind. Cas. 113; 19 C. W. N. 658; 21 C. L. J. 377; 16 Cr. L. J. 561 (F. B.).

(3) 1 C. L. R. 62.

the unsatisfactory nature of Jauhar Ali's testimony with regard to his claims in this matter.

It remains to consider grounds Nos. 19, 20, 21, 22 and 23, which relate to the *alibi* set up on behalf of Indra Dewan and Ram Bhagwan. A Vakil named Bimala Charan Sinha deposed that on the 10th November 1917, he appeared for Indra Dewan in a civil suit before the fourth Munsif of Bankipur, that on the previous day both Indra Dewan and Ram Bhagwan came to him at 5 or 5-15 P. M. to consult him about the case, and remained with him till 6-30 P. M. and that he made a note to that effect in his diary of the 9th. Indra Dewan also furnished evidence tending to show that he was in his class at the Bihar National College up to 2-30 P. M. The Jury believed this evidence and acquitted him.

Ram Bhagwan called the Head Comparing Clerk of the Patna District Judge's Court to prove that he must have been present at the Civil Court from 2 to 2-30 and then again at 3-30 P. M. for the purpose of receiving from the Court the copies of two documents for which he had made applications on the 1st November. The evidence in this case showed that both Indra Dewan and Ram Bhagwan were in the habit of riding bicycles, and in his charge the learned Sessions Judge told the Jury after they had themselves visited the scene of occurrence and were able to judge the distance that it was possible to walk from Bankipur to the place of occurrence in 40 minutes. The Jury disbelieved the evidence given on behalf of Ram Bhagwan and found him guilty.

Now the first point that has been made by Mr. Manuk is that the learned Judge should not have treated the evidence of Jung Bahadur Singh, the Head Comparing Clerk, so lightly and he should have discussed it in greater detail and told the Jury that there was no reason for disbelieving this witness. The matter turned upon the two applications for copy filed on the 1st November. It is alleged that a counterfoil is usually given to the applicant with a direction to call on a certain day and that in this case Ram Bhagwan presented his counterfoil to the Head Comparing Clerk on the 9th November between 2 and 2-30 P. M. It is said that the copies were ready on the 7th and 8th and that Ram Bhagwan came himself between 2 and 2-30 and gave a receipt upon the counterfoil for the copies, which he took away with him between 3-30 and 4-30 P. M. In cross-examination the Head Comparing Clerk admitted that if an applicant presented his counterfoil on the 9th July receipted under that date and then went home and did not return till the 20th November and then demanded his copies, the date "9th November" would still remain upon the receipt and also in the endorsement at the back of the copies, which contains a column showing the date on which the copy is delivered to the applicant. The Head Comparing Clerk adds, however, that such a case has never occurred, and Mr. Manuk's complaint is that this qualification should have been specially brought to the notice of the Jury. The learned Judge was evidently under the impression that the whole of the evidence of the witness was inconclusive and that it did not establish definitely and beyond doubt that Ram Bhagwan was actually present at the Civil Court up to 3-30 P. M. I share in that opinion, and I think that having regard to the fact that the witness was examined on the 26th of February and the argument of Counsel was heard on the 28th of February, the somewhat meagre discussion of the witness' evidence did not in the circumstance amount to a misdirection or lead to a miscarriage of justice. Moreover, accepting every word of the Head Comparing Clerk's evidence, it would still be open to Ram Bhagwan to have been at the place of occurrence at 4-30 P. M. on the day in question. It was open to the Jury to believe the witnesses who deposed in favour of Indra Dewan and disbelieve those who deposed in favour of Ram Bhagwan. Mr. Manuk has characterised the finding of the Jury in this respect as perverse. When there was evidence which they could have believed as to the guilt of Ram Bhagwan and when it was open to them to disbelieve the evidence offered by the accused in his defence, I cannot see that the charge of perversity can be supported.

Then our attention has been drawn to a passage in the learned Sessions Judge's charge in which he refers to the circumstance that Bimola Charan Sinha had produced documents in support of his story in Court. The charge as it stands after correction on the 1st March states

that the witness had produced documents, but Mr. Manuk says that what the learned Judge told the Jury was that the witness had produced no documents and that the Judge had made this a point of attack against the credibility of the witness. I think we must take the charge as it stands and in the absence of any evidence to the contrary, we must hold that the Judge told the Jury that there were documents to support the *alibi*, probably referring to the records produced in the Civil Court on the 10th November.

Mr. Manuk then draws attention to the fact that in the course of his address the Public Prosecutor drew attention to the fact that the Vakil had not produced his personal diary of the 9th in which he said he had entered the hour of Ram Bhagwan's visit. Mr. Manuk strongly characterises the conduct of the prosecution as unfair in not asking the witness immediately to go to his house and to bring the book, and he submits that no conclusion adverse to the defence should be drawn from the non-production of this piece of documentary evidence. In my opinion it was open to the prosecution to make the suggestion that they did, and the defence could even at that late stage have asked the permission of the Court to adduce the evidence in question. The Jury had the evidence of the witnesses before them and they were competent to draw what inferences they liked upon the facts. I do not think it was the duty of the prosecution to stop the trial in order to give the witness an opportunity of producing the diary.

Mr. Manuk next criticizes the charge on the ground that the learned Judge should have brought to the notice of the Jury the fact that in connection with the Salarpur murder case Jauhar Ali had implicated Ram Bhagwan.

Now the history of that case is this. A Muhammadan named Naz'ruddin disappeared about a month before the riot at Khairatoli. He was not in any way connected either with Khairatoli, or with Jauhar Ali, but four or five days after his disappearance his father Wajid lodged an information at the Bankipur Police Station saying that Bikam Pargash (father of Ram Bhagwan) and Shankar had probably murdered him. While the Police investigation was going on he met Jauhar Ali, who was a stranger to him, in a bread shop in the Civil Court compound at Bankipur and Jauhar Ali on hearing him talk about the disappearance of his son said that he had seen Nazirud-din being thrown into a canal by some Hindus. It does not appear from the evidence of Abdul Wajid that in this bread shop Jauhar Ali named Ram Bhagwan as one of the murderers, but Abdul Wajid states that he went off at once to the Police Station and told the Sub-Inspector what Jauhar Ali had told him. Mr. Manuk states that the learned Judge should have told the Jury that Jauhar Ali had named Ram Bhagwan in the baker's shop. This does not appear to be the case from Abdul Wajid's evidence, nor does it appear from the evidence of the Sub-Inspector Kuldip Narain, who was in charge of the case. At page 39 of his deposition in this trial Jauhar Ali says that Pragash and others were the accused. At page 49 he says that he does not think that Ram Bhagwan's name was mentioned in the baker's shop and that it was Abdul Wajid who gave the name of Pragash. At page 47, however, he states that he recognised Pragash and Ram Bhagwan among the murderers, and Mr. Manuk insists that it was the duty of the learned Judge to bring this statement prominently to the notice of the Jury.

The learned Government Advocate on the other hand suggests that this inclusion of Ram Bhagwan's name was unintentional, that Jauhar Ali was giving his evidence in great pain while lying on a *charpoy* in Court and that he did not in fact implicate Ram Bhagwan at any previous stage of the investigation in the Salarpur murder case.

It is admitted that the Police found no evidence against any one in that case and refused to prosecute. The learned Judge appears to have discussed Jauhar Ali's evidence fully (see charge at page 14). At page 18 he asks the Jury to treat the evidence with caution. At page 15 he draws attention to the hostility between the parties as evidenced by the Salarpur murder case, and the only omission of which he can be found guilty is his failure, while telling the Jury that there was hostility with Pragash, also to add that there was hostility

with Ram Bhagwan, the son of Pragash. In my opinion the omission to inform the Jury that in one solitary passage in his testimony Jauhar Ali had added the name of Ram Bhagwan does not seem to me to have been an omission of such prime importance as to vitiate the verdict.

This disposes of all the points so ably and forcibly argued before us by Mr. Hasan Imam and by Mr. Manuk.

It is true that the ability of Counsel engaged in the defence does not relieve the Judge of the task which the law imposes upon him of fully and fairly charging the Jury. At the same time it is reasonable that the Judge should take into account the elaboration and the skill of Counsel. On this point a number of authorities have been cited to us in the course of the argument, but it is not necessary to discuss them all. I desire, however, to draw attention to *Queen* v. *Nim Chand Mookerjee* (4), in which their Lordships of the Calcutta High Court so far back as 1873 made the following observations:—

"What a Judge says to a Jury on the law is an absolute and binding direction upon them. What he addresses to them upon the facts are only such observations as he thinks it necessary and proper to make in assisting them to arrive at a conclusion upon the evidence, which it is wholly in their province to deal with as they think proper, and the observations which a Judge would make to a Jury upon the facts would be determined by circumstances which must vary, one may almost say, in every case and in every tribunal in the country. They would vary in a very great degree according to the intelligence of the Jury whom the Judge was addressing; they would also vary very much, according as the case had or had not been fully discussed both for and against the prisoners by Counsel prior to his addressing them. Had there been no discussion of a case by Counsel, it would undoubtedly be necessary for the Judge to point out many things which, after the case had been fully discussed on both sides, both for the Crown and for the prisoner, might well seem to him unnecessary. And on the other hand a Judge has very often to caution a Jury against accepting without very careful consideration some of the suggestions that are made to them. When we are called upon to say whether or not the Judge has done his duty in addressing the Jury on the facts, we must look to his summing up as a whole, and see that the case has been fairly laid before them."

In the case of *Emperor* v. *Malgowda* (5), upon which Counsel in the present case have relied, their Lordships of the Bombay High Court do not disapprove of the above principles, but they make the reservation that the Judge should not omit matters of prime importance merely because they have been discussed by the Advocate.

In my opinion taking the charge as a whole, it is not open to the imputation of partiality to the Crown. It was impossible for the learned Judge not to make allowance for the ability with which the defence was conducted before him and not to leave to the Jury, who were a body of unusually intelligent men, much that he would not have left to them if they had been less educated or less experienced. The omissions of which the learned Judge has been guilty were not omissions of prime importance in the circumstances of this case and to interfere with the verdict on the grounds urged would be to convert a trial with the aid of a Jury into a trial with the aid of assessors. If the institution of trial by Jury is to be maintained at all and is to flourish in this country, the superior Courts must be jealous to see that nothing is done to weaken the Jury's sense of responsibility in matters of fact, and unless there is clear and unmistakable evidence that the Jury were misled by the Judge into a miscarriage, I think we should decline to interfere. The appeal will be dismissed.

THORNHILL, J. - I have had the advantage of reading the judgment of my learned brother with which I fully agree. It, therefore, appears unnecessary for me to discuss in detail the various grounds of objection set out in the appellants' petition. They are mostly based on non-direction by the learned Sessions Judge. It must be remembered that 25 witnesses were examined for the prosecu-

(4) 20 W. R. Cr. 41.

(5) 27 B. 644 at p. 645; 4 Bom. L. R. 633.

tion and cross-examined at considerable length. It appears to be assumed that the headings of the charge to the Jury made under section 367, Civil Procedure Code, contain a *verbatim* account of the Judge's summing up, and it would appear further that the present grounds are made out by comparison of the recorded evidence with the headings of charge and where any evidence might be construed in favour of the accused and mention of it is omitted from, or is not fully referred to in, the headings of charge, objection is taken. The remarks of their Lordships of the Privy Council in *Channing Arnold* v. *Emperor* (6) would appear most appropriate: "A charge to a Jury must be read as a whole. If there are salient propositions of law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the Jury's province."

It is clear from the cross-examination of the prosecution witnesses and from some of the written statements that a good deal of attention of the defence was concentrated upon showing that the riot did not take place in field No. 35, but may have taken place in field No. 111, or elsewhere. In this respect two grounds of objection relating respectively to the admission of a sale-deed and the presumption arising under section 103B of the Bengal Tenancy Act demand special attention. The prosecution case was that field No. 35 was in possession of the complainant Jauhar Ali, while on behalf of the accused it was sought to show that Rafiq, son of Amanat Ali, was in possession. The following extracts relating thereto and taken from one of the headings of the charge have been severely attacked:—

"As to the title to and possession of plot No. 35 the prosecution have produced a sale-deed, Exhibit 9, executed by Amanat Ali in favour of Jauhar Ali on 27th March 1906. Jauhar Ali was granted the area slip and *parcha* but in the finally published Record of Rights his name did not appear but the name of Amanat Ali is shown." ..... "No evidence of possession of Rafiq has been given, except in the finally published Record of Rights."

The sale-deed, Exhibit 9, above referred to was produced on the 18th of February and handed over to the officers in charge of Exhibits. It was marked on the 19th. No objection was in fact made to its admission in the Sessions Court. But the learned Counsel who appeared for the accused in that Court states that he was unaware it had ever been made an Exhibit and that he certainly intended to object to it. It is a document which Jauhar Ali produced when he alleged possession for the last 10 or 12 years. The objection made is that its execution has not been formally proved and that the Judge in performing the duties prescribed by section 298, Criminal Procedure Code, should have rejected it whether it was or was not objected to by the parties. In my opinion there is a considerable difference between evidence which is inadmissible on account of its inherent nature and evidence, such as the document complained of, which would be admissible on formal proof of its execution. Here the document was innocently admitted on the supposition that formal proof of it was waived. Even assuming that it was wrongly admitted though not objected to, it seems clear from the authorities that it is not the admission of every inadmissible evidence which vitiates trial by Jury and that it is the duty of the Appellate Court first to consider whether the evidence improperly admitted is material and such as is likely to have exercised a prejudicial influence on the minds of the Jury.

Now the sale deed of 1906 could not have proved present possession, and it does not appear to me that, had it been objected to and rejected on the ground that it had not been proved, the case for

(6) 23 Ind. Cas. 661; 41 C. 1023 at p. 1062; 18 C. W. N. 785; 26 M. L. J. 621; 15 Cr. L. J. 309; 1 L. W. 461; 7 Bur. L. T. 167; (1914) M. W. N. 506; 16 M. L. T. 79; 12 A. L. J. 1042; 20 C. L. J. 161; 16 Bom. L. R. 544; 8 L. B. R. 16; 41 I. A. 149; 83 L. J. P. C. 299; (1914) A. C. 644; 111 L. T. 324; 30 T. L. R. 462 (P. C.).

the defence would have been advanced in face of the abundant evidence of possession given by the witnesses mentioned in the Judge's charge. There is authority to show that if evidence has been admitted, which should have been rejected, it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict, *Emperor* v. *Waman* (7). Cases also have been cited indicating where a verdict is vitiated owing to misdirection, the Appellate Court should not go into the facts and substitute its own decision for the verdict of the Jury. In my opinion, the accused have not been prejudiced by the admission of the document in question and the circumstances and fact of its admission do not constitute any material misdirection or error demanding a retrial. It is also urged that notwithstanding how strongly Counsel for the accused may have relied on and explained the entry in the Record of Rights shewing the name of Amanat Ali, father of Rafiq, to have been recorded, it was the bounden duty of the Judge to have drawn the attention of the Jury to the presumption of correctness attached to the entry arising under section 103B of the Bengal Tenancy Act. It would appear to me, where this presumption was never denied and where no question was raised which the Court was called upon to decide (see section 298, Criminal Procedure Code), it was not incumbent upon the Judge to dwell upon a matter such as this, arising during the course of the trial, unless there was some indication that the Jury misunderstood it or were ignorant as to its effect. The Jury was an unusually intelligent one. They had heard Jauhar Ali cross-examined as to the importance of the Record of Rights and his admissions relating thereto. The Jury had likewise the benefit of being addressed by the learned Counsel for the accused on the subject. The tone of the Judge's remarks in his headings of charge seems to me to indicate that he was dealing with a matter, namely, the Record of Rights, the presumption under which was thoroughly appreciated by the Jury he was addressing. To my mind the fact that the learned Judge did not pointedly call the attention of the Jury to the provisions of section 103B did not influence their finding in the least. Mr. Manuk on behalf of Ram Bhagwan, while relying on the joint grounds put forward by all the appellants, further raised objection to the way in which the evidence relating to the *alibi* pleaded by his client was presented to the Jury. My learned brother has likewise dealt in detail with this. No doubt the Judge might have presented the evidence of the Comparing Clerk in a more amplified form, but considering this witness was one of the last examined and his evidence was, therefore, fresh in the minds of the Jury, I do not think the fact of the Judge exercising his discretion in dealing concisely with his evidence is a good ground for complaint.

In conclusion I would remark that while mindful of the interesting and able arguments of Mr. Hasan Imam and Mr. Manuk on behalf of their clients, a careful examination of the evidence and the headings of the learned Judge's summing up has led me to the opinion that he has well fulfilled the requirements of law and discharged his duty to the Jury. He appears to me to have dealt with all the important and salient features of the case and to have presented them fairly and honestly to the Jury. I, therefore, agree with my learned brother that this appeal should be dismissed.

Appeal dismissed.

(7) 27 B. 626; 5 Bom L. R. 599.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No 222 OF 1918.

May 23, 1918.

Present :—Justice Sir P. C. Banerji, KT.

MANOHAR—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 182, applicability of—Petition to District Magistrate to unlock house containing false allegations, whether falls within scope of section—Offence, gist of.

Section 182, clause (*a*), of the Penal Code applies to a case in which it is intended that a public servant

should do or omit to do something which he ought to do or omit to do if he knew the true facts, that is, which he would be legally justified in doing or omitting to do if he knew the true facts.

Asking a Magistrate to do an act which would be an illegal act even if true facts were stated to him, would not come within the purview of the section.

Accused petitioned the District Magistrate praying that as certain tenants occupying his houses had absconded leaving the houses locked up, the houses might be unlocked to enable him to execute the necessary repairs. His application was sent for compliance and report to the Police, who reported that the allegations contained in the petition were untrue, upon which the District Magistrate sanctioned his prosecution under section 182 of the Penal Code:

Held, that the section was inapplicable to the circumstances of the present case.

Criminal revision from an order of the Sessions Judge, Jhansi.

Mr. *Satya Chandra Mukerji*, for the Applicant.

Mr *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicant, Manohar, has been convicted under section 182 of the Indian Penal Code, under the following circumstances. He submitted a petition to the District Magistrate in which he stated that certain tenants occupying his houses had absconded, leaving the houses locked up, and he prayed that the houses might be unlocked and opened to enable him to execute repairs, as otherwise the houses would fall down when the rains began. The application was sent to the Police for compliance and report. The Sub-Inspector reported that the allegations in the petition were untrue. Thereupon the District Magistrate sanctioned the prosecution of the accused under section 182 of the Indian Penal Code, and he was tried and convicted The question is whether the conviction is legal. Under section 182 a person who gives to a public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant to do any of the things mentioned in clause (*a*) or clause (*b*) of the section, would be liable to punishment. In this case it is not alleged that clause (*b*) is applicable. The question is whether clause (*a*) applies. Under that clause the false information must have been given with the intention or the knowledge hat the public servant would do or omit any hing which he ought not to do or omit if the true facts were known to him. In the present case if the true state of facts were known to the District Magistrate, he would not be legally competent to issue the order which he issued or which was asked for. It is equally clear that he would not be competent to make the order if the information given to him was untrue. It seems to me that clause (*a*) of section 182 applies to a case in which it is intended that a public servant should do or omit to do something which he ought to do or omit to do if he knew the true facts, that is, which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a Magistrate to do an act which would be an illegal act even if true facts were stated to him would not, it seems to me, come within the purview of the section. The information must be information regarding a fact which would induce the Magistrate to do something which he would be legally competent to do if he had been cognizant of the true facts. As I have already stated, if the true facts were before the Magistrate he could not have issued the order which he issued to the Police. By reason of the true facts not being stated he issued an order which he could in no case have issued. Therefore it seems to me that the present case is not a case to which the section applies. I allow the application, set aside the conviction and sentence, and direct that the fine imposed on the applicant, if paid, be refunded.

Application allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 290 1918.

May 23, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Beachcroft.

BIMAL CHANDRA BANERJEE—PETITIONER

versus

TEZ CHANDRA BANERJEE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 181 (2)—Penal Code (Act XLV of 1860), s 408 Criminal breach of trust by servant Jurisdiction of trying Magistrate—Revision—Interference by High Court.

The accused, a Tahsildar, realised a large sum of money from the tenants of his master at a place M., and being bound to render accounts at a place B. presented there a false account with false entries in his papers, shewing that a much lesser sum than what he had realised was due from him:

Held, that it was doubtful whether the Court at B. would have jurisdiction to try the offence of criminal breach of trust against the accused. [p. 94, col.]

Section 531, Criminal Procedure Code, is imperative and the Court is required to see in every case, in which it is asked to set aside a conviction on the ground that the trying Magistrate had no jurisdiction to try the case, whether there has in fact been a failure of justice. [p. 94, col. 2.]

Rule against the order of the District Magistrate, Alipore.

FACTS appear from the judgment.

Babu *Manmatha Nath Mukherjee* (with him Babu *Satindra Nath Mukherjee*), for the Petitioner.—The question is whether the Alipore Court had jurisdiction to try the case. The charge does not specify the place where the alleged misappropriation took place. The whole complaint is that the accused did not disclose that he had received the sum of Rs. 800 from the tenants of Mr. B. Chakerbarty at Magura in the District of Jessore. The petition of complaint further states that having received the money the petitioner went home, resigned the service, and then on the complaints of the tenants he was written to. He then came down and gave a false account, showing that only four annas and two pies were due by him to the complainant. Refers to the provisions of section 181 (2) of the Criminal Procedure Code. Giving of a false account does not show that the money is retained and that does not confer jurisdiction on the Alipore Court to try the case. The Alipore Court should not have tried the case, when the petitioner stated before it that he would be seriously prejudiced in his defence if the trial went on at Alipore instead of at Magura. In fact it was not possible for him to produce all the evidence in support of his case at Alipore which he could produce at Magura. Refers to *Simhachalam* v. *Rati Kanta Laha* (1).

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown (with him Babus *Atulya Charan Bose* and *Amarendra Nath Bose*), for the Opposite Party.—The offence was concluded at Bhawanipur within the jurisdiction of the Alipore Court. The only defect in the charge is that it does not specify the place where the money was retained. I rely on the provisions of sections 531 and 537, Criminal Procedure Code, which would cure the defect of jurisdiction, if any. Barring a mere statement there is nothing on the record to show that the accused has been in any way prejudiced by the trial having taken place at Alipore. The accused cannot get relief merely on the ground that the Alipore Court had no jurisdiction to take cognizance of the case unless he shows to the satisfaction of the Court that he was really prejudiced in his defence Refers to *Kangali Sardar* v. *Rama Charan* (2).

Babu *Manmatha Nath Mukherjee*, in reply.—Both the Courts below proceeded upon the erroneous assumption that the loss ensued at Bhawanipur. Once it is shown that the Court has got no jurisdiction to try the case it is the duty of the prosecution to show that section 531, Criminal Procedure Code, would apply. See also section 256, Criminal Procedure Code.

JUDGMENT.—In this case a Rule was issued at the instance of the petitioner, Bimal Chandra Banerjee, calling on the District Magistrate to show cause why the conviction and sentence upon him (the petitioner) should not be set aside on the ground that the Alipore Court had no jurisdiction to try the case. The petitioner was a Tahsildar in the employment of Mr. Beyomkesh Chakerbertty with reference to Mr. Chakerbertty's Jessore estates. The complaint against him was that he had misappropriated a sum of Rs. 800 which he had received by way of *selami* from tenants on three dates between January and March 1917. The charges, which are in identical terms, *mutatis mutandis* were that the petitioner at "Gangralia Cutchery, Police Station Magura, District Jessore, being a servant in the employment of Mr. B. Chakerbertty, in such capacity being entrusted with such and such a sum committed criminal breach of trust with respect to the said amount by criminally misappropriating the same and thereby committed an offence punishable under section 408, Indian Penal Code, within my cognizance". The case was being tried by an Honorary Magistrate

(1) 41 Ind. Cas. 138; 21 C. W. N. 573; 25 C. L. J. 451; 44 C. 912; 18 Cr. L. J. 762.

(2) 12 Ind. Cas. 985; 38 C. 786; 12 Cr. L. J. 609.

with first class powers at Alipore. Proceedings had been commenced against the petitioner before in the Alipore Court on the same charge and he was discharged under section 203 on the ground that that Court had no jurisdiction. The District Magistrate, however, on application by the complainant was of a different opinion and directed the present trial. The charges may be objected to on the ground that they are not clear and precise; for instance, if the entrustment and criminal misappropriation took place at Gangralia as alleged in the charge, it is difficult to see how they could fall within the cognizance of the Magistrate at Alipore unless some other words were added as to the place of misappropriation. Section 181 (2), Criminal Procedure Code, provides: "The offence of criminal misappropriation or of criminal breach of trust may be enquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed." It has been argued here for the Crown that although the moneys were undoubtedly received at Magura, still the accused was bound to account to the complainant at the Sudder Cutchery at Bhawanipore and that he was actually so called upon to account in the month of May 1917. In presenting his account at that time he is said to have made certain entries in the *rokar*, and to have urged on the strength of those entries that only a small sum of 4 annas 2 pies was due by him to the complainant. It may be doubtful whether this would bring the case within the jurisdiction of the Alipore Court—whether it could be said that the offence was committed within the limits of that Court's jurisdiction. It is not, however, in our opinion, necessary to discuss that point, because it appears that the case may be decided on the provisions of section 531, Criminal Procedure Code. That section provides: "No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the enquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong Sessions division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice." That section is imperative and the Court is required to see in every such case whether there has in fact, been a failure of justice. Now in this case the accused undoubtedly demurred at the first opportunity to the jurisdiction of the Alipore Court. He again presented a petition just before the trial before the Honorary Magistrate commenced, in which he stated that he would be seriously prejudiced in his defence if the trial went on at Alipore instead of at Magura and that it would be almost impossible for him to produce all the necessary papers and witnesses from Magura. That was his apprehension when the case was about to commence But we do not find in his petition here a single statement to show that those apprehensions have been realized in any way whatever. So far as can be seen from the order-sheet, he made no request to the trying Magistrate to summon any witnesses on his behalf from Magura or elsewhere, or to give him facilities for producing papers or documents. He does not appear to have intimated that he wished to call evidence in his defence. In his petition before this Court he does not allege that he did anything of the kind, or that it was refused or that he was in any way prejudiced by the trial having taken place at Alipore. He merely stated that he desired relief from this Court on the ground that the Magistrate of Alipore had no jurisdiction to take cognizance of the complaint. In those circumstances, we do not think that we should interfere. It does not appear that the petitioner has been prejudiced in the slightest degree. The Rule is accordingly discharged. The petitioner must surrender to his bail and serve out the remainder of his sentence.

Rule discharged.

PATNA HIGH COURT.
CRIMINAL REVISION No. 259 OF 1918.
July 25, 1918.
Present:—Mr. Justice Mullick and Mr. Justice Thornhill.
GODHAN AHIR AND OTHERS —PETITIONERS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss 110, 190 (c)—Proceedings under s 110—Local inspection by Magistrate before instituting proceedings, effect of.

Although section 190 *(c)* of the Criminal Procedure Code in terms applies only to offences, the principle of that section must apply to cases of a miscellaneous character, *e. g.*, to proceedings under section 110 of the Code. [p. 95, cols. 1 & 2.]

Where a Magistrate was influenced by his preliminary local investigation in coming to a finding as to the guilt of an accused person under section 110 of the Criminal Procedure Code:

Held, that the conviction was bad inasmuch as the Magistrate should not, under the circumstances, have tried the case himself. [p. 95, col. 2.]

Criminal revision from an order of the District Magistrate, Motihari.

Messrs. *Hasan Imam*, *G. C. Pal* and *Ambica Prasad Upadhya*, for the Petitioners.

The Government Pleader, for the Crown.

JUDGMENT.

MULLICK, J.—The petitioners before us have been ordered by the Sub Divisional Magistrate of Bettiah to execute each a bond on their own recognizances for Rs. 100 with two sureties of Rs. 50 each to be of good behaviour for one year. There was an appeal to the District Magistrate, without success.

It appears that proceedings were instituted by the Sub Divisional Magistrate after inspection of a certain locality during his winter tour, in consequence of numerous complaints to the effect that the petitioners were in the habit of committing mischief by letting loose their cattle upon the lands of their neighbours and of using violence if resisted. Now although he recorded a proceeding purporting to be based upon information received from a complainant named Jotil Ahir, it is clear that he was considerably influenced by his own inquiry before he drew up proceedings and that he was really in the position of a prosecutor. He ought not to have, therefore, tried the case himself. Although section 190 (*c*), Criminal Procedure Code, applies only to offences, I think the principle of that section must apply to cases of a miscellaneous character. The principle was applied by a Division Bench of this Court to a proceeding under section 147, Criminal Procedure Code, in the case of *Ram Asis Singh* v. *Abdus Samad Barahil*, Criminal Revision No. 401 of 1916, and by their Lordships of the Calcutta High Court in a case under section 110, Criminal Procedure Code, in *Alimuddin Howaldar* v. *Emperor* (1).

Mr. Lewis, the trying Magistrate, has very candidly observed in his judgment that it was impossible for him to remove from his mind the impression which was produced upon seeing large tracts of land completely devastated by ravages of cattle, and he also states in his explanation that in addition to the 28 witnesses who had deposed before him some 150 others were present and made oral complaints to him. It is clear, therefore, that his finding as to the guilt of the accused was affected by the preliminary local investigation. The order, therefore, calling upon the petitioners to execute bonds must be set aside, but we think that as there was evidence to justify the proceedings there must be a re-trial.

It has been strongly contended that there is no evidence of habitual mischief to bring the petitioners within the operation of section 110 (*d*), Criminal Procedure Code, nor of any association such as would justify a joint trial, nor any specific finding as to the part which each of the accused took in the acts which have been held to constitute habitual mischief. These are matters, however, which must be the subject of the new trial, which we now direct the Magistrate to hold. The Magistrate, of course, will bear in mind that a joint trial is not permissible unless there is evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief to which the witnesses have deposed. He must also bear in mind that he cannot use entries in the station diaries or Police reports without legal evidence of the acts alleged. There must also be an investigation as to whether each of the petitioners who have been bound down has taken part

(1) 29 C. 392; 6 C. W. N. 595.

in the various acts or otherwise acted in concert.

The learned Government Pleader has contended that the local inquiry made by Mr. Lewis was merely made for the purpose of testing the evidence of witnesses. But that does not appear to be the case. His inquiry was made not with the object of testing the evidence of witnesses who had already deposed before him, but for the purpose of finding out whether or not any proceedings were to be instituted against the accused. That being so, the principle that a Court is free to make a local inquiry for the purpose of understanding the evidence which has been given before him, does not justify the proceedings in this case.

We direct that the order of the Court below be set aside and that the case be re-tried by a Magistrate other than the Magistrate upon whose inquiry the proceedings were started.

If having regard to the fact that the petitioners have already been in jail for sometime, the trying Magistrate is of opinion that no further proceedings are necessary, it will be competent to him to drop the proceedings and to discharge the petitioners. Pending the trial of the petitioners, they will be released on their own recognizances in such sums as the District Magistrate may deem proper.

THORNHILL, J.—I agree.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION 85 OF 1918.

June 18, 1918.

Present:—Mr Kotwal, Offg. A. J. C.

MARTAND RAO—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 107, 125, 434—Order requiring security for good behaviour—District Magistrate, power of, to set aside order—Revision—High Court, interference by.

An order requiring security for good behaviour under section 107 of the Criminal Procedure Code can be cancelled by the District Magistrate under section 125 of the Code on the ground that there is no proof of any likelihood of a breach of the peace, and the High Court will refuse to interfere with the order on this ground in revision, unless the District Magistrate has been moved under section 125.

The High Court will on its revisional side interfere only as a Court of last resort under very exceptional circumstances.

Criminal revision against the order of the Magistrate, First Class, Bhandara, in Miscellaneous Criminal Case No. 51 of 1917, dated the 14th February 1918.

Mr. *M. Bhawani Shankar Niyogi*, for the Applicant.

ORDER.—This is an application asking this Court to interfere in revision and set aside the order of the Sub-Divisional Magistrate, Bhandara, passed under section 107, Criminal Procedure Code, ordering the applicant to execute a bond for keeping the peace for one year on the grounds that there is no proof of any likelihood of a breach of the peace and that the materials on the record do not justify the order.

Under section 125, Criminal Procedure Code, the District Magistrate has the power to cancel the bond on the grounds stated above: *Emperor* v. *Abdur Rahim* (1) and *Emperor* v. *Dalli* (2). The applicant has not applied to the District Magistrate under the above section, and following the Allahabad ruling cited above I decline to interfere in revision till this has been done. This Court will on its revisional side interfere only as a Court of last resort under very exceptional circumstances: *Emperor* v. *Hussain Shah* (3). No sufficient grounds are disclosed for not resorting to the District Magistrate in the first instance. The application is rejected.

Application rejected.

(1) A. W. N. (1905) 143; 2 Cr. L. J. 335.
(2) 29 Ind. Cas. 827, 11 N. L. R. 98; 16 Cr. L. J. 555.
(3) 17 C. P. L. R. 107.

PRAFULLA NATH TAGORE *v.* SHITAL KHAN.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1353 AND 1378 TO 1389 WITH RULES NOS. 954 TO 1001 OF 1915.

February 25, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

PRAFULLA NATH TAGORE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHITAL KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B C. of 1885), s. 167—Annulment of incumbrances—Procedure—Rent-decree in respect of divided tenure—Sale in execution of decree, whether sale under Bengal Tenancy Act—Notice, service of, proof of—Entry in order sheet, value of.

Where in execution of a decree obtained in a suit for the rent of a tenure which has long before the suit been divided into separate *taluks*, the tenure is sold, the sale is not one under the Bengal Tenancy Act. To have the benefits of a sale for arrears of rent under the Bengal Tenancy Act there should be a separate suit in respect of each of the separate *taluks*. [p. 98, col. 1.]

The destruction of valuable incumbrances is a very severe measure, which the law allows only if a certain procedure is strictly followed, and when a party wishes to enforce that severe measure he must show that he has strictly followed the procedure laid down and there must be good proof of his strict compliance with the procedure [p. 98, col. 1.]

An entry in an order sheet that a certain notice has been served is not sufficient proof of the service. [p. 97, col. 2.]

Appeals against the decrees of the Subordinate Judge, 2nd Court, Backergunge, dated the 12th March 1915, affirming those of the Munsif, 4th Court at Barisal, dated the 15th August 1914.

Babus *Dwarka Nath Chakravarty*, *Broja Lal Chakravarty* and *Hira Lal Chakravarty*, **for the Appellants.**

Babus *Gunada Charan Sen*, *Sarat Chandra Dutta* and *Biraj Mohan Mojumdar*, for the **Respondents.**

JUDGMENT.

No. 1353 OF 1915.

The plaintiffs-appellants, who may be referred to as the Tagore Estate, claim to have purchased at sales in execution of decrees for rent, under the Bengal Tenancy Act, a Jamma and a Patni Taluq, and to have taken all necessary steps to set aside encumbrances and to have obtained *kabuliyats* from the cultivating *ryots*, and on these grounds to be entitled to rent from those *ryots*.

These claims are opposed by what may be referred to as Gobinda Babu's Estate, and the contentions set up against them are, so far as we are now concerned, (1) that the sale of the Jamma was not a sale for arrears of rent, so as to affect incumbrances, (2) that necessary steps were not taken to set aside incumbrances within the Pattai Taluq, and (3) that for various reasons the *kabuliyats* are not binding. As to (1):—The decree in execution of which the sale was held was a decree in a suit brought for rent for the Jamma as a tenure covering twelve annas of the Mouza. Originally there was such a tenure, but the lower Appellate Court found that long before the suit it had been divided and separate Taluqs had been created out of it. This finding has been attacked in argument before us on two grounds. The first ground is, that it is based partly on a document, Exhibit X, which is not evidence.

As to this, all that the judgment says is that this document, which is a judgment dated 24th March 1859 (not 1858), mentions that two of the shares comprised in the 12 annas were settled separately. Other, and much stronger, reasons, based on other materials, were given for the decision. But we also notice that this document was admitted without objection in the trial Court, and was not objected to in the lower Appellate Court, or in the grounds of appeal in this Court. On the contrary the question raised in the grounds of appeal in this Court is as to how the document should be construed, a question which arises only if the document is evidence. Had objection been taken to the admission of this document in good time, the party producing it might have given other evidence. As the objection was not taken until arguments were heard in this Court, over three years after the appeal was laid here, it should not be allowed.

The second ground on which this finding was attacked before us was, that in the absence of a finding that the landlord gave his consent in writing to the division of the original tenure, the finding that it was divided cannot stand. The finding is, that it was divided, and that separate estates were created out of it. A principal reason given for this finding is, that even after these separate Taluqs had all become

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vested in the same persons, the Dashmina family, the Zemindars, in suing for rents, treated them as separate Taluqs. It is true that a Zemindar may collect rents separately from the several different co-sharers who hold a Taluq, without consenting to the splitting up of the Taluq into several different Taluqs. But a Zemindar would hardly bring several separate suits, for rent of several shares of a subordinate Taluq, against the holder of the whole of that Taluq. Having regard to all the facts found and relied upon, we think the finding that separate Taluqs were created is sufficient.

To have the benefits of a sale for arrears of rent under the Bengal Tenancy Act, there should have been a separate suit in respect of each of the separate Taluqs.

The destruction of valuable incumbrances is a very severe measure, which the law allows only if a certain procedure is strictly followed, and when a party wishes to enforce that severe measure he must show that he has strictly followed the procedure laid down.

As to the Pattai Taluq the lower Appellate Court has held that it has not been proved that notice was served on Aditya Chakravarty, who had purchased a share in it. The question is one solely of fact, but the finding has been assailed on the ground that an entry in the order sheet is sufficient *prima facie* proof of service of that notice. The lower Appellate Court has given authority for holding that it is not sufficient proof, see *Radhay Koer* v. *Ajodhya Das* (1). There is no other evidence, and as pointed out already, there must be strict compliance, and good proof of compliance, with the procedure required by the law, before the severe consequence which the appellants seek to infer can follow.

As to the *kabuliyats* there are rent suits, in some of which the appellants are plaintiffs as Zemindars, while in the others, the Gobinda Babu's Estate is plaintiff, as holder of the incumbrance which the Zemindar claims to have set aside. The suits were tried together, that justice might be done between all concerned. The *ryots* cannot be ordered, now that all parties are before the Court, to pay rent both to the Zemindar and to the holder of the subordinate tenures. It may also be noticed that the *ryots* were in possession before they executed the *kabuliyats*. They were not admitted to possession by the Zemindar. This appeal is dismissed with costs.

This judgment will govern Appeals Nos. 1378 to 1389 of 1915, which are also dismissed with costs.

The Rules granted in connection with the suits by the Gobinda Babu's Estate are discharged with costs, in each case one gold *mohur*.

Appeals dismissed;
Rules discharged.

(1) 7 C. L. J. 262.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1273 OF 1916.

April 17, 1918.

Present:—Mr. Justice Scott-Smith.

HAR LAL—PLAINTIFF—APPELLANT

versus

BASANT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel, requisites of—Suit in Revenue Court to establish occupancy rights—Subsequent suit in Civil Court for possession as owner, maintainability of.

A piece of land, which was originally *shamilat*, fell on partition to the share of the defendant, who caused a notice of ejectment to be served on the plaintiff who was in possession of the land. The plaintiff brought a suit in the Revenue Court to contest the notice of ejectment, on the ground that he was a tenant with rights of occupancy in the land. The Revenue Court held that he was not an occupancy tenant, and he was consequently ejected. He then brought a suit for possession as owner of the land in the Civil Court:

Held, that inasmuch as the defendant was not caused to shift his position in consequence of anything represented to him by the plaintiff, the requisites necessary to constitute estoppel as defined in section 115 of the Evidence Act did not exist and the plaintiff was not, therefore, estopped from establishing that he was the owner of the land in dispute. [p. 99, cols. 1 & 2.]

In order to bring a case within section 115 of the Evidence Act there must have been, (1) a representation which amounts to an intention of causing or permitting to believe in another; (2) belief on the part of that other; and (3) an action arising out of that belief. [p. 99, col. 1.]

Second appeal from the decree of the Additional District Judge, Karnal at Ambala,

dated the 24th of January 1916, affirming that of the Munsif, 2nd Class, Kaithal, District Karnal, dated the 29th of June 1915, dismissing the suit.

Mr. *Nihal Chand Mehra*, for the Appellant.

Mr. *Trilochan Das Khanna*, for the Respondents.

JUDGMENT.—The facts of the case out of which the present appeal arises are briefly as follows. Plaintiff-appellant sues for possession as owner of the land in suit. It was originally *shamilat deh* and on partition fell to the share of the defendants-respondents. The latter caused notice of ejectment to be served on the plaintiff under the provisions of the Punjab Tenancy Act. Plaintiff then brought a suit in the Revenue Court to contest the notice of ejectment, on the ground that he was a tenant with rights of occupancy in the land. The Revenue Court held that plaintiff was not an occupancy tenant and he was subsequently ejected from the land. The lower Courts have dismissed the present suit, on the ground that plaintiff having pleaded in the Revenue Court that he was an occupancy tenant cannot now allege that he has proprietary rights.

Plaintiff has filed a second appeal to this Court, and it is urged that plaintiff was not estopped from alleging that he had acquired proprietary rights in the land in suit. It is pointed out that the requisites necessary for an estoppel as defined in section 115 of the Indian Evidence Act do not exist. Three things are generally necessary for bringing a case within the scope of section 115, Evidence Act:—

(*i*) there must have been a representation which amounts to an intention of causing or permitting to believe in another;

(*ii*) there must have been belief on the part of that other;

(*iii*) there must have been an action arising out of that belief.

Now, Counsel for the respondents admits that there has been no action on the part of his clients on account of plaintiff's representation that he was a tenant with rights of occupancy. Defendants have not been caused to shift their position in consequence of anything represented to them by the plaintiff. It appears to me, therefore, that there is no estoppel. No authorities have been cited by the lower Appellate Court. Three authorities have been cited by the first Court, *Abdullah Khan* v. *Ghulam Jan* (1), *Kamal Krishna Kundu* v. *Kedar Nath Kundu* (2) and *Ramchandra Shivjiram* v. *Tama Ragho Mangiya* (3). The first and last of these rulings are clearly distinguishable and the second ruling cited appears to be a misquotation.

I accept the appeal and setting aside the orders of the lower Courts remand the case for decision on the merits to the Court of first instance. Stamp in this and in the lower Appellate Court will be refunded and other costs will be costs in the case.

Appeal accepted.

(1) 16 Ind. Cas. 886; 155 P. W. R. 1912; 186 P. L. R. 1912.
(2) 3 Ind. Cas. 34; 10 C. L. J. 517 at p. 519.
(3) 15 Ind. Cas. 830; 36 B. 500; 14 Bom. L. R. 390.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 178 OF 1915.

July 13, 1916.

Present:—Mr. Mittra, Offg. A. J. C.

SHANKER SINGH—PLAINTIFF—APPELLANT

versus

HUKUMCHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 91—Mortgage—Redemption—Interest in mortgaged property, what is—Perpetual lessee, whether can redeem.

The interest which entitles a person to redeem must be derived directly or indirectly from the mortgagor since the making of the mortgage. In other words, a person may redeem only if he is affected by the mortgage; if he is not affected by it, there is no occasion for his redeeming and he cannot be permitted to do so. [p. 101, col. 1.]

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management; but it is not competent to him to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he created the mortgage. [p. 101, col. 2.]

The owner of certain *malik makbuza* plots mortgaged them to the defendant and subsequently

granted a perpetual lease thereof to the plaintiff. The defendant obtained a sale decree upon the mortgage, without making the plaintiff a party to the suit, and himself purchased the mortgaged property in the execution sale. The plaintiff thereupon brought a suit to redeem the mortgage:

Held, (1) that the plaintiff's lease was contrary to usage and was, therefore, not binding on the defendant; [p. 10, col. 2.]

(2) that the foreclosure and sale in pursuance of the mortgage prejudiced the plaintiff's interest in the mortgaged property and he was, therefore, entitled to redeem it. [p. 101, col. 2.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 79 of 1914, dated the 26th November 1914.

The Hon'ble Mr. *M. R. Dixit* (with him Mr. *V. R. Pandit*, R. B.), for the Appellant.

Mr. *H. Mitra*, R. B., for the Respondents.

JUDGMENT.—One Karim Khan was the owner of a half share of certain *malik makbuza* plots. On the 4th May 1900 he executed a mortgage in favour of the defendants' predecessor. On the 22nd February 1902 he executed a lease (Exhibit P-1) in favour of the plaintiff. On the 9th February 1909 he executed a document called *intkalnama* (Exhibit P-2) also in favour of the plaintiff. The defendants obtained a sale decree upon their mortgage in Suit No. 296 of 1911, without making the plaintiff a party, and themselves purchased the property mortgaged in the execution sale. The present suit is for redemption of the mortgage on the basis of the lease and the *intkalnama*. The first Court held that the plaintiff was entitled to redeem and decreed his claim. The lower Appellate Court has dismissed the suit mainly on the ground that the plaintiff has no right to redeem, under either of the two documents. The plaintiff has, therefore, filed this second appeal.

The lease (Exhibit P-1) is an ordinary agricultural lease, under which the plaintiff is entitled to hold the land, so long as he pays the rent. It is a perpetual lease. In the subsequent document, the parties described the status of the plaintiff as that of an occupancy tenant. The plaintiff, before 1889, would have been an occupancy tenant in Nimar. Under the present law, he is a sub-tenant, and section 60 of the Central Provinces Tenancy Act provides that a sub tenant shall hold on such terms as may be agreed between him and his landlord. Under section 85 of the Tenancy Act, he may be ejected in execution of a decree for an arrear of rent. It is clear, therefore, that the plaintiff, though a permanent sub-tenant, is liable to eviction for non-payment of rent.

The *intkalnama* recites that a sum of Rs. 100 has been received in advance from the plaintiff and describes the transferor as having *malik makbuza* rights. It then proceeds to say: "You have already acquired occupancy rights in respect of my share of the aforesaid fields. I have, therefore, been recovering from you Rs. 12-10 every year on account of the rent of the aforesaid fields of my share. In lieu of the aforesaid amount I have transferred to you for 9 years, that is, from Chaith Samvat 1966 to the end of Samvat 1974, whatever right I possess in the said land of recovering rent. Now I will not set up any claim against you in respect of any rent of the aforesaid fields, until the expiry of the above mentioned term. * * * I am responsible for my share of the land revenue during the above-mentioned period, and you shall have no concern whatever with the same."

The appellant's contention is that by the *intkalnama* he has been made a lessee of the *malik makbuza* rights for 9 years. The respondents contend that, under the document, the rent is remitted in consideration of the advance of Rs. 100 and the plaintiff is merely a rent-free sub-tenant for the period. I think the contention of the respondents is sound. The appellant has not made himself responsible to the Government for land revenue. If it were intended to give him proprietary rights for the time being, there would have been an agreement for mutation of names, in accordance with the provisions of section 125 of the Land Revenue Act, 1881. No such mutation has taken place in the appellant's favour, nor has he made himself liable to the penalties prescribed by section 94 for recovery of an arrear of land revenue. For example, he cannot be arrested and imprisoned in a civil jail, nor can his other property be attached and sold to satisfy such arrear. I am of opinion that the parties did not contemplate the creation of any proprietary

interest in favour of the plaintiff by either of the two documents.

The question now for decision is whether, under these circumstances, the plaintiff has a right to redeem. His learned Counsel relies upon section 91, clause (*a*) of the Transfer of Property Act, which runs as follows:—"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—(*a*) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property."

Now if the plaintiff had a proprietary interest in the property he would undoubtedly be entitled to redeem, but I have held that he is a perpetual sub-tenant within the meaning of the Central Provinces Tenancy Act: "Has he any interest in the property? The true test has been laid down in Dr. Ghosh's learned treatise on the Law of Mortgages, 4th Edition, page 23*, as follows:—"The interest which entitles a person to redeem must be derived directly or indirectly from the mortgagor since the making of the mortgage. In other words, a person may redeem only if he is affected by the mortgage; if he is not affected by it, there is no occasion for his redeeming and he is not permitted to do so." In support of this, the learned Doctor cites the case of *Girish Chunder Dey* v. *Juramoni De* (1), where Rampini and Sale, JJ., held that a *ryot* has no such interest.

The mortgage sought to be redeemed shows that the land was ordinarily let to tenants and was in their occupation at the date of the mortgage. Now, but for the passing of Act XVII of 1889, the plaintiff would have been an occupancy tenant in Nimar, and an ordinary tenant elsewhere, and this even if his lease had been for one year. Such fixity of tenure, being the creation of a Statute, and not the result of a contract, would have been binding upon the mortgagees. The occupancy or ordinary tenant in such a case would not have been affected by the sale or foreclosure of the *malik makbuza* rights, and the tenant would, therefore, not have been entitled to redeem. But here since the passing of Act XVII of 1889 we have a permanent right as sub-tenant created by contract clearly binding on the mortgagor. The right of a mortgagor in possession to create a lease binding on the mortgagee has been discussed in *Madan Mohan Singh* v. *Raj Kishori Kumari* (2). At page 388*, Mookerjee, J., says:—"The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land, or to authorize its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage." The plaintiff's lease in perpetuity was clearly not in conformity with usage, and will, therefore, not be binding upon the mortgagees, and they have already repudiated it by dispossessing the plaintiff. The foreclosure or sale in pursuance of the mortgage will in this case prejudice the plaintiff's interests, and I think he is, therefore, entitled to redeem.

One of the arguments used by Cotton, L. J., in *Tarn* v. *Turner* (3) is, that a lessee, whose lease has not been consented to by the mortgagee and is, therefore, not binding on him, may be prejudiced by the action of the mortgagee insisting on his rights as a legal owner of the property. Lopes, L. J., at page 470 says: "The position of the plaintiff (the lessee) is this, that unless he is allowed to redeem, he may be evicted by the defendant (the mortgagee). In these circumstances, has he a right to redeem? I think he has." Fry, L. J., however, in general terms says that a person who claims as lessee under a mortgagor after a mortgage and thereby derives his interest in the equity of redemption, has a right to redeem. In this country we have to interpret the words used in the Transfer of Property Act. Can a person be said to

(1) 5 C. W. N. 83.

(2) 17 Ind. Cas. 1; 17 C. L. J. 384

(3) (1883) 39 Ch. D. 456 at p. 464; 57 L. J. Ch. 1085; 59 L. T. 742; 37 W. R. 276.

*Page of 17 C. L. J.—*Ed.*

have any interest in the property unless he can be prejudiced by a foreclosure of the mortgage or a sale in pursuance of it? I think not.

In the case of *Raghunandan Prasad* v. *Ambika Singh* (4) the perpetual lessee who was allowed to redeem would have been prejudiced if he were not so allowed. In *Payi Matathil Appu* v. *Kovamel Amina* (5) Shephard and Best, JJ., say:—"In our opinion the word 'interest' is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant or a person having a charge." Although the words used are very general, they should be read with reference to the facts of the case. The tenant there was entitled to possession and could not obtain possession which was with the mortgagee, and under these circumstances, for giving effect to the rights of the tenant, it was necessary that he should be allowed to redeem the prior mortgage. I need not notice the cases where Patnidars in Bengal have been allowed to redeem, for they have "substantial proprietorial interests," as pointed out by Pontifex, J., in *Kasumunnissa Bibee* v. *Nilratna Bose* (6). The lower Appellate Court lays stress upon the fact that the plaintiff can be ejected for non payment of rent. But I am unable to attach much importance to this, as most leases provide for re-entry by the lessor upon default in payment of rent I hold, therefore, that the plaintiff has a right to redeem.

The lower Appellate Court is entirely wrong in thinking there was an estoppel or *res judicata* in the case. The defendants had brought Suit No. 938 of 1905 for possession as mortgagees. In this suit the present plaintiff was joined as a party. The lower Appellate Court thinks that the plaintiff did not, in that suit, set up his rights under the lease of 1902. There is nothing to show that he did not. Moreover the judgment in that suit (Exhibit D 1) shows that the plaintiff's claim was for constructive possession and not *khas* possession. By this I understand it was a suit for propreitary possession and even if the defendant did not set up his lease by way of defence, he was not bound to do so as this would be no answer to the suit, as framed. There is also no foundation for a case of estoppel and no estoppel was pleaded. There was no obligation on the part of the plaintiff to inform the defendants of his exact rights under the lease of 1902, before the latter instituted Suit No. 296 of 1911.

The decree of the lower Appellate Court is set aside and the decree of the first Court is restored. The respondents will pay the plaintiff's costs throughout.

Appeal accepted.

(4) 29 A. 679; A. W. N. (1907) 227; 4 A. L. J. 703.

(5) 19 M. 151; 5 M. L. J. 279; 6 Ind. Dec. (N. S.) 810.

(6) 8 C. 79; 9 C. L. R. 173; 10 C. L. R. 113; 4 Ind. Dec. (N. S.) 51.

PATNA HIGH COURT.

CUTTCAK CIRCUIT.

APPEALS FROM APPELLATE DECREES NOS. 65 AND 66 OF 1917.

April 17, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Roe.

NANDAKISHORE JAGATI AND OTHERS—APPELLANTS

versus

NIDHI BIHARA AND OTHERS—RESPONDENTS.

Bengal Alluvion and Diluvion Regulation (XI of 1825), ss. 4, 5—Accretion—Re-formation in situ—'Small and shallow river,' meaning of.

Primarily where a party can show that *char* land is in fact a re-formation *in situ* of land identifiable as his own, he is entitled to that land even though it may have been for a period submerged. [p. 103, col. 1.]

Section 4 of the Bengal Alluvion and Diluvion Regulation of 1825 as a whole was not intended to apply to lands which had been previously in existence and the property of individuals. Section 5 of the Regulation was intended to apply to such lands. [p. 104, col. 1.]

The expression "small and shallow river" in clause (4) of section 4 of the Bengal Alluvion and Diluvion Regulation is used in contra-distinction to the expression "large and navigable" used in clause (3) of the same section. [p. 104, col. 2.]

The bed of a large and navigable river would not be settled with a private owner. [p. 104, col. 2.]

Appeal from a decision of the District Judge, Cuttack, dated the 19th June 1917, reversing that of the Munsif, Kendrapara, dated the 15th December 1916.

Mr. *S. C. Bose*, for the Appellants.

Mr. *B. N. Sinha*, for the Respondents.

JUDGMENT.

ROE, J.—The plaintiffs in this case, on the strength of a claim that they were proprietors of the bed of a river and of one bank thereof,

asked for a decree for possession of land which had accreted under the further bank to the occupancy holdings of the defendants. The learned Munsif, after an enquiry through a Commissioner, was of opinion that the plaintiffs had proved their proprietary right in the lands in suit and, accordingly, gave them a decree for *khas* possession. The learned Judge was of opinion that, under clause (1) of section 4 of Regulation XI of 1825, the defendants had a better claim than the plaintiffs, on the ground that the lands claimed were gradual accretions to the holdings of the defendants. Had we been convinced from the pleadings and the evidence given that the parties thoroughly understood what was required to be proved to establish a claim to alluvial land by gradual accretions, we should have accepted this finding as a finding of fact. We are not so satisfied and are of opinion that the case must be re-tried. The defendants did not in their written statement allege a gradual accretion They said only that the land had been "thrown up as *char*." No issue was framed on the manner of the re-formation, and the point was not touched in the judgment of the trial Court.

The case law from the earliest days of the Weekly Reporter to the present day is, that primarily, where a party can show that *char* land is in fact a re formation *in situ* of land identifiable as his own, he is entitled to that land even though it may have been for a period submerged. In order that in this re-trial the true points for decision may be understood, we would refer in the first instance to the following passage in the case of *Lopez* v. *Muddun Mohun Thakoor* (1):

"In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable."

Their Lordships refer with approval, in the course of their judgment, to the case of *Musammat Imam Bandi* v. *Hurgovind Ghose* (2). The following passages in the judgment in the latter case are most significant: "The Judges mistook the nature of the question which they had to try. They conceived that the question was as to alluvial land, in the sense of land gradually gained from the river and which, *having no other owner*, would belong by way of accretion to the lands of the adjoining proprietor. Whereas the ownership of the adjoining lands, though essential in the consideration of a title founded on accretion, was of little, or no value, in the issue actually joined between these parties.

"The land in dispute was inundated..... became partially dry...and was again inundated and again re-appeared.

"The question then, is, to whom did this land belong before the inundation. Whoever was the owner then remained the owner while it was covered with water and after it became dry."

The doctrine in *Lopez's case* (1) is stated in the following terms in the case of *Radha Proshad Singh* v. *Ram Commar Singh* (3):—

"The doctrine in *Lopez's case* (1) was doubtless in favour of the defendants in both suits; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the *thakbust* proceedings of 1864 as within the boundaries of their original Mouzas, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion".

The Judicial Committee again in *Ritraj Kunwar* v. *Sarfaraz Kunwar* (4) pointed out

(1) 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L R. 521; 2 Suth. P. C. J. 336; 2 Sar. P, C J. 594; 20 E. R 625.

(2) 4 M. I. A. 403; 7 W. R. P. C. 67; 1 Suth. P. C. J. 208; 1 Sar. P. C. J. 371; 18 E. R. 753.

(3) 3 C. 796; 1 C. L. R. 259; 3 Sar. P. C. J. 776; 3 Suth. P. C. J. 486; 2 Ind. Jur. 147; 1 Ind. Dec. (N. S. 1091.

(4) 27 A. 655 at p. 669; 2 A. L. J. 623; 2 C. L. J. 185; 9 C. W. N. 889; 8 O. C. 293; 15 M. L. J. 349; 7 Bom. L. R. 872; 32 I. A. 165; 8 Sar. P. C. J. 873; (P. C.).

that the provisions of the second clause of section 4 are in accordance with the English Law, which may be stated to be as follows :—

"All the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject,...the right to the soil remains in the owner, so that if at any time thereafter the water shall recede, and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner."

If the whole Regulation be read in the light of these decisions, the scope of sections 4 and 5 becomes at once apparent. The first clause of section 4 deals with lands gained by gradual accretion from the public domain of the river or the sea. The second clause deals with changes made by sudden or violent action of a river. The third clause deals with *chars* or islands formed in the public domain of the river or the sea. The fourth clause deals with changes made by the action of a river of which both the bed and the water are private property. Section 5 deals with all other changes, and in particular cases of gain by alluvion and dereliction as opposed to gain by gradual accretion. Section 4 as a whole was not intended to apply to lands which had been previously in existence and the property of individuals. Section 5 was intended to apply to such lands.

Assuming that the land in suit falls within the plaintiffs' boundaries, the first issue for determination in a case such as this must be: Is the accretion a true accretion of land not previously in existence or a re formation of land which can be identified as the property of the plaintiffs? It is not sufficient that the plaintiff can show that the accretion is *in situ* of a river bed which has been settled with him. It is necessary that he should show that the land had previous existence and was re-formed.

The next issue will be: does property in the land still vest in the plaintiffs ? [*Lopez* v. *Muddun Mohun Thakoor* (1).] "It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation."

It will be open to the defendants, the burden of proof being upon them, if these issues are decided in the plaintiffs' favour, to prove a right to the land under the English rules of equity, in accordance with section 5 of the Regulation, as a slow, gradual and imperceptible accretion [*Ritraj Kunwar* v. *Sarfaraz Kunwar* (4), *Attorney-General for Nigeria* v. *Holt* (5), *Baldeo Thakurai* v. *Ugra Nath Misra* (6) and *Bhagwan Rai* v. *Gopi Rai* (7)].

If either the first or the second issue is decided against the plaintiffs, the Court will consider whether clause (4) of section 4 of Regulation XI is applicable, and I would remark here that the fact that this river is one of the biggest in Orissa is not conclusive that it would not have been regarded as a small and shallow river by the framers of the Regulation. The terms "small and shallow" are used in distinction to the terms "large and navigable" used in the third clause. I should myself assume (as the framers of the Regulation seem to assume) that where a river is large and navigable its bed would not be settled with a private owner.

These issues need not be regarded as exhaustive. The whole suit should, in my view, be re-tried in the Munsif's Court and it will be open to the parties to frame such issues as they please within the law as explained in this judgment, and to adduce evidence afresh on the issues framed. And whereas the proprietary rights in the lands are to be determined on precisely the same considerations as the subordinate rights, it is expedient that the landlord of the defendants be impleaded and a fresh boundary commission, if he so desires, executed in his presence. I would, therefore, direct that the landlord of Amatpur be joined as a defendant and the whole suit re-tried, and would make no order as to the costs of this Court or of the Courts below incurred up to date. The judgments and decrees of the Courts below are set aside in these terms.

CHAPMAN, J.—I agree.

Re-trial ordered.

(5) (1915) A. C. 599 at p. 615; 84 L. J. P. C. 98.
(6) 29 Ind. Cas. 278.
(7) 10 Ind. Cas. 311.

JAHIRAL HAQUE *v.* SADAR ALI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 269 OF 1917.

June 12, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda KT.

JAHIRAL HAQUE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SADAR ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 153—*Rent, suit for—Appeal, second, whether lies.*

In a suit for rent where the amount claimed does not exceed Rs 100, no special appeal lies to the High Court where the only question decided in the suit is whether the relation of landlord and tenant exists between the parties. [p. 106, col. 1.]

Appeal against the decree of the Sub-Judge, Chittagong, dated the 9th November 1916, reversing that of the Munsif, Hathazari, dated the 4th January 1916.

FACTS material to this report will appear from the following extract from the judgment of the lower Appellate Court:—

"This appeal has been preferred by the defendants Nos. 1 and 2 against the decree for rent passed against them and others, and the point for determination is whether the relationship of landlord and tenant subsisted between the appellants and the plaintiffs-respondents.

"The Record of Rights (Exhibit 6) shows that within Taraf Sambhu Ram and under the proprietors Rahamatali and others, the defendant No. 1 and the father of defendant No. 2 and some other persons were recorded as tenants. There is no reliable evidence to prove that the rent lands appertained to Hissas Nos. 3 and 4 and that Rahamatali alone was entitled to get rent for the same from the appellants and others. The oral evidence which consists of the deposition of the plaintiffs' father cannot be relied upon, and there is no other evidence to corroborate him on the above points. In the Record of Rights, Rahamatali and others were mentioned as proprietors and I do not see how the expression can be construed as meaning Rahamatali and his brother and not Girish and others, who admittedly had shares in the Taraf. That rent was realized from the defendants Nos. 1 and 2 by or on behalf of the plaintiffs and their alleged predecessor Rahamatali is not proved by reliable evidence. The statement of the plaintiffs' father, who is interested in the result of the suit, cannot be believed without corroboration. There are no collection papers to support his deposition. Non-production of the alleged collection papers is not sufficiently accounted for. The plaintiffs' father says that there are witnesses to prove realization of paddy by him from the defendants but none of them has been examined. It is not necessary to decide in the rent suit whether the *wakfnama*, under which the plaintiffs are alleged to have got the right of Rahamatali, is valid and whether it was acted upon. That Rahamatali alone was the landlord in respect of the rent lands is not proved by reliable evidence. The plaintiffs claim rent as Mutwallis but their names do not appear to have been registered as such.

"The defendant No. 1 and others purchased the shares of Girish and Nanda Lal in the Taraf under a registered Kobala (Exhibit B). The C. S. plots, comprising the lands of the rent sued for, are covered by the above Kobala. It was not likely that the defendant No. 1 paid rent to the plaintiffs for the above lands when he himself was one of the purchasers under the Kobala.

"For the above reasons I find that relationship of landlord and tenant between the plaintiffs-respondents and defendants-appellants is not proved by reliable evidence."

The plaintiffs appealed to the High Court.

Babu *Charu Chander Sen*, for the Respondents.—I raise a preliminary objection that this second appeal is not competent under section 153 of the Bengal Tenancy Act. The suit was for recovery of arrears of rent, and the finding of the lower Appellate Court is: "I find that the relationship of landlord and tenant between the plaintiffs-respondents and the defendants-appellants is not proved by reliable evidence." See *Gangadhar Karmakar* v. *Shekhar Basini Dasya* (1), *Shilabati Debi* v. *Roderigues* (2), *Bhagabati Bewa* v. *Nunda Kumar Chuckerbutty* (3). The determination of a question of relationship of landlord and tenant is a

(1) 31 Ind. Cas. 812; 23 C. L. J. 235.
(2) 12 C. W. N. 448; 35 C. 547.
(3) 12 C. W. N. 835.

finding of fact. See *Ram Kanai Dass* v. *Fakir Chand Dass* (4).

Babu *Dhirendra Lal Kastgir* (with him Babu *Tarakeswarnath Mitter*), for the Appellants.—The second appeal is competent. The Subordinate Judge has decided a question of title, as will appear from the facts stated in the judgment in appeal. The defendants Nos. 1 and 2 claimed a title to the rent lands in themselves as purchasers from a co-sharer of the plaintiffs and the Subordinate Judge has given effect to it. Refers to *Sita Nath Pal* v. *Kartick Gharmi* (5).

JUDGMENT.—This appeal must be dismissed. No special appeal lies to this Court having regard to the provisions of section 153 of the Bengal Tanancy Act. The only question decided in the suit is, whether the relationship of landlord and tenant exists. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(4) 8 C. W. N. 438 at p. 442.
(5) 8 C. W. N. 434.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 151 OF 1917.

January 16, 1918.

Present:—Mr. Lindsay, J. C.

DWARKA PRASAD—PLAINTIFF—APPELLANT

versus

PRITHIPAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by widow—Necessity, nature of—Lender, duty of, to make enquiry—Interest, high rate of, whether can be recovered—Reasonable rate.

Where a loan is advanced to a Hindu widow for legal necessity, the lender is not bound to ascertain how the necessity for the loan was brought about. Even if it is found that the necessity arose owing to the mismanagement of the estate by the widow the lender is entitled to recover the loan, unless it is shown that he acted *mala fide*. [p. 107, col. 2.]

Where the necessity for the loan is apparent, the lender is not required to make any particular enquiry about it. [p. 108, col. 1.]

A creditor who advances money to a Hindu widow for legal necessity at a high rate of interest is not entitled to recover interest at that rate, unless he explains why that rate was fixed. In such cases the creditor should be allowed a reasonable rate of interest. [p. 108, col. 2; p. 109, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 26th March 1917, reversing the order of the Subordinate Judge, Sitapur, Tahsil Biswan, dated the 18th December 1916.

Mr. *A. P. Sen*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff-appellant Dwarka Prasad to enforce a mortgage executed in his favour by a lady, named *Musammat* Kailas Kuar. This lady was the widow of one Ram Bakhsh deceased. She has died and Ram Bakhsh's property has descended to the two defendants Prithipal Singh and Jadu Nath Singh, who were the reversioners. The mortgage was executed on the 9th of March 1911 in favour of the plaintiff to secure a loan of Rs. 900. The plaintiff claimed that this mortgage debt was a charge upon the property in the hands of the defendants and that the defendants were bound to satisfy the same.

Various defences were raised. It was alleged that the deed had not been executed by *Musammat* Kailas Kuar. It was also pleaded that even if it had been executed by her she did not understand the purport of the deed; and lastly it was pleaded that in any case there was no legal necessity for the loan advanced to *Musammat* Kailas Kuar.

We are no longer concerned with any question of the execution of the deed. It has been proved, and is now admitted, that *Musammat* Kailas Kuar did execute the deed in the plaintiff's favour and it has also been found, and the finding is not disputed, that Kailas Kuar, when she executed the deed of mortgage, knew what she was about. The only question which I have to determine is whether in the circumstances disclosed the plaintiff was entitled to recover.

The Court of first instance found that the deed had been executed for legal necessity and that the plaintiff was entitled to a decree. This decision has been reversed in appeal by the District Judge. The view taken by the learned Judge was that there was really no necessity for *Musam-*

mat Kailas Kuar to borrow this money from the plaintiff. According to the Judge *Musammat* Kailas Kuar had been left in possession of a comfortable estate which brought in a considerable income, that there was no excuse for her incurring the debt and that consequently the defendants, who are the reversioners, were not responsible for any money which *Musammat* Kailas Kuar had borrowed from the plaintiff.

In order to determine this question of legal necessity we have to look to the facts as disclosed by the evidence and there is no difficulty whatever in ascertaining the purpose for which the money was borrowed. It is admitted that the first defendant in this case Prithipal Singh was the *lambardar* of the whole of the property in which Kailas Kuar's husband had a share. It is proved that at or about the time when this money was borrowed Prithipal Singh was temporarily of unsound mind and that his wife *Musammat* Raj Kuar had been appointed his guardian. It is admitted that prior to the execution of the deed *Musammat* Raj Kuar had obtained a decree against *Musammat* Kailas Kuar for arrears of revenue and that this decree was outstanding at the time the money was borrowed from the plaintiff. It is further admitted that at the date of the deed further arrears of revenue were owing from *Musammat* Kailas Kuar and that for the purpose of realising these arrears *Musammat* Raj Kuar, as the guardian of her husband the *lambardar*, had applied to the Deputy Commissioner for attachment of *Musammat* Kalias Kuar's property in order that the demand for the arrears of revenue might be satisfied. It is proved that after the execution of this deed the plaintiff himself deposited in Court the money which was required to satisfy the decree. It is also proved that he deposited in the Court of the Deputy-Commissioner the other sum which was owing for revenue and in respect of which *Musammat* Kailas Kuar's share in the property had been attached. As a result of these payments the decree was discharged and Kailas Kuar's property was released. In these circumstances there can, I think, be no doubt that the plaintiff has succeeded in establishing that at the time this money was advanced to *Musammat* Kailas Kuar there was a legal necessity for the loan. The observations of the learned Judge in his judgment regarding the circumstances in which *Musammat* Kailas Kuar appears to have been extravagant and to have mismanaged the estate of her husband all appear to me to be beside the mark in dealing with the present claim. The plaintiff is a person who has lent money to a widow in possession of her husband's estate; and in these circumstances, unless it is shown that he acted *mala fide*, he cannot be affected by any mismanagement on the part of the widow, although it may be possible to say that with better management the estate might have been kept free of debt. It is not suggested in any way that the plaintiff here encouraged *Musammat* Kailas Kuar in her extravagance, if she was guilty of any. Indeed there is nothing at all to show that the plaintiff had any reason to suppose that *Musammat* Kailas Kuar had been living beyond her means. It seems to me, therefore, that the decision of the learned Judge is wrong. Whether it be the case or not that *Musammat* Kailas Kuar was living beyond her means, that is not a circumstance which can, in my opinion, affect the rights of the plaintiff. In order to entitle the plaintiff to recover it was for him to show that he had inquired into the necessity for the loan and had satisfied himself, as well as he could, that the lady was acting in the particular instance for the benefit of the estate, or at least that he was led on reasonable grounds to believe that there was necessity for the alienation. It has been pointed out on behalf of the respondents here that the plaintiff did not go into the witness box and that there is no direct evidence that he made such inquiry as the law demands. That is true. On the other hand there is some evidence to show that representations were made to the plaintiff by the lady's brother who was acting as her general attorney. This man admits that he negotiated the loan on behalf of the lady; and it is idle to suppose that the money was advanced without some inquiry being made. After all it is difficult to see what necessity there could have been for any particular inquiry in the matter, for there can be no doubt that an unsatisfied decree was in existence at the time and that

there can equally be no doubt that the plaintiff must have been made aware of the fact that the estate in the hands of the widow had been or was about to be attached by the Deputy Commissioner for arrears of revenue. The necessity for the loan was apparent and indeed the defendants here are hardly in a position to raise the question at all, when we find that one of them was the *lambardar* and that it was his action in enforcing his claim to recover arrears of revenue which was the immediate cause of the loan being taken. The defendants can certainly not be heard to say that they did not receive these moneys direct from the plaintiff and that the sums were not due on account of arrears of revenue for which *Musammat* Kailas Kuar's estate was liable. It certainly is not the law that the lender is bound to ascertain how the necessity for the loan was brought about; and in the absence of any allegation or proof of bad faith on the part of the plaintiff it seems to me that, on the law as laid down in the well-known case of *Hunooman-persand Panday**, the plaintiff was entitled to recover. According to the judgment of the learned Subordinate Judge out of the sum of Rs. 900 mentioned in the deed Rs. 864-7-3 were actually paid by the plaintiff himself to the *lambardar* or his representative on account of arrears. The other small sum of Rs. 35 odd seems to have been absorbed principally in the costs of the execution and registration of the deed. As the learned Judge observes, this small sum is negligible for the purpose of this claim. I hold, therefore, that the plaintiff is entitled to recover this sum of Rs. 900.

There only remains for consideration another point, namely, the rate of interest to be awarded to the plaintiff. It was pleaded in the written statement that the rate of interest was exorbitant and should in any case be reduced. The learned Subordinate Judge overruled this objection and held that the plaintiff was entitled to recover interest at the stipulated rate. The learned Judge in view of his other findings did not touch this question. He merely remarks that it was admitted by the plaintiff, who was the respondent before him, that the high rate of interest was partly due to famine conditions and partly also to the fact that the loan to the widow was a risky proceeding. The plaintiff himself did not go into the witness-box to explain the circumstances in which the rate of interest was fixed at 24 per cent. per annum, compoundable with yearly rests. No doubt the law on the subject of reducing the interest provided by a contract has been laid down in a long series of authorities. The general principle is that unless it can be shown that the plaintiff exercised undue influence within the meaning of that expression as defined in section 16 of the Contract Act, interest can be recovered at the full rate. It seems to me, however, that this general proposition is subject to certain exceptions, and my attention has been drawn to a ruling of their Lordships of the Privy Council which is to be found reported as *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (1). That was also a case in which a creditor brought a suit against the reversioners to recover a sum which had been advanced by him to a Hindu widow while in possession. The bonds in the case before their Lordships stipulated for interest at the rate of 18 per cent. per annum. The learned Judges of the High Court held that the plaintiff was not entitled to this high rate of interest, which they reduced to 12 per cent. Before their Lordships the objection was taken that the High Court ought not to have reduced the rate. As to this the observations of their Lordships are to be found at page 315 of the report. They are as follows:—

"Then comes the question—Was 12 per cent. a sufficient rate of interest? The widow was borrowing in a case of necessity. It was for the plaintiff to see whether there was really and fairly a ground of necessity. Was there a necessity to borrow at the rate of 18 per cent? That is a question to which he ought to have applied his mind and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent. he ought not to have charged her at that rate."

It seems to me, therefore, that in view of these observations of their Lordships it was for the plaintiff to explain why he had fixed the rate at 24 per cent per

*See 6 M. I. A. 393.—*Ed.*

(1) 18 C. 314; 18 I. A. 1; 15 Ind Jur. 34; 5 Sar. P. C. J. 64; 9 Ind Dec. (N. S.) 207.

annum compound interest. As the plaintiff did not go into the witness box to give his reasons why this rate was fixed, I consider myself entitled, in accordance with what is laid down in this judgment, to reduce the rate to the rate allowed by their Lordships, namely, 12 per cent.

The result is that I allow the appeal and give the plaintiff a decree of Rs. 900 with simple interest at the rate of 12 per cent. The usual sale decree will be prepared and the period allowed for payment will be six months from the date of this Court's decree. The plaintiff is entitled to his costs both here and in the Court below.

Appeal party allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1116 OF 1916.

May 13, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

MAHARAJ BAHADUR SINGH—PRINCIPAL DEFENDANT—APPELLANT

versus

JADAB CHANDRA GHOSE HAZRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of documents—Company's Sicca rupees, whether mean rupees in current coin.

Where in a *kabuliyat* of 1850 by which a *patni taluk* was created, the rent reserved was stated to be "Company's Sicca rupees 96":

Held, that as the Calcutta Sicca rupee, though coined by the Company, had never become known as the "Company's Sicca rupee" the expression "Company's Sicca rupees" used in the *kabuliyat* must be regarded as ambiguous; so that the intention of the parties must be re-ascertained, having regard to the surrounding circumstances, such as the conduct of the parties, the date of the document, the stamp duty paid on the document, and a reference to current coin in a portion of the *kabuliyat*. [p. 110, col. 2.]

The history and origin of the term 'Sicca rupee' discussed. [p. 110, cols. 1 & 2.]

Appeal against the decree of the District Judge, Murshidabad, dated the 5th April 1916, affirming that of the Munsif of Lalbag, dated the 29th September 1915.

FACTS. The suit was for recovery of arrears of Patni rent. The Patni Taluk was created or confirmed by a Kabuliyat dated 12th Asar 1257, corresponding to 8th July 1850. The rent was stated to be "Company's Sicca Rs. 96". The stamp in the Kabuliyat was of Rs. 3, and it was stated in the body of the Kabuliyat that a stamp of Re. 1 was paid for the Kabuliyat and a stamp of Rs. 2 for the Nazar. The plaintiffs and their predecessors had been realising rent at the rate of Rs. 96 in current coin. The plaintiffs now sued for Rs. 102 odd, the equivalent of Rs. 96 in Calcutta Sicca coin.

Babu *Bipin Behary Ghosh* (with him Babu *Urukram Das Chackravarti*), for the Appellant.—The question is whether the plaintiff should get rent at Rs. 96 in current coin or Rs. 102, the equivalent of Rs. 96 in Sicca coin.

The Kabuliyat was executed in 1850 and Sicca coin ceased to be legal tender from 1st January 1838. The word "Company's Sicca rupees" is ambiguous. There was no such thing as "Company's Sicca rupee" ever current. It must be either "Company rupees" or "Sicca rupees". From the date of the Kabuliyat (1850), which was long after the Sicca rupee ceased to be legal tender, it must be assumed that what was meant by "Company's Sicca rupees" was current coin and not Sicca coin. The stamp attached to the Kabuliyat makes it clear that what was meant was current coin, and not Sicca coin. A stamp of Rs. 3 (Re. 1 for the Kabuliyat and Rs. 2 for the Nazar, the amount of which was Rs. 120) was attached to the Kabuliyat. If it was intended that rent should be paid in Sicca coin (the equivalent of Rs. 96 in Sicca coin being Rs. 102), the stamp payable would be Rs. 4 under Regulation X of 1829, the stamp law then in force. In the body of the Kabuliyat it is written that a stamp of Rs. 3 is attached, Re. 1 for the Kabuliyat and Rs. 2 for the Nazar and there Rs. 3, the amount is written in current coin and there is no mention of Sicca coin.

The acceptance of rent from the defendant and his predecessors by the plaintiffs and their predecessors in current coin of Rs. 96 for a very long time shows that what was meant by the term "Company's Sicca rupees" in the Kabuliyat was current coin and not Sicca coin. Moreover, the plaintiffs and their predecessors having accepted rent at the rate of Rs. 96 in

current coin. they are not entitled to claim rent at an enhanced rent.

The cases reported as *Ram Saran Sing* v. *Gyan Sing* (1), *Ram Khelwan Singh* v. *Kumar Rai* (2), *Rameshar Koer* v. *Gobardhan Lal* (3), *Mir Tapurah Hossein* v. *Gopi Narayan* (4) and *Kamaleshwari Pershad* v. *Kanai Singh* (5) do not apply in the present case.

Babu *Sajni Kanta Sinha* (with him Babu *D N. Bagchi*), for the Respondents.—Though the Kabuliyat is dated 8th July 1850, it appears from the Kabuliyat that the Patni Taluk was created long before that and Sicca coin ceased to be legal tender only in 1838. The plaintiffs were not in possession of the Kabuliyat and through mistake were realising rent at the rate of Rs 96 in current coin, but they are entitled to claim rent at the rate given by the Kabuliyat converting the Sicca coin into current coin.

When Regulation X of 1829 was passed, the Sicca coin was legal tender. The stamp of Rs. 3 was attached to the Kabuliyat because it was not a new Kabuliyat but only replaced the old Kabuliyat, which was executed long ago and which was lost.

JUDGMENT.—This appeal arises out of a suit to recover arrears of Patni rent. The *taluk* was created or confirmed by a Kabuliyat dated 25th Assar 1257, corresponding with the 8th July 1850. The rent reserved is therein stated to be "Company's Sicca Rs. 96" and the question in controversy is whether the plaintiffs-landlords are entitled to Rs. 96 in current coin or the equivalent in current coin of 96 Sicca rupees.

The word Sikka or Sicca, meaning originally, it would seem, a die or stamp, came next to mean a stamped coin and more particularly the silver coinage of the Kings of Delhi. Lastly 'Sicca rupiya' became the name specifically given to the rupee coined by the East India Company from the year 1773 and bearing inscriptions denoting that it had been struck by King Shah Alam at Murshidabad in the 19th year of his reign. From Acts XVII of 1835 and XIII of 1836 it appears that this rupee being latterly coined only at the mint in Calcutta became known as the Calcutta Sicca rupee. The 1st of the aforesaid Acts prohibited the further coinage of the Sicca rupee and introduced the coin to be denominated and thereafter known as "the Company's rupee." Under the second Act Sicca rupee ceased to be legal tender from the 1st of January 1838.

The question then is whether the rupee mentioned in this document of 1850 is the "Calcutta Sicca rupee" or the Company's rupee exclusively current after the year 1837. In the course of the argument we have been referred to the cases reported as *Ram Saran Sing* v. *Gyan Sing* (1), *Ram Khelwan Singh* v. *Kumar Rai* (2), *Rameshar Koer* v. *Gobardhan Lal* (3), *Mir Tapurah Hossein* v. *Gopi Narayan* (4) and *Kamaleshwari Pershad* v. *Kanai Singh* (5), but these cases do not help us. They merely determine that when the rent is fixed in Sicca rupees, the difference in value between the Sicca rupee and the Company's or current rupee is realisable as part of the rent and is not to be regarded as an Abwab. Here the question is which of the two coins was intended, and the difficulty is caused by the collocation of the two terms 'Company' and 'Sicca'. It does not appear that the 'Sicca' rupee though coined by the Company ever became known as the "Company's Sicca" and the 'Company's' rupee has always borne the special signification given to it by Act XVII of 1835.

The words "Company's Sicca" rupees must, therefore, be regarded as at best ambiguous and to ascertain the true intention of the parties we must look to the surrounding circumstances.

Of the earlier document referred to in the Kabuliyat we have no information and its date has not been ascertained. By the year 1850 Sicca rupee had long ceased to be legal tender. The stamp on the Kabuliyat is Rs. 3. Now if by Rs. 96 had been intended the equivalent of Rs. 96 Sicca in current coin, that is Rs. 102 6-8, then under Regulation X of 1829, (the Stamp Law then in force) Schedule A, Articles 28 to 31, the duty payable was Rs. 4. The reference, therefore, in the penultimate sentence of the Kabuliyat is clearly to

(1) 6 C. L. J. 637.
(2) 6 C. L. J. 667.
(3) 7 C. L J. 202.
(4) 7 C. L. J. 251.
(5) 20 Ind. Cas. 171; 19 C. L. J. 348; 17 C. W. N. 1159.

GHOLAM MOWLAH *v.* ALI HAFIZ.

Rs. 96 in current coin. Lastly the principal plaintiff deposes that he succeeded to the property some 25 years before suit, and throughout that period realised Rs. 96 in current coin as the rent annually payable. He further admits that his predecessor also accepted rent at that rate. This course of conduct, the date of the document, the stamp duty paid, and the reference to current coin in the sentence referring to the Stamp Act lead us to the conclusion that in this case the rent annually payable is not the equivalent of 96 Sicca rupees, but is Rs. 96 in current coin.

To the extent thus indicated we decree this appeal and modify the decrees of the Courts below. Parties will have proportionate costs throughout. Interest on costs at 6 per cent.

Appeal partly allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No 60 OF 1915.

December 15, 1915.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

Munshi GHOLAM MOWLAH—DEFENDANT NO. 2—APPELLANT

versus

Mollah ALI HAFIZ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. I, rr. 3, 10 (2)—Suit to eject third person from trust properties, whether can be brought under s. 92—Transferee of trust properties, whether can be made party to suit.

A claim for the recovery of possession of trust property from a trespasser or from a transferee from a trustee is not within the scope of section 92 of the Civil Procedure Code, and a Court trying a suit under that section is not competent to bring before it under rule 3 or rule 10 (2) of Order I of the Code any person who is in possession of trust property either as a trespasser or as a transferee. [p. 112, col. 2; p. 114, col. 1; p. 115, col. 1.]

Appeal against the decision of Mr. Justice Greaves, dated the 26th March 1915, sitting on the Original Side, removing defendant No. 1 from the position of Mutwalli and declaring the alienation to defendant No. 2 to be invalid and further declaring the latter to be trustee till the appointment of a new Mutwalli.

Messrs. *S. R. Das* and *A. Rasul*, for the Appellant.

Messrs. *Asghar* and *P. N. Chatterjee*, for the Plaintiffs-Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the action was brought by four plaintiffs whose names appear upon the record: the second and third are two sons of Abdur Rahman, who is the first defendant, and the first and the fourth are relations of Abdur Rahman, and the second defendant was a man called Gholam Mowlah, who was a purchaser of certain property from the first defendant. The purchase was effected by a deed which is dated the 12th June 1910; I need not read the deed in detail because it has been fully commented upon by Mr. Asghar, the learned Counsel for the plaintiffs, this morning:—It refers to certain property in Calcutta on a part of which stands a mosque; and Abdur Rahman, the vendor, in the conveyance refers to the fact that this property was his hereditary property, that his father and he himself have, generation after generation, in succession without anybody's objection all along for more than twelve years, been enjoying and possessing the proprietary rights thereof one after another and that no one else has any sort of right or claim thereto. Then he refers to the fact that he has got into necessitous circumstances and must sell. He says, "consequently, there is no other means left but to sell my aforesaid Calcutta properties, subject to the duties and responsibilities of the said mosque, and I cannot sell the same to any other purchaser than a religious Musalman of the Sunni sect. You (*i.e.*, defendant No. 2) are a religious Musalman of the Sunni sect, and believing all my aforesaid statements you became desirous of purchasing the aforesaid property as proposed by me, and having fixed the value thereof at Rs. 3,000 I received from you yesterday," and so on, and he sells the property subject to all the aforesaid conditions, and says, "you, being *malik* in all my aforesaid rights and titles, shall continue all along to enjoy and possess the same, and shall exercise all sorts of proprietary rights. You shall maintain the mosque according to the custom prevailing and look after the same and shall perform all the acts and

observe the festivals that are necessary for the Musalmans of the Sunni sect in connection therewith:" and, he refers to the different prayers, and then to the properties and says, "all these belong to me personally; no one else has any sort of right or claim thereto; you believing all these statements of mine and other statements mentioned above relating to my title agreed to and purchased .....should any one else purchase the aforesaid property from you, he shall also have to carry out the aforesaid conditions in respect of the mosque and you shall not be entitled to sell the aforesaid property to any one else who is not a Musalman of the Sunni sect."

Now, it is said that this was a trust property held by the first defendant Abdur Rahman as trustee, and that he had no right to sell the property in the way he did. The action was brought by the plaintiffs against these two defendants. The first defendant did not appear; two of the plaintiffs, as I have said, are his sons; the other two plaintiffs are his relations. It was apparently proved in evidence that they had very little connection with this mosque, that they did not live in Calcutta; one of them did not live there for fifteen years: and, without saying more, I agree with what the learned Counsel for the second defendant argued yesterday that there is ground for saying that their claim ought to be looked upon with great care. I do not want to say more than that, because I have not heard what Mr. Asghar might have said with regard to that matter in full detail, but there are certain facts, which, if I had been a Judge in the first instance, would have led me to investigate the *bona fides* of this claim with great care.

Now, the second defendant, it has been found by the learned Judge, was a *bona fide* purchaser: He made certain enquiries which were detailed to us yesterday by Mr. Das and I am not going to repeat them. The learned Judge said that if the defendant had made certain further enquiries he would, in all probability, have found that this was trust property, and the learned Judge has, therefore, come to the conclusion that the second defendant had what is called in law constructive notice, meaning thereby that if he had made these further enquiries to which the learned Judge refers, which, in his opinion, were reasonable enquiries, he would have found that there was a trust, and inasmuch as he did not make those reasonable enquiries, he must be taken to have been affected with notice. This is what was meant by the words 'constructive notice.' Therefore, that is the position of the parties.

Then, the claim is made and it is admittedly under section 92 of the Civil Procedure Code. Now, the nature of the claim was this: As far as the first defendant Abdur Rahman was concerned, it is alleged that he had committed a breach of the trust by selling the property to the second defendant. It is asked that he should be removed from the position of trustee and that a new trustee should be appointed in his place. I think there were other prayers, but those were the main prayers as far as the first defendant was concerned.

As regards the second defendant, the essence of the claim against him was that he was a trespasser and that the property of which he was in possession under this purchase should be handed over to the new trustee who was to be appointed by the Court. It was in essence, as regards the second defendant, an action in ejectment of the second defendant from that property. It has been admitted by Mr. Asghar, the learned Counsel for the respondents, in the stress of argument that such a claim cannot be made in a suit which is instituted under section 92 of the Civil Procedure Code, and, therefore, as far as the claim for that relief is concerned, he cannot substantiate the part of the decree which carries out that claim. But he says that the second defendant is really in the position of a trustee, and because he is in the position of a trustee, the plaintiffs were entitled to have him kept before the Court as a party to the proceeding, in order that he may hear the decree which the learned Judge would make against the first defendant and in such a way that the second defendant might be bound by that decree. His argument is, first of all, that this is a trust for two reasons: First, the second defendant had a *constructive* notice of the trust. The learned Judge has found that he had

constructive notice of this particular trust, and for the purpose of my judgment I will assume that this is a correct finding. Then he goes on to say that in addition to that the second defendant performed the duties, which the trustee of that trust would have to perform, and consequently he was a trustee *de facto*.

Now, I do not agree with the argument upon that point, because it is clear that any duties which he may have performed in connection with the mosque must be attributed to the covenant which he had made in the deed of conveyance of the 12th of June 1910. It is perfectly true that it is found that he had a constructive notice of the trust,—and it is so found because he did not make certain enquiries—but it is also true, as the learned Judge has found as a fact, that he was a *bona fide* purchaser and he did not in fact know that such a trust existed. Therefore, when we find in the deed that he personally undertook a covenant to the vendor that he would perform certain duties, because, as the vendor says: "I have been looking after and keeping supervision over the same (mosque) and doing all other acts in connection therewith at my own expense... and I cannot sell the property to anybody else than a person who is a religious Musalman of the Sunni sect,...and I would not sell it to you unless you undertake to perform the same kind of duties as I have been performing"—meaning thereby, not as a trustee, but, as he says, 'out of my own pocket and out of my own money,'—it is clear to me that such duties as may have been performed by the defendant No. 2 must be attributed to that personal covenant which he made in that deed, and not to the position of a trustee of this particular trust. Therefore, I do not think that he must be taken as acting as a trustee *de facto*. The argument which was put forward by Mr. Asghar on this point, therefore, fails.

Then his argument is that if he does not succeed there, he is entitled to bring to his aid Order I, rule 3, of the Civil Procedure Code, which runs as follows: "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise:" and, the learned Counsel says that under that rule, he is entitled to keep the second defendant before the Court, in order, as I have said before, that he might hear the declaration which would be made by the Court against the first defendant. I think the answer to that argument is the one which was given by Mr. Das yesterday, and it is this: inasmuch as the essence of the relief which was claimed by the plaintiff against the second defendant was ejectment, or, to be strictly accurate, recovery of possession of property, and inasmuch as it is admitted that this claim could not be brought under section 92, I fail to understand how Order I, rule 3, can be applied in aid, because it is only applicable for the purpose of preventing multiplicity of suits: and one way of testing it is this—the concluding words point to it; they are:—"Where if separate suits were brought against such persons, any common question of law or fact would arise." Once it is decided that the claim against the second defendant could not be instituted under section 92, it is clear to my mind that it is outside the power of the Judge to make use of Order I, rule 3, for joining the second defendant as a party to the proceedings under that section.

For these reasons, I think that this decree, so far as it affects the second defendant, must be set aside and the appeal, so far as that defendant is concerned, must be allowed with costs both of the Court of first instance and of this appeal. Against the first defendant the decree will stand and will be available to the plaintiffs for what it is worth.

WOODROFFE, J.—In my opinion the case is covered by the decisions in *Budree Das Mukim* v. *Choni Lal Johurry* (1) and *Balh Singh Dulhuria* v. *Niradbaran Roy* (2). It has doubtless been held in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3) that where there is a claim for administration of a trust which falls within the section, a claim to eject an alienee may

(1) 33 C. 739; 10 C. W. N. 581.
(2) 2 C. L. J. 431.
(3) 24 C. 418; 12 Ind Dec. (N. S.) 943.

be joined with it. But, in my opinion, that claim does not come within the scope of the section and it is open to the charge of misjoinder. That decision has been dissented from in the cases to which I have referred. The decision in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3), not being a decision under the present Code, is not a decision which is binding upon us. I, therefore, agree that the appeal should be decreed.

MOOKERJEE, J.—I agree that this appeal must be allowed and the decree discharged in so far as it affects the appellant.

The suit was, in essence, of a composite nature. As against the first defendant, the alleged trustee, it was framed as one under section 92 of the Civil Procedure Code and appropriate reliefs were claimed against him. As against the second defendant, the transferee from the first defendant, the suit was in substance one for ejectment. In my judgment in the case of *Budh Singh Dudhuria* v. *Niradbaran Roy* (2) I held—on grounds which were fully stated then and need not be repeated now—that suits for recovery of possession of trust properties from third parties, for instance, from trespassers and from transferees from the trustees, were not within the scope of section 539 of the Code of Civil Procedure of 1882, which has been subsequently replaced by section 92 of the Code of 1908. If I may say so without impropriety, I have heard nothing urged in the course of the elaborate and careful argument addressed to us on behalf of the respondents which has in any way shaken my opinion. That view is in conformity with a long line of decisions in all the Indian High Courts. Amongst the cases in this Court reference may be made to *Mohiuddin* v. *Sayiduddin* (4), *Budree Das Mukim* v. *Chooni Lal Johurry* (1), *Ayatannessa Bibi* v. *Kulper Khalifa* (5). Amongst the cases in the Bombay High Court may be mentioned those of *Lakshmandas* v. *Ganpatrav* (6), *Vishvanath* v. *Rambhat* (7), *Kazi Hassan* v. *Sagun Balkrishna* (8), *Ghelabhai* v. *Uderam* (9), *Malhar Bhagvant Kulkarni* v. *Narsinh Krishna Majli* (10) and *Collector of Poona* v. *Bai Chanchalbai* (11). In the Allahabad High Court there is a distinct preponderance of judicial opinion in support of the same view, as is indicated by the decisions in *Muhammad Abdullah Khan* v. *Kallu* (12), *Ghazoffar Husain Khan* v. *Yawar Husain* (13), *Jamaluddin* v. *Mujtaba Husain* (14) and *Dasondhay* v. *Mohammad Abu Nasar* (15). In the High Court of Madras the same view has been taken since 1880, as is clear from the decisions in *Strinivasa Ayyangar* v. *Strinivasa Swami* (16), *Neti Rama Jogiah* v. *Venkatacharulu* (17), *Chettikulam Prasanna Venkatachala Reddiar* v. *Collector of Trichinopoly* (18), *Asam Raghovulu Setty* v. *Pellati Sitamma* (19) and *Rangayya Naidu* v. *Chinnasamy Iyer* (20). The cases in this Court, which support the contention of the respondents, are, so far as I have been able to investigate, only two, namely, *Lutifunnissa Bibi* v. *Nazirun Bibi* (21) and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3); from these I respectfully dissent; they do not, in my opinion, give a correct exposition of the true intention of the Legislature in framing section 539 of the Code of 1882 and section 92 of the Code of 1908. I do not feel pressed by the argument based on Order 1, rule 3, and rule 10, sub-rule 2, mentioned in the judgment of Seshagiri Aiyar, J., in *Asam Raghavalu Setty* v. *Pellati Sitamma* (19), as they are of no real assistance to the respondents. Once it is held, as I think it must be held, that a suit for ejectment of a trespasser or of a transferee from

(4) 20 C. 810; 10 Ind. Dec. (N. S.) 545.
(5) 22 Ind. Cas. 677; 41 C. 749; 19 C. W. N. 234.
(6) 8 B. 365; 8 Ind. Jur. 686; 4 Ind. Dec. (N. S.) 616.
(7) 15 B. 148; 8 Ind. Dec. (N. S.) 99.
(8) 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec (N. S.) 651.
(9) 12 Ind. Cas. 577; 36 B. 29; 13 Bom. L. R. 989.
(10) 17 Ind. Cas. 665; 37 B. 95; 14 Bom. L. R. 941.
(11) 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690.
(12) 21 A. 187; A. W. N. (1899) 18; 9 Ind. Dec. (N. S.) 828.
(13) 28 A. 112; 2 A. L. J. 591; A. W. N. (1905) 208.
(14) 25 A. 631; A. W. N. (1903) 120.
(15) 11 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710.
(16) 16 M. 31; 2 M. L. J. 139; 5 Ind. Dec. (N. S.) 729.
(17) 26 M. 450.
(18) 24 Ind. Cas. 369; 26 M. L. J. 537; (1914) M. W. N. 581.
(19) 25 Ind. Cas. 794; 27 M. L. J. 266; 16 M. L. T. 178; (1914) M. W. N. 692.
(20) 28 Ind. Cas. 898; 28 M. L. J. 326; 17 M. L. T. 191.
(21) 14 C. 33; 5 Ind. Dec. (N. S.) 779.

a trustee is not within the scope of section 92, it follows as a necessary corollary that the Court is not competent to bring before the forum any such person under either of the two rules mentioned.

I am also unable to accept the contention of the respondents that the appellant was in the position of a constructive trustee. No doubt, he undertook to maintain the worship in the mosque; but this was not in furtherance of the trust which the plaintiffs seek to enforce against the first defendant; it was rather, as the Chief Justice has pointed out, in pursuance of the covenant contained in the conveyance from the first defendant to the second defendant.

In my opinon, the decree as against the second defendant cannot possibly be supported and must accordingly be discharged.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 287 OF 1917.

May 14, 1918.

Present:—Mr. Lindsay, J. C.

RAMADHIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JOKHAN—PLAINTIFF AND JANKI—DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 52, 60—Mortgage—Redemption, suit for, by some of several mortgagors—Acquisition of portion of equity of redemption by mortgagee pending suit, effect of—Lis pendens, *doctrine of, applicability of—Plaintiff, whether can redeem whole property.*

Where a mortgagee acquires a portion of the mortgaged property, the right of the owner of the other portion of the property to redeem the whole is not absolute. In such a case the right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage; but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate. [p. 116, col. 1.]

Where a mortgagee acquires a portion of the mortgaged property, pending a suit for redemption by some of several mortgagors, it cannot be said that by taking such a transfer he affects the rights of the plaintiffs under the decree or order which may be made in the suit. Section 52 of the Transfer of Property Act has, therefore, no application to such a case, and the mortgagee can insist upon his right to confine the plaintiffs to a suit for redemption of their share of the mortgaged property only. [p. 116, col. 1.]

Appeal from the decree of the First Subordinate Judge, Bahraich, dated the 23rd April 1917, reversing that of the Munsif, Kaisarganj, dated the 6th February 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Aditya Prasad*, for Respondent No. 1.

JUDGMENT.—This is a defendant's appeal arising out of a suit for redemption brought by the plaintiff-respondent Jokhan.

In my opinion the decision of the lower Appellate Court is wrong and must be reversed.

The facts are very simple. On the 4th of November 1894 one Debi Din mortgaged a 4-annas share in certain immoveable property to one Har Bhajan. The mortgage was a mortgage by conditional sale. The mortgage money was Rs. 50 and the period of the mortgage was ten years. The mortgagee was put in possession, with a stipulation that he was to be allowed to enjoy the fruits of the trees in the groves which were mortgaged and was also to be allowed to appropriate dry timber. It was further agreed that interest on the mortgage money should accrue at the rate of 9 per cent. per annum. Debi Din died about the year 1900 and was succeeded by his two sons, Jokhan and Janki. Jokhan is the plaintiff in the present suit while Janki was impleaded as the defendant No. 3. The mortgagee has also died and is now represented by his son and grandson, the defendants Nos. 1 and 2, who are the appellants before me.

Jokhan sued for redemption of the entire mortgage. While the suit was pending the mortgagee-defendants took from Janki a conveyance of his 2-annas share in the mortgaged property and consequently it was urged in the lower Appellate Court that the plaintiff was only entitled to redeem his own share. The Subordinate Judge who heard the appeal applied the provisions of section 52 of the Transfer of Property Act to the case and held that the transfer made by

Janki in favour of the 1st and 2nd defendants was, as he put it, null and void under this section and could not operate to prevent Jokhan claiming redemption of the entire property. Accordingly the Subordinate Judge allowed redemption of the entire 4-annas share upon payment of the principal sum of Rs. 50 plus Rs. 45 by way of interest. He refused to allow any *post diem* interest.

In appeal here two points are taken on behalf of the mortgagee appellants It is said in the first place that the Subordinate Judge ought only to have allowed redemption of a 2-annas share and further that *post diem* interest ought to have been allowed. So far as section 52 of the Transfer of Property Act is concerned, I think the Court was wrong in applying it in the present case. By the last clause of section 60 of the Transfer of Property Act it is provided that "nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of the mortgagor."

It is clear that in a case like the present the right of the owner of a portion of the mortgaged property to redeem the whole is not absolute. The right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage, but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate. Consequently, although, as in the present case, the mortgagee may acquire a portion of the equity of redemption pending the suit, it cannot be said that by taking a transfer he affects the right of the plaintiff under the decree or order which may be made in the suit. In other words, the right of the plaintiff not being absolute no case of prejudice can arise and I can see no reason why the mortgagee should not be allowed to take a transfer of a portion of the mortgaged property during the suit, and then insist upon his right to confine the plaintiff to a suit for redemption of his share of the mortgaged property only. If the decree of the lower Appellate Court be allowed to stand, the only result will be that the mortgagee will now be driven to bring a suit for redemption against the plaintiff-respondent for the purpose of obtaining possession of a 2-annas share of the mortgaged property. If the rights of the parties can be finally settled in one suit, there is no point in driving either of them to a second suit.

As for the question of interest the decision of the Subordinate Judge is certainly wrong. There is nothing in the language of the deed to show that it was the intention of the parties that interest should cease to run as soon as the period of the mortgage had expired. On the contrary, the reasonable and proper construction is that both parties intended that interest should continue to accrue up to the time of redemption. The Subordinate Judge seems to think that the mortgagee was not entitled to claim *post diem* interest, because, if he were, he would gain an advantage by making delay in bringing his suit for foreclosure. The answer to this is that no matter how long the bringing of the foreclosure suit is delayed, all that the mortgagee can get in the event of foreclosure taking place is the property itself, whatever may be the amount of the mortgage debt. On the other hand the plaintiff could easily have stopped the running of interest by bringing his suit immediately after the expiration of the period of the mortgage. The case-law on the subject is very clear and is laid down in a decision of their Lordships of the Privy Council in *Mathura Das* v. *Raja Narindar Bahadur* (1).

The result is that I allow the appeal. A fresh decree will be prepared declaring the right of the plaintiff Jokhan to redeem 2 annas share of the property upon payment of one half of the mortgage debt. Interest at the contract rate will be allowed up till the date fixed for payment. The office will prepare a redemption decree in accordance with the terms of Order XXXIV, rule 7, and a period of six months will be allowed to the plaintiff for redemption. In case redemption is not made, the decree will order that the plaintiff's right to redeem will be barred. As regards costs the plaintiff will be allowed proportionate costs

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 258.

in the first Court, and defendants Nos. 1 and 2 will have their costs from the plaintiff both here and in the Court below.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 775 AND 823 OF 1916.

April 4, 1918

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

IN No. 775 OF 1916.

Moonshi SHAHED BAKSH—PLAINTIFF—APPELLANT

versus

GOLAM NABI KHONDOKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 823 OF 1916

Moonshi SHAHED BAKSH—DEFENDANT—APPELLANT

versus

GOLAM NABI KHONDOKAR—PLAINTIFF—RESPONDENT

Muhammadan Law—Religious office, transfer of, validity of—Public policy.

A religious office such as that of a *khadim* or *mutwalli* is not capable of being mortgaged The transfer of such an office is opposed not only to the Muhammadan Law but also to public policy.

Appeals against the decrees of the Subordinate Judge, 1st Court, Burdwan, dated the 23rd of December 1915, affirming those of the Munsif, Additional Court at Kalna, dated the 23rd of December 1914.

Mr. *K. Ahmed* and Babu *Sarat Chandra Mukherjee*, for the Appellant.

Babu *Bhudhor Haldar*, for the Respondents.

JUDGMENT.

FLETCHER, J.—These two appeals are preferred against the judgment of the learned Subordinate Judge of Burdwan, dated the 23rd December 1915, affirming the decision of the Munsif at Kalna. The two cases are these :—In the suit out of which Second Appeal No. 823 arises, the plaintiff sued for a declaration that a religious office along with the endowment that went therewith was not liable to be mortgaged by the person who had at the time been holding the office, and, in the other case, namely, the suit out of which Second Appeal No. 775 arises, the plaintiff sought to enforce a mortgage that had been granted by a former holder of the office. It appears that there is a

Muhammadan shrine dedicated to a certain Peer to which the Muhammadans of the District are accustomed to resort for religious purposes; and, for the purposes of the upkeep of what is called the *asthana* and for the suitable performance of the necessary ceremonies and observances that take place in the shrine, persons are required to be employed and their remunerations for the duties they perform are met by the persons who resort to the place, and apparently the way in which these various *khadims* or *mutwallis* are remunerated is by allowing them to appropriate the offerings received during a particular number of days. An office like this is not capable of being mortgaged, whether it is in the Muhammadan religion, or in any other religion. For the performance of these public duties, the officers are remunerated by salaries or other suitable forms of remuneration and these offices are not capable of being mortgaged. In addition to this, in the present case, there is another difficulty, if the office can be sold or brought to sale either by voluntary deed of sale or upon bankruptcy or insolvency, the person who would take charge of this shrine might not belong to the Muhammadan religion and might be a person professing some other religion altogether. That obviously is opposed not only to the Muhammadan religion but also to public policy. I think the learned Judge was quite right, when he came to the conclusion that this office was incapable of being transferred. The present appeals, therefore, fail and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeals dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 237 OF 1915.

February 15, 1918.

Present:—Mr. Justice Beaman and Mr Justice Heaton.

TULLA SOBHARAM PANDYA—PLAINTIFF—APPELLANT

versus

THE COLLECTOR OF KAIRA—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), ss. 144, 56—Attachment of village for non-payment of jama—Government, whether can levy assessment from rent-free grantee.

A village was settled by the Government with the *talukdar* and a *jama* was fixed on the whole of

the village. Subsequently, the village was attached under section 144 of the Bombay Land Revenue Code for non-payment of the *jama* and an assessment was levied under section 160 of the Code. The plaintiffs, who held lands rent-free under the *talukdar*, contended that they were not liable to pay the assessment:

Held, that the fact that the plaintiffs held lands rent-free from the *talukdar* did not affect the right of Government to assess the lands, inasmuch as the *talukdar* had no power to free any lands from liability to pay assessment to the Government. [p. 120, col. 1; p. 121, col. 1.]

First appeal from the decision of the District Judge, Ahmedabad, in Suit No. 64 of 1914.

The appeal was heard on the 14th December 1916 by Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton, when their Lordships remanded certain issues to the trial Court by the following

JUDGMENT.—The question raised in this and the cognate suits are of considerable importance, and they have been disposed of by the learned Judge without any evidence being recorded, although the pleadings indicate that the parties are at issue on various questions of fact. We are of opinion that it is essential to the right decision of the suit upon the merits that certain issues of fact should be gone into after evidence has been recorded. We, therefore, frame with the assistance of the Pleaders of the parties the following issues and refer the same for trial to the lower Court, directing that such additional evidence as may be required be taken, and that the Court should try the issues and return the evidence to this Court with its findings and reasons before the commencement of the summer vacation:—

(1) By whom was the attachment levied, and under what section or sections of the Land Revenue Code?

(2) Is the Talukdari Settlement Officer a duly appointed agent of the Collector within the meaning of sections 144, 159 and 160 of the Land Revenue Code?

(3) Whether the attachment was levied on the whole of the village, including the lands in suit, or on a share of it? If the latter, on what share?

(4) Whether the Udhad Jama was fixed on the whole of the village, including the lands in suit, or on a share of it? If the latter, on what share?

(5) Whether the plaintiffs or their predecessors were not merely grantees of the lands in suit from the present Talukdar of Badalpur or his predecessors?

(6) If the plaintiffs or their predecessors were grantees from the Talukdar, whether the grants to them were prior or subsequent to the fixing of the lump assessment?

(7) If the plaintiffs were proved to be such grantees, whether the defendant was entitled to levy a rate on the lands held by them sufficient to make up the deficit in Government revenue as claimed?

(8) Whether the plaintiffs were entitled to any, and if so, what relief?

The stay order to continue.

After the finding of the District Judge the appeal was again heard by Beaman and Heaton, JJ.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.

HEATON, J.—The plaintiffs are land-holders in the village of Badalpur in the Kaira District and they sued for an injunction to restrain the Collector from acting as he proposes to do by way of levying assessment from them. The Talukdari Settlement Officer gave them notice to this effect dated the 20th May 1913. Their case is that they hold their lands rent-free. The defendant, who originally was the Talukdari Settlement Officer and who has now been replaced by the Collector, maintained that the village of Badalpur had been attached under the powers conferred by section 144 of the Bombay Land Revenue Code and that in virtue of section 160 of that Code he had power to levy assessment on the lands of the plaintiffs. The District Court decided the case in favour of the defendant and the plaintiffs appealed to this Court. The evidence at that stage was so extremely scanty that eventually this Court found itself unable to decide the appeal and remanded eight issues to be determined by the District Judge. Those issues have been found on in a sense adverse to the plaintiffs, who again appear as appellants in this Court.

The first thing we have to determine is the nature of the agreement or settlement for this village of Badalpur. It must have been made in the early part of the last century but there is no document relating to it, and there are no Kabuliyats signed by the Talukdars of the village,

We have not even an extract from the register of Talukdars. There is mention made of the Mehwasi villages, of which Badalpur is one, in Government official correspondence, from which extracts are filed; of the years 1821 (Exhibits 37-8); 1822 (Exhibit 39); and 1823 (Exhibit 40). Then we have an extract from a Jamabandi statement of 1821-22 (Exhibit 41) and Kalambandi of 1828 (Exhibit 18). We have also general historical knowledge to go by. We know that the settlements or agreements for Mehwasi villages were made with the Mehwasi Chiefs or Heads of the villages and were usually made for the village as a whole in each case and were not made for any particular lands. The payment due for each village was annual, was a fixed lump sum or substantially fixed in amount (there may be small variations from year to year) and was regarded as *jama* or land revenue, though based on the amount of tribute which the Chief formerly paid and not on an estimate of assessable lands.

The evidence in the case indicates, so far as it goes, that the settlement or agreement for Badalpur was of the normal kind: that it was for the whole village and for a fixed annual payment for which the Mehwasi Chief of the village was responsible. Were it otherwise, there would be definite evidence of it forthcoming, as is to be expected where there is a variation from the normal.

The learned Pleader for the plaintiff-appellant challenged this conclusion, but the only evidence or circumstance in the case on which he could base any argument of value is the Kalambandi, Exhibit 18. This is a statistical statement prepared by the village authorities in reply to a set of questions sent them by some Government officer: the kind of thing that is usual in a newly acquired territory, where the Government desires to inform itself of the condition and resources of the country. It shows amongst other things that only about one-sixth part of the land in the village paid either *vaje* or *vero* to the Chief or Talukdar; the other five-sixths paid nothing. This information, though it may be of great value to the plaintiffs in resisting any demand the Talukdars might make on them, has no bearing on the nature of the settlement or agreement between the Government and the Talukdars. The Government recognised the existing or traditional position of the Mehwasi Chiefs provided they paid the annual *jama*; it was no part of the understanding or of the policy of the Government to concern themselves with the internal arrangements or economy of the Mehwasi villages. This Kalambandi, therefore, is found on examination to be of no value to the plaintiffs, for it does not give any indication of a state of affairs in any way incompatible with the ordinary type of settlement or agreement.

The plaintiffs have also argued that they were the original owners of the village and certain witnesses depose that there is a tradition in the village to that effect. It may be that there is such a tradition, but that it is well-founded there is no reason to suppose and that it has any bearing on the case is not apparent.

Again, the plaintiff argues that he holds and always has held his lands rent-free. That again may be conceded and so long as the management of the village remained with the Talukdar, the plaintiff could not be called on to pay anything. But unfortunately the payment of the *jama* by the Talukdar became irregular and the village was attached by order of the Collector made under section 144 of the Bombay Land Revenue Code (Exhibit 49). Thereafter, section 160 of that Code became applicable. This appears to be beyond question. Now, section 160 when applied to a Talukdari village (see section 33 of Bombay Act VI of 1888), runs as follows: "The lands of any village or share of a village so attached shall be unaffected by the acts of the superior holder or of any of the sharers, or by any charges or liabilities subsisting against such lands, or against such superior holders or sharers as are interested therein, so far as the public revenue is concerned, but without prejudice in other respects to the rights of individuals; and the Collector or the agent so appointed shall be entitled to manage the lands attached, and to receive all rents and profits accruing therefrom to the exclusion of the superior holder or any of the sharers thereof; until the Collector restores the said superior holder to the management thereof." This leaves it open

to Government to levy the *jama* from all the lands of the village Their powers are ample, for section 45 of the Code expressly recognises the right of Government to levy assessment on all lands which are not excepted under the provisions of any special contract with Government or any law for the time being in force There is neither a special contract nor a law which prohibits Government in the circumstances of this case from levying an assessment on the plaintiffs' lands. This supplies the answer to a further argument urged on behalf of the plaintiffs, which is that they held their lands absolutely rent-free, and no one, not even the Government, can lawfully demand assessment from them. They do not so hold them from the Government: that is clear, for if they did, there would be some Sanad or some record of the matter. If they hold them rent-free from the Talukdar, that does not affect the right of Government to assess the lands; for the Talukdar has no power to free any lands from liability to pay assessment to the Government; only the Government can do that.

The same conclusion, that it is lawful for Government to demand assessment from the plaintiffs, can be reached by a consideration of section 24 of Bombay Act VI of 1888.

In reality there is no great hardship involved to the plaintiffs. The Government will only gather in the agreed *jama*, which must apparently be light if it is distributed over the village as a whole.

It is unnecessary after this to state in detail the findings on the issues which were sent down. That which is the most important is No. 4: "Whether the Udhad Jama was fixed on the whole of the village, including the lands in suit, or on a share of it? If the latter, on what share?" I find that the Udhad Jama was fixed on the whole of the village and as I have said, it follows from the operation of sections 144 and 160 of the Bombay Land Revenue Code that the Government have the right to levy assessment on the lands of the plaintiffs in this village. Therefore I think that the decree of the District Judge dismissing the plaintiffs' suit should be maintained and that this appeal should be dismissed.

BEAMAN, J.—I have asked my learned brother to deliver the judgment of the Court in this case, because he was a party to the remand order and fully acquainted with the litigation in all its earlier stages. I have only to add in agreement with what has just been said that, in my opinion, there can be no doubt but that the settlement made in the earlier part of the nineteenth century was made with a Rathor Rajput, whom I will call the Talukdar, on behalf of the whole village. Such was the nature generally of all these settlements. Their object was to maintain to some extent at any rate the seignorial rights and privileges of the petty Chieftains and to recognise them as proprietors of their respective villages subject only to the payment of the Udhad Jama. In such circumstances the Government had no concern with the internal economy of the village. Provided that the Talukdar duly paid the stipulated Udhad Jama, he might, as far as Government was concerned, gratify his pride or generosity by granting as much of village land as he chose rent-free, or upon any other terms that pleased him, to inferior holders; but such grants could never be taken as superseding the paramount obligation of the village as a whole to pay through the recognised Chieftain the *jama* due to the Government. That is a primary charge, and, in my opinion, it cannot, upon any known theory, be found to have been settled with the Talukdar upon this or that piece of land in the village; but it is settled with the Talukdar upon the village as a whole; the price, that is to say, at which he is to be recognised by the Government as a Chieftain and proprietor of the village. It is possible that at the time that such settlements were made the recognised Talukdar or his predecessor may already have given away much of the village land rent-free to privileged classes, such as Brahmins, Bhats and Charans. That, however, in my opinion, does not affect the principle upon which this case has to be decided. That principle is that, apart from all other considerations and private arrangements within the village itself, the village must contribute the agreed *jama* to Government. Otherwise we might have the extreme case put by the learned Judge

below of the Government consenting to recognise a Chieftain as proprietor of a village upon payment of an annual *jama* and the Chieftain then giving away every inch of land in the village rent free and declining to pay Government one rupee of the agreed *jama*. In such a case it is not to be supposed that Government ought to or would recognise such alienations. The Government would then, in my opinion, be entitled to say that since the Talukdar had repudiated his obligations, the village as a whole, failing anyone coming forward to represent it, must certainly be made to pay the Government *jama*. And that is in effect what has occurred in the present case. The Jama has not been paid, and according to the Kalambandi a very large proportion of the village lands have already been given away and were not in the Talukdar's own estimate liable to contribute to the *jama*. That, however, was a matter with which Government, as far as I can see, had nothing to do. As soon as the Talukdar declared himself unable to keep his treaty obligations, the Government, in my opinion, had a perfect right to put in force the provisions of sections 144 and 160 of the Bombay Land Revenue Code for the single purpose of obtaining from the village the amount of *jama* which was due from it. Such a mode of contribution would not press nearly as heavily upon these inferior holders of rent-free lands as would the resumption of the village and the levy of assessment after making revenue survey, and it is quite clear that one or the other of these modes would have to be adopted. It cannot be seriously, I think, argued that Government intended to make free presents of these villages to anyone to whom the Talukdars in a fit of generosity might grant the whole of their lands rent-free. It is upon this principle, I think, that this and all cognate cases must be decided.

I am in entire concurrence with the judgment of my learned brother and the decree he proposes to make.

We treat this and the other six appeals, *viz.*, First Appeals Nos. 233, 234, 235, 236, 238 and 239 of 1915, as consolidated for the purpose of costs, and dismiss them with costs, one set of costs payable by all the appellants.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 111 OF 1916.

December 17, 1917.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

KYA ZAN—APPELLANT

versus

TUN GYAW AND OTHERS—RESPONDENTS.

Mortgage—Money-decree for mortgage amount against heirs of mortgagor paid off by one heir, effect of—Charge, redemption of.

A money-decree for the amount of a mortgage-debt obtained against the heirs of the mortgagor was paid off by one of the heirs, the first defendant, who remained in possession of the mortgaged property with the consent of the other heirs Subsequently his creditors obtained decrees against him and attached this property and sold it in execution. One of the other heirs of the mortgagor then sued to redeem the property impleading his co-heirs and the auction-purchasers as parties to the suit:

Held, (1) that the transaction between the first defendant and his co-heirs amounted to a joint charge given by the latter to the former on their joint undivided share of the property in respect of the amount of their share in the debt, and that the plaintiff being one of the co-heirs on whose behalf the joint charge was made was entitled to redeem it; [p. 122, col. 1.]

(2) that the charge was not an interest in the land, and that, therefore, all that the auction-purchasers obtained by their purchase was the share of the 1st defendant in the mortgaged property. [p. 122, col. 1.]

Mr. *Naidu*, for the Appellant.

Mr. *Halkar*, for the Respondents,

JUDGMENT.—The plaintiff sues to redeem certain land on payment of Rs. 550. The plaintiff and the defendants No. 4, 5 and 6 are the surviving heirs of their deceased widowed mother Ma Si Li, who had mortgaged the land to one Maung Te. Maung Te obtained a money-decree against Ma Si Li's heirs for the amount of the mortgage-debt. The 1st defendant, Tun Gyaw, paid off that debt and with the consent of the heirs remained in possession of the land. Subsequently Tun Gyaw's creditors obtained decrees against him and attached this land and sold it in execution. Maung Myo, 2nd defendant, is the auction-purchaser and the 3rd defendant is apparently purchaser from Maung Myo. The Divisional Judge dismissed the suit on the ground that the plaintiff had not shown that Rs. 550 was the amount of the charge. Mr. Naidu for the plaintiff appellant contends that if Tun Gyaw was not a mortgagee he had a charge on the land which the plaintiff is entitled to redeem. Tun Gyaw

was the son in-law of Ma Si Li and at that time was apparently entitled to a share as a co-heir through his deceased wife. Tun Gyaw was clearly not a mortgagee. The transaction between Tun Gyaw and the co-heirs was oral and amounted to a joint charge given by the other co-heirs to him on their joint undivided share of the land in respect of the amount of their share in the debt. The charge would not be an interest in the land and, therefore, did not pass to the 2nd defendant, who bought 1st defendant's interest in the land. All that the 2nd and 3rd defendants obtained by their respective purchases would be the share of Tun Gyaw, if any, in the land and such share was not subject to the charge. The plaintiff being one of the co-heirs, on whose behalf the joint charge was made, is entitled to redeem it, he having made the other co-heirs parties to the suit. The plaintiff in his plaint asks to redeem by a payment of Rs. 550: he states that Tun Gyaw paid off the mortgage-debt by a payment of Rs. 550; but he does not admit in his plaint that Tun Gyaw was in the position of a co-heir. If Tun Gyaw was entitled (through his wife) to a share in Ma Si Li's estate, he would be liable for a corresponding share of the mortgage-debt; and the charge he would then have would be the amount he advanced for the benefit of the other co-heirs when paying off the mortgage debt, *i. e.*, Rs. 550 less his own share. It must first be ascertained what share (if any) Tun Gyaw had in this land, in order to ascertain what the remainder was which formed the subject-matter of the charge. If Tun Gyaw was not entitled to any share in Ma Si Li's estate, he would have only a charge on the land (Rs. 550), and the 2nd and 3rd defendants would have bought nothing. If Tun Gyaw was entitled to (say) a 1/5th share in Ma Si Li's estate, the charge would be Rs. 440 on an undivided 4/5ths share in the land; and the 2nd and 3rd defendants would have bought an undivided 1/5th share in the land. I would set aside the decree of the Divisional Court and remand the case under Order XLI, rule 23, to the District Court to try the following issues and to determine the case accordingly:—

(1) What share (if any) had Tun Gyaw in this land?

(2) What was the joint share of the co-heirs of Ma Si Li, other than Tun Gyaw, in this land?

(3) What was the amount of the charge given to Tun Gyaw by such co-heirs on their joint share in this land?

The answers to the 2nd and 3rd issues will depend upon the decision of the 1st issue.

Upon paying off the amount of the charge (to be ascertained under issue 3), the plaintiff will be entitled to a decree for possession of the undivided share to be ascertained under issue 2. The share to be ascertained under issue 1 will be the interest which the 2nd defendant bought.

Under Order XXXIV, rule 15, the decree should direct possession to be given to the plaintiff of the undivided share (to be ascertained under 2nd issue) upon his paying into Court the amount of the charge (to be ascertained under the 3rd issue), which amount Tun Gyaw will be at liberty to withdraw.

Costs throughout will abide the final result, *i.e.*, the plaintiff will receive as against the first three defendants a share of his costs in all Courts proportioned to the share of the land of which possession is ultimately decreed to him.

Decree set aside; Case sent back.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 591 OF 1918.

July 22, 1918

Present:—Justice Sir Asutosh Chaudhuri, KT.

DEUTSCH ASIATISCHE BANK—

PLAINTIFF

versus

HIRALAL BURDHAN & SONS—

DEFENDANTS.

Limitation Act (IX of 1908), *ss.* 9, 15—"*Disability*" *and* "*inability*," *meanings of*—*Alien enemy, right of, suspension of, whether disability*—*Applicability of s.* 9 *to alien enemies prevented from suing*—*S.* 15, *inter-*

prelation of—Royal proclamation, effect of—Interpretation of Statutes—Statutes of Limitation.

Section 9 of the Limitation Act applies to, and makes no exception in favour of, alien enemies who are prevented from suing in consequence of a declaration of war [p. 124, col. 1.]

The suspension of an alien enemy's right to sue is a "disability" within the meaning of the section. [p. 123, col. 2.]

The word "disability" in section 9 of the Limitation Act means want of legal ability. It is different from "inability" to sue. [p. 123, col. 2.]

Statutes of Limitation are in their nature strict and inflexible and are not susceptible of equitable construction. [p. 124, col. 1.]

The Official Liquidator of a Bank cannot be looked upon as an agent of the Bank. He is an officer of the Crown whose rights depend upon the terms of his appointment. [p. 124, col. 2; p. 125, col. 1.]

Section 15 of the Limitation Act relates to injunctions or orders of Court, and not to royal proclamations which prevent the institution of suits by alien enemies. [p. 125, col. 1.]

JUDGMENT.—This is a suit which has been instituted by the Official Liquidator on behalf of the plaintiff Bank. The Bank, which is a German Bank, was closed on or about the 4th August 1914 immediately upon the declaration of War between England and Germany. This Liquidator was appointed on the 22nd December 1914, but the terms of appointment did not give him express power to sue. He was by that order authorised "to liquidate the assets", which can hardly be said to include the right to sue, but by an order made on the 1st November 1915 express power was given to him to sue and this suit was instituted on 9th May 1918. It is based on four on-demand promissory notes, one dated 4th June 1914, another dated 11th June 1914 and two notes dated 30th June 1914, and would, therefore, be barred if the ordinary rule of limitation applied. It is argued on behalf of the defendant that time began to run against the plaintiff Bank from the dates of promissory notes, and that under section 9 of the Limitation Act the time having once begun to run the subsequent disability or inability of the plaintiff to sue did not stop it. It is claimed, however, on behalf of the plaintiff Bank that inasmuch as the Bank could not sue after the declaration of war, and also inasmuch as the Official Liquidator could not sue until express power was given to him on the 1st November 1915, the period between 4th August 1914 and 1st November 1915 ought to be allowed to the plaintiff and should be excluded. This raises a novel point so far as this Court is concerned. If section 9 of the Limitation Act is applicable to this case, there can be no question that the suit is barred. The question is, was there a subsequent "disability" or "inability", so far as the plaintiffs were concerned, to sue? The expression "inability" does not occur in the Limitation Act except in this section, and so far as "disability" is concerned section 6 gives certain cases of disability, but there is no definition of the term. "Disability" means want of legal ability. It is different from "inability" to sue, and I think I ought to accept the interpretation which has been put upon these terms in *Poorno Chunder Ghose* v. *Sassoon* (1) and *Jivraj* v. *Babaji* (2). It is argued, however, that an alien's right to sue is suspended in consequence of the war and revives on the restoration of peace, and, therefore, it cannot be construed as "disability." I have very carefully considered the matter and find on reference to various cases that the suspension of such right is looked upon as a "disability". In the case of *Robinson & Co.* v. *Mannheim Insurance Co.* (3) the learned Judge refers to the "disability of an alien enemy to sue" (page 160).* I also find in *Porter* v. *Freudenberg* (4) that the expression "disability" is used in connection with an alien enemy's right to sue. In *De Wahl* v. *Braune* (5) Martin, B., speaks of an alien enemy being under "disabilities." In some other cases the expression "personal disability to sue" is used. It, therefore, appears to me that the suspension of the right comes within the meaning of the expression "disability". In *Janson* v. *Driefontein Consolidated Mines Ltd.* (6) Lord Davey speaks of the plaintiff's "inability" to sue, but it makes no difference whether it is "disability" or "inability" as section 9 covers both. If

(1) 25 C. 496; 2 C. W. N. 269; 13 Ind. Dec. (N. S.) 329 (F. B.).

(2) 29 B. 68.

(3) (1915) 1 K. B. 155; 84 L. J. K. B. 238.

(4) (1915) 1 K. B. 873; 84 L. J. K. B. 1001.

(5) (1856) 25 L. J. Ex. 343; 1 H. & N. 178; 108 R. R. 508; 156 E. R. 1166.

(6) (1902) A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268; 18 T. L. R 796.

*Page of (1915) 1 K. B.—*Ed.*

that is so, I am constrained to hold that section 9 does apply to a case of this character. Statutes of Limitation are in their nature strict and inflexible and as early as *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (7) the Privy Council held that it was not susceptible, of equitable construction. In the case of *Mohummud Buhadoor Khan* v. *Collector of Bareilly* (8) a question came up relating to Act IX of 1859 in respect of limitation affecting claims against the property of rebels forfeited to the Crown. The Privy Council held that the Limitation Act could not be construed as implying any saving with regard to persons under disabilities. It was argued that a saving with regard to persons under disabilities must be taken to be by equitable construction implied in the clause which came up for construction. Their Lordships thought it impossible that any Court could add to the Statute that which the Legislature had not done. It was also argued in that case that the disablilities referred to in the General Limitation Act XIV of 1859 ought to be understood as being incorporated in Act IX of 1859, but their Lordships also held against such contention. The result is that section 9 must be construed according to its plain meaning and I cannot either add to it or substitute anything for it. The section, when it was enacted, did not apparently contemplate a case of this character. If it is a case of omission I cannot supply it, it is for the Legislature. I can only construe the Statute as it stands. It makes no exception in the case of alien enemies. In America, however, in some of the State Courts and in the United States Courts an important exception to the rule appears to have been adopted, which although not within the letter is said to be within the spirit of the Statutes of the several States and their saving clauses, namely, that the Statute of Limitations does not run during a period of civil war as to matters in controversy between citizens of the opposing belligerants. This exception is predicated upon the ground that the Courts are not open to belligerents. In some cases cited in Wood on Limitation a "disability" happening by inevitable necessity appears to have been recognised as constituting an exception to the Statute of Limitations though not specified therein, but it also appears that the rule is not allowed to extend beyond necessity arising from war or death (Wood on Limitation, Vol. II, page 1136, 4th Edition, note to section 242). In the case of *De Wahl* v. *Braune* (5) [(1856) 25 L. J. Exch. 343] Lord Bramwell was of opinion that the Statute would run even when there was disability on account of war in the case of an alien enemy. No doubt the observation is *obiter* and in another report of the same case 1 H. & N. 178 (5) the passage does not appear, but there is no reason to doubt the correctness of the report which contains the passage, and although a great many years have elapsed since then, no different view appears to have been taken by any Court in England. Some text-writers have adopted that view and some others have taken a different view but it is unnecessary to refer to them. My attention was also called to an article in the Law Quarterly Review, Vol. XX, page 168-169, based upon some American cases which I have not had the opportunity of considering. In *Beckford* v. *Wade* (9) it was held that though the Court was shut up in time of war so that no original causes could be sued out, the Statute of Limitations continued to run. I find that case was cited by the Madras Court in support of its decision in *Kambinayani Javayi Subbarajulu Nayanivaru* v. *Uddighiri Venkataraya Chetty* (10). Even before *Beckford* v. *Wade* (9) the same was held. See *Frideaux* v. *Webber* (11) and Bynions case (1667) cited in *Hall* v. *Wybourn* (12). I come to the conclusion that the time sought to be excluded cannot be allowed under the Act as it at present stands, and, therefore, the suit must be held barred.

The Official Liquidator cannot be looked upon as an agent of the plaintiff Bank.

(7) 20 W. R. 375; 13 B. L. R. 177; 2 Suth. P. C. J. 897.

(8) 21 W. R. 318; 13 B. L. R. 392; 1 I. A., 167; 3 Sar. P. C. J. 363.

(9) (1805) 17 Ves. Jun. 87; 34 E. R. 34; 11 R. R. 20

(10) 2 M. H. C. R. 268.

(11) (1661) 1 Lev. 31; 83 E. R. 282.

(12) (1689) 2 Salk. 420; 91 E. R. 365.

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He is an officer of the Crown whose rights depend upon the terms of his appointment. His right to sue is not derived from the Bank. No explanation has been given why the suit could not have been instituted within time. He was appointed long before the suit was barred. There is no explanation of the extraordinary delay. I think the suit must be dismissed with costs as of a motion including the defendant's costs of entering appearance.

Section 15 of the Limitation Act was mentioned as saving limitation in this case, but it did not appear to me to be strongly relied upon. It relates to injunctions or orders of Court, not royal proclamations. No doubt declaration of war prevented commercial intercourse between the parties but it can hardly be treated as covered by the section. Possession of the plaintiff Bank was taken by the Government. The remedy of the Bank is suspended but as it will revive when the war will end, I think the Statute of Limitations should provide for such cases.

Suit dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 41 OF 1917.

April 22, 1918.

Present:—Mr. Lindsay, J. C.

RAM ADHIN—DECREE-HOLDER—APPELLANT

versus

RAM LOT AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s 2—; Civil Procedure Code (Act V of 1908), s. 48—'Decree,' meaning of—Order dismissing appeal for default, whether decree—Execution of decree—Limitation, meaning of.

An order dismissing an appeal for default is not a decree within the meaning of the definition of that word contained in the Civil Procedure Code of 1882. [p. 127, col. 2.]

Where an appeal was dismissed for default under the Civil Procedure Code of 1882:

Held, that the only decree which could be executed was the decree of the original Court and that limitation for execution of the decree must be taken to have begun to run from the date of the original decree, and not from the date of the order dismissing the appeal from that decree for default. [p. 128, col. 2.]

Appeal against the order of the District Judge, Fyzabad, dated the 22nd November 1917, reversing that of the Subordinate Judge, Fyzabad, dated the 3rd July 1917.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Basudeo Lal*, for the Appellant.

The Hon'ble Syed *Wazir Hasan* and Mr. *A P. Sen*, for the Respondents.

JUDGMENT.—This is an appeal against an appellate order of the District Judge of Fyzabad dismissing an application for execution of decree made by Ram Adhin, the appellant, on the ground that it was barred by limitation under the provisions of section 48 of the Code of Civil Procedure. It appears that the decree-holder obtained this decree on the 27th of September 1904 against Matadin, who is now represented by the respondents to this appeal.

Matadin went in appeal to the Court of the District Judge. A date was fixed for hearing of the appeal but the hearing was adjourned till the 29th of March 1905. On that date Matadin himself did not appear in Court. He was, however, represented by a Pleader. This gentleman informed the Court that he had received no instructions from his client and was not in a position to argue the case on his behalf. The result was that an order was passed by the learned District Judge dismissing the appeal for default. A formal order was prepared in the shape of a decree. No costs were, however, awarded to the respondent in consequence of the dismissal. After this, applications for execution were made from time to time by the decree holder and finally we have a fresh application which was made on the 6th of March 1917.

The Court of first instance held that this application was within time as the period of 12 years' limitation provided by section 48 of the Code of Civil Procedure ran from the 29th of March 1905, the date upon which the judgment-debtor's appeal had been dismissed for default by the District Judge.

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This order has been reversed in appeal by the present District Judge. He has held that limitation ran from the date of the original decree, namely, the 27th of September 1904. He has held that the order of the District Judge dated the 29th of March 1905 was not a decree; and that consequently it could not be contended that limitation ran from that date on the principle that the decree of the Appellate Court is the decree which has to be executed. The learned Judge has pointed out quite correctly that under the definition of the term "decree" contained in the present Code of Civil Procedure an order of dismissal for default is not a decree. The question, therefore, which he had to consider was whether or not under the language of the former Code (Act XIV of 1882) the order of the 29th March 1905 was or was not a decree. He held that it was not; and in coming to this conclusion he relied upon the ruling of their Lordships of the Privy Council reported in 12 A. L. J. Reports at page 624 [*Abdul Majid* v. *Jawahir Lal* (1)]. This case is also reported in Indian Law Reports 36 Allahabad 350.

The case for the decree-holder appellant here is that the decision of the Court below is wrong and that the learned Judge was in error in relying upon the judgment to which I have just referred. It is pointed out that in that case their Lordships were dealing with an order passed in accordance with the Rules of Practice of the Privy Council, and it is contended, and I think rightly, that the judgment in question cannot be deemed to apply directly to cases which are decided in Courts in India under a totally different procedure. In connection with this argument I may refer to another judgment of their Lordships to be found at page 284 of the same volume of the Allahabad Series [*Batuk Nath* v. *Musammat Munni Dei* (2)]. With regard to the later case to which the learned Judge refers, I adjourned the hearing of this appeal for the purpose of obtaining a certified copy of the order which was passed by their Lordships of the Privy Council. It seems clear the judgment in *Abdul Majid* v. *Jawahir Lal* (1) was delivered with reference to the special rules of procedure contained in an Order of Council dated the 26th of June 1873. Similarly in an earlier case reported at page 284 of the same volume [*Batuk Nath* v. *Musammat Munni Dei* (2)] the order which their Lordships were interpreting had been passed under another Order in Council dated the 15th of June 1853. It seems, therefore, that these judgments of their Lordships cannot be treated as direct authority for the proposition that an order dismissing an appeal for default under the provisions of the old Code of Civil Procedure (Act XIV of 1882) is not a decree, for, as I have already observed, their Lordships were not in either of those cases discussing the provisions of that Code.

It was admitted in the course of arguments that under the provisions of the old law there was a conflict of decisions as to whether an order of dismissal for default was a decree, and I have been referred by the learned Counsel for the appellant to a number of decisions on the point. The learned Counsel for the appellant was not able to refer me to any authority of this Court which is directly in point. He cited two cases, namely, *Mohammad Husain* v. *Mohammad Yusuf* (3) and *Raghunath* v. *Farkhund Ali* (4). In the former case the judgment deals with the effect of an order passed in a case where an appeal was withdrawn. It certainly was not decided in that case that such an order was a decree. On the contrary, the point under consideration was one of limitation and the Article of the Schedule which was being considered was an Article dealing with a period of limitation running from the date of a "decree or order." It was observed in the judgment that if the order of the Appellate Court was not a "decree", it was certainly an "order" finally disposing of the appeal. Similarly in *Raghunath* v. *Farkhund Ali* (4) the matter for decision was a question of limitation with reference to the provisions of Article 179 of the Limitation Act.

(1) 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; 36 A. 350 (P. C.).

(2) 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. J. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 104 (P. C.).

(3) 3 O. C. 50.

(4) 5 O. C. 143.

There again it was not decided whether the order in question was a decree or merely an order, indeed it was not necessary for the Court to decide this point. I have examined the other cases to which the learned Counsel for the appellant has referred me. It is obvious that a great many of them cannot be regarded as authority for the proposition that under the Code of 1882 an order dismissing an appeal for default was a decree. For example in the case reported as *Beni Rai* v. *Ram Lakhan Rai* (5) it seems to have been assumed that an order of an Appellate Court dismissing an appeal for want of prosecution was a decree. But the question which was before the Court in that case was, whether or not the order which the Appellate Court had passed amounted to an affirmation of the decree of the Court of first instance. The discussion arose in connection with an application for leave to appeal to His Majesty; and having regard to the provisions of the Code of Civil Procedure relating to this right of appeal it is clear that an appeal may lie either from a decree or order. It was not necessary, therefore, for the Judges to decide whether or not the order they had before them in that case was a decree. It certainly was an order. Similarly in another case of the Allahabad Court reported as *Muhammad Razi* v. *Karbalai Bibi* (6) it was assumed that an order declaring an appeal to have abated was in effect an affirmation of the decree of the Court below. There the question was one of limitation, and clearly the period of limitation ran from the date of the "order or decree." It seems to have been assumed that the order declaring the appeal to have abated was a decree. On the other hand the decision of the Allahabad Court in *Pohkar Singh* v. *Gopal Singh* (7) seems to have assumed that an order dismissing an appeal for default was not a decree. In the case reported as *Ramchandra Pandurang Naik* v. *Madhav Purushottam Naik* (8) it was held by one of the learned Judges that the order of an appellate Court dismissing an appeal for default was a decree under section 2 of Act XIV of 1882. The learned Judge who delivered this opinion held that such an order was an adjudication adverse to the appellant's right to have his appeal heard, and decided the appeal. The other learned Judge who was a party to the judgment declined to express any opinion on this point. This opinion seems to have been followed in a Full Bench decision of the Calcutta High Court reported as *Radha Nath Singh* v. *Chandi Charan Singh* (9).

There being no authority of this Court to bind me in dealing with this question, I feel myself at liberty to decide the matter for myself with reference to the language in which the definition of the term "decree" was expressed in the Code of 1882. That definition read as follows :— "Decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication so far as regards the Court expressing it decides the suit or appeal." After much consideration I have come to the conclusion that an order passed under the former Code by which an appeal was dismissed for default was not a decree within the meaning of the Code, and in coming to this conclusion I am fortified by the opinion of a Bench of the Calcutta High Court to be found in a recent judgment reported as *Syam Mandal* v. *Sati Nath Banerjee* (10). At pages 959* and 960* of the report the learned Judges who delivered the judgment of the Bench observe as follows :—

"It is indisputable that the original decree is merged in the appellate decree whether the latter confirms, amends, or reverses the original decree, and it is the appellate decree alone which can be executed; see the authorities collected in *Abdul Rahiman* v. *Maidin Saiba* (11) and *Chandra Kanta Bhattacharjee* v. *Lakshman Chandra Chakravarty* (12). But this doctrine cannot be applied where the appeal is dismissed in default; in such a case, the appeal fails for non-prosecution and it cannot appro-

(5) 20 A. 367; A. W. N. (1898) 77; 9 Ind. Dec. (N. S.) 595.

(6) 5 Ind. Cas. 473; 32 A. 136; 7 A. L. J. 58.

(7) 14 A. 361; A. W. N. (1892) 30; 7 Ind. Dec. (N. S.) 599.

(8) 16 B. 23; 8 Ind. Dec. (N. S.) 493.

(9) 30 C. 660; 7 C. W. N. 486 (F. B.).

(10) 38 Ind. Cas. 493; 44 C. 954; 24 C L. J. 523; 21 C. W. N. 776.

(11) 22 B. 500 at p. 506; 11 Ind. Dec. (N. S.) 915.N.

(12) 36 Ind. Cas. 460; 24 C. L. J. 517; 21 C. W. 430.

*Page of 44 C.—*Ed.*

priately be said that the Court of Appeal adopts the decree of the primary Court. This was recognised by Sir Barnes Peacock, C. J., when in his judgment in the Full Bench case of *Bipro Dis Gossain* —v. *Chunder Seekur Bhuttacharjee* (13) he observed that if in the case of an appeal, a new judgment of affirmance of the former decree should be given, then a new judgment would have to be executed, but if the appeal were dismissed for default, there would be no new judgment, and the judgment of the lower Court would be the judgment to be enforced. This view was adopted by a Full Bench of the Madras High Court in *Virasamy Mudali* v. *Manommany Ammal* (14) and has now been accepted by the Legislature in the definition of the term 'decree' in section 2 (2) of the Code of Civil Procedure of 1908, which expressly provides that any order of dismissal for default is not a decree.....In our opinion it is fairly clear that when an appeal against an original decree has been dismissed for default, the order of dismissal is not a decree, that there is consequently neither in form nor in substance an appellate decree wherein the original decree may be deemed to become merged and that the original decree is thus the decree to be executed, notwithstanding the dismissal of the appeal for default."

The reasoning of the the learned Judge appears to me to be unanswerable and it is supported by the observations of their Lordships of the Privy Council in the case to which the learned Judge of the Court below has referred. At page 353 of the report (I. L. R. 36 All. 350) (1) we have the following observations which the lower Appellate Court has reproduced in its judgment: –"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from."

These observations are very pertinent to the case in hand, and although I have recorded my opinion that this judgment of their Lordships is no direct authority on the interpretation of the language of Act XIV of 1882, the remarks I have just referred to are of great importance, inasmuch as they lay down a definite principle upon the basis of which it is possible to determine whether a particular order amounts or does not amount to a decree. It seems to me, in view of this language, that the decision of one of the Judges of the Bombay Court referred to in *Ramchandra Pandurang Naik* v. *Madhav Purushottam Naik* (8) and the opinion expressed by the Judges of the Calcutta Court in *Radha Nath Singh* v. *Chandi Charan Singh* (9) can no longer be regarded as setting forth a correct exposition of the law.

I hold, therefore, that in the present case the order of the Appellate Court dated the 29th of March 1905 did not amount to a decree, and that consequently the only decree which was capable of execution was the decree of the Court of first instance passed on the 27th of September 1904. Consequently the fresh application for execution, which was made on the 6th of March 1917, was beyond the period of 12 years allowed by section 48 of the Code of Civil Procedure.

The learned Advocate for the appellant invited me, in case I decide against his contention upon this question of law, to send the case back to the Court below for the decision of an issue as to whether the judgment-debtor had been guilty of force or fraud in the matter of resisting the previous proceedings taken in execution of decree. I am unable to yield to this invitation, the fact being that the decree-holder never set up any plea either of force or fraud for the purpose of having the period of limitation extended. He took his stand upon the view that limitation for his application began to run from the date of the order in appeal. Having failed in that contention I cannot now allow him to fall back upon a ground which was never raised before.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(13) 7 W. R. 521; B. L. R. Sup. Vol. 718, 2 Ind. Jur. (N. S.) 248.

(14) 4 M. H. C. R. 32 at p. 39.

UPENDRA NARAIN ROY *v.* JANKI NATH ROY.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 28 OF 1917.

July 4, 1917.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

UPENDRA NARAIN ROY—DEFENDANT No. 1—APPELLANT

versus

JANAKI NATH ROY AND OTHERS PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. VI, r. 17—Amendment of plaint, when to be allowed—Relinquishment of claim, what amounts to—Letters Patent (Cal.), cl. 15—Order granting or refusing amendment, whether judgment—Costs—Discretion of Court—Appellate Court, interference by.

On an application for amendment of a plaint the trial Court, without deciding anything, made the order for amendment subject to any contentions which the defendants might raise in answer to the claim as amended:

Held, that it would have been better and more regular if the question of the right to amend had been determined before the order was made or, if this would have involved a lengthy enquiry covering the same ground as the evidence in the suit, if the hearing of the application to amend had been adjourned to the hearing of the suit and determined on the evidence then taken. [p. 130, col. 1.]

Order II, rule 2, Civil Procedure Code, refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim, and a decree has been made in that suit. In such a case a second suit in respect of the portion so omitted is barred. But the rule does not apply to the amendment of a plaint by the addition of a claim which has been omitted in the plaint as originally filed. [p. 130, col. 2; p. 131, col. 1.]

Where a person knowing of the facts before the institution of a suit omits to make a particular claim by an oversight and the suit is carried to a decision without any amendment, Order II, rule 2, Code of Civil Procedure, prevents him from suing subsequently in respect of the claim so omitted, and it is no answer on his part to say that such omission was due to a mere mistake and was not actuated by any fraudulent or dishonest motive. But these principles do not apply where he makes an application for amendment before decree for the purpose of including the claim which was omitted through oversight. [p. 131, col. 1.]

The Court being desirous of getting at the true facts will allow an amendment subject to three general conditions; (*a*) *Bona fides* on the part of the applicant; (*b*) possibility of amendment without such prejudice to the other party as cannot be compensated by costs; (*c*) where the amendment is not such as to turn a suit of one character into a suit of another character. [p. 131, col. 2.]

An order for costs made by a Court within its discretion ought not to be interfered with by the Appellate Court. [p. 132, col. 2.]

Where the trial Court made the costs of an application for amendment costs in the cause:

Held, that as the amendment was opposed by the opposite party, the trial Court was not wrong in making the order and that it ought not to be interfered with by the Appellate Court. [p. 132, col. 2.]

Ordinarily an order granting or refusing an amendment would not be a "judgment" within the meaning of clause 15 of the Letters Patent. [p. 130, col. 2.]

Appeal from the order of Mr. Justice Chitty, dated 9th March 1917.

Mr. *Jackson* (with him Mr. *I. B. Sen*), for the Appellant.

Mr. *C. R. Das* (with him Mr. *N. Sircar*), for the Respondent.

JUDGMENT.

WOODROFFE, J.—The respondents instituted this suit on the 9th December 1916 against the defendants for recovery of money due to them by the first defendant on the mortgage of the 1st April 1915. There were a previous mortgage and a further charge, dated 7th January 1914 and 11th December 1914, executed by the same defendant. But these were not included in the suit. On the 26th February 1917, the plaintiffs gave notice of an application for amendment of the plaint. The affidavit, which is verified by the plaintiffs' attorney, states that they did not include their claims under the previous mortgage and charge under the *bona fide* and erroneous impression that this Court had no jurisdiction to entertain any suit in respect of the mortgage and charge as they comprised properties outside the local limits of our jurisdiction. They say they overlooked one of the provisions of the mortgage of the 1st April 1915. It is said that the defendant, taking advantage of the omission to include these previous claims, filed a suit in the Court of the Subordinate Judge at Pabna, praying for a declaration that the mortgage-debts secured by the previous mortgage and charge were unenforcible. The ground there taken is that no leave was obtained under Order II, rule 2, of the Civil Procedure Code; that the defendant in that suit intentionally omitted to sue in respect of these sums of Rs. 1,50,000 and Rs. 90,000, and that the plaintiff in that suit was entitled to a declaration that the defendant's mortgage lien for these two sums was unenforceable in law.

The plaintiffs' application for amendment in this suit is supported by an affidavit verified by their attorney, Mr. P. C. Kar. On the other hand, there is an affidavit of

Kedarnath Sirkar, a *gomashta* and law agent of the defendant. He alleges that the prior mortgage and charge were not included designedly and with dishonest motives and not under error as alleged. His affidavit is supported by his master. These allegations are denied in the affidavit of Rai Bahadur Janaki Nath Roy, who explains how these claims were omitted.

The matter came before Chitty, J., who thought it was not possible or convenient to decide the issue of fact raised at that stage. He, however, without deciding anything, made the amendment subject to any contention which the several defendants might raise in answer to the claim as amended. The learned Judge said that he did not see how the defendants would be prejudiced by the amendment being allowed instead of having a lengthy enquiry and a practical decision of the suit in a chamber application. I think it would have been better and more regular that the question of the right to amendment should have been determined before the order was made, or, if this would have involved a lengthy enquiry covering the same ground as the evidence in the suit, that the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken. Objection has accordingly been taken by Mr. Jackson for the appellant on the ground that an order should not have been made without first determining the plaintiffs' right to it. How, he asks, can the Court make an order for amendment subject to the right of the party to object that it ought to have been allowed? The respondents' Counsel also states that he was desirous of and asked the Court to hear the application on the facts. In support, however, of the course which the learned Judge took, it must be noted that the Court minutes show that Mr. Chakravarti, who appeared for the appellant in the lower Court, said that as long as his rights were safeguarded and it was understood that his contention was that the omission to sue was not a mistake but was done advisedly, he had no objection.

The matter is, however, not of importance, as I have come to the conclusion on the facts that the order made was justified.

It has been objected in the first instance that no appeal lies. No case has been cited in support of the appeal. Ordinarily an order granting or refusing amendment would not be a "judgment." Such an order does not determine the rights of the parties but only a matter of procedure, namely, whether a right may be put forward for determination. Here the Court has held that it may. If the Court were wrong, the order would be subject to appeal in the appeal against the final decree. But here the question is complicated by the fact of the Pabna suit. It is contended for the appellant that the order made does not reserve the alleged right of the appellant in that Pabna suit and that the rights of the appellant in that suit are affected, and, to use the words of Counsel, "his basis in the Pabna suit is gone." It is argued that when that suit was instituted, the respondents had not included their previous mortgage and charge in the plaint in this Court and that if the matters had continued as they originally were, the appellant would have got the declaration he sought. These chances of success, it is said, are now spoiled because the respondents have been allowed to amend in this Court so as to include claims, the omission of which was made the basis of the Pabna suit. It is also suggested that the hearing of the Pabna suit might be affected. This is not possible because the Pabna suit was instituted before the amendment, and if there were any difficulty in the two suits being concurrently heard (on the assumption that they covered the same ground), it would be the Calcutta suit as amended, and not the Pabna suit, which might be affected. As regards the other point it has more ingenuity than substance. It proceeds on the erroneous assumption that the amendment was prohibited by Order II, rule 2. This rule does not touch the matter before us. It refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim, and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. That is not the case here. In the present case the suit has not been heard but a claim has been omitted by, it is

said, inadvertence. To hold that in such case an amendment should not be allowed would be to hold something which the rule does not say and which would be absurd. The rule says: "he shall not afterwards sue," that is, it assumes that there has been a suit carried to a decision, and a subsequent suit. It does not apply to amendment where there has been only one suit. As the plaintiff had in law a right to apply for an amendment before the conclusion of his suit, it cannot be said that any rights of the appellant in the Pabna suit are affected. Such a contention is based on the erroneous assumption that nothing could be done by way of amendment of the Calcutta suit to remove the objection that the claims on the previous mortgage or charge were not sustainable. A case would fall within Order II, rule 2, only if a plaintiff fails to apply for amendment before decree, and then brings another suit. The plaintiffs are not doing that but asking for amendment in the one and only suit they have brought. This is, therefore, not a case in which the amendment either affects rights accrued to the other party, or otherwise prejudices him.

It has doubtless been held that where a person knows of the facts before the institution of the suit and omits to make a particular claim by an oversight, it is no answer to say that such omission was due to mere mistake, and was not actuated by any fraudulent or dishonest motive. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it: *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1), *Bulwunt Singh* v. *Chittan Singh* (2), *Ganes Chandra Chowdhry* v. *Ram Kumar Chowdhry* (3) and *Syed Abdulla* v. *Hurkishen Singh* (4). But these observations apply only where there has been a suit and a decree and a subsequent suit in which such mistake is pleaded, and not to such a case as is before us. It has been argued that the bar under Order II, rule 2, exists not because a point has been decided but because it should and would have been decided if the plaintiff had put it forward. This is quite true, but is not to the point. The observation assumes that there has been a suit and a decree in which the point omitted might have been considered and determined. In the present case we are now in only a preliminary stage of a suit in which no decree has been made and there has been no anterior suit.

As regards the power of amendment, the Code says:—"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The Court being desirous of getting at the true facts will allow an amendment subject to three general conditions: *Bona fides* on the part of the applicant; possibility of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued), and subject to this that the amendment is not such as to turn a suit of one character into a suit of another character. This statement is not made as being exhaustive but as embodying what are perhaps the three chief conditions on which amendment may be allowed. So it has been held that:—Where a party who has an honest case has, either through ignorance [see *Mukhoda Soondury Dasi* v. *Ram Churn Karmokar* (5) and *Krishnaji* v. *Wamnaji* (6)], *bona fide* mistake or some misapprehension, not placed the real facts before the Court [see *Bhyro Dutt* v. *Musammat Lekhranee Kooer* (7) and *Lakshmibai* v. *Hari* (8)], or has misconceived his cause of action and form of suit [*Ragho Parashram* v. *Vishnu Govind* (9), *Shyam Chand Koondoo* v. *Land Mortgage Bank of India, Ld.* (10), and *Krishnaji*

(1) 11 M. I. A. 551 at p. 605; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.
(2) 3 N. W. P. H. C. R. 27.
(3) 3 B. L. R. A. C. J. 265; 12 W. R. 79.
(4) 2 C. L. J. 490.
(5) 8 C. 871 at p. 875; 11 C. L. R. 194; 7 Ind. Jur. 32; 4 Ind. Dec. (N. S.) 562.
(6) 18 B. 144; 9 Ind. Dec. (N. S.) 604.
(7) 16 W. R. 123.
(8) 9 B. H. C. R. 1.
(9) 5 Bom. L. R. 329.
(10) 9 C. 695 at p. 698; 12 C. L. R. 440; 4 Ind. Dec. (N. S.) 1112.

MUKHRAM SINGH v. SADASI KOER.

Lakshman Rajvade v. *Sitaram Murarrav Jakhi* (11)] he should be allowed to amend, where this may be done without injustice to the defendant, and in appeal, particularly where the objection that the suit was not maintainable was not taken in the first Court [*Ragho Parashram* v. *Vishnu Govind* (9)]. Where, however, there is reason to think that an omission to claim was deliberate, it would, it has been said, generally not be proper to allow amendment [*Lukhee Kant Doss Chowdhry* v. *Sumeeroddi Tustar* (12)]. In short, the object of a trial being to get at the rights of the parties, any amendment which may be required for that purpose should, subject to well-known general principles governing this matter, be allowed. It has been held that apart from the question of limitation, it is unjust to a plaintiff to put him to the great expense of a new suit when a reasonable amendment, not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit [*Modhe* v. *Dongre* (13)]. Here there is not merely a question of expense, for if the amendment were refused it might be that the plaintiffs would be altogether debarred of their remedy in respect of the previous mortgage and further charge, the factum of which is not denied.

Assuming then but not deciding in favour of the appellant that there is an appeal, the grounds put forward to show that the order appealed from is erroneous are in themselves without substance. The appellant has asked us to deal with the facts and we do so. It may be a matter of doubt whether there is an appeal or not, but, assuming this in favour of the appellant, his case fails on the facts.

In my opinion there is no sufficient ground for disbelieving the affidavit verified by the Attorney that the claims were omitted by inadvertence. The evidence before us does not justify the conclusion that the omission was deliberate and dishonest, as alleged. I may here record the fact that Mr. Jackson contended that it was not necessary that he should establish his client's case on this point, and that apart from it the law prohibited amendment. In my opinion, and on a full consideration of the facts and law, I am of opinion that the amendment made was justified. The appeal, therefore, fails and is dismissed with costs.

We have been asked to vary Mr. Justice Chitty's order in the first Court as regards costs. He made the costs of the application for amendment costs in the cause. This matter, of course, was one within his discretion, with which I think we ought not to interfere unless it is shown that he was clearly wrong. This was not a case in which the party seeking the amendment alleged an error on his part which was admitted by the other side and in which no opposition was made to the amendment, in which case an order might have been that the party seeking the amendment should pay costs. In this case the opposite party opposed this application for amendment on the grounds which have been mentioned in my judgment: and it is not unlikely that for this reason the learned Judge did not determine the facts on this point and ordered the costs to be costs in the cause. The learned Judge's order as regards costs will stand, and, as I have said, the appeal is dismissed with costs.

SANDERSON, C. J.—I agree.

Appeal dismissed.

(11) 5 B. 496; 3 Ind. Dec. (N. s) 327.
(12) 21 W. R. 208; 13 B L. R. 243.
(13) 5 B. 609 at pp. 613, 614; 3 Ind. Dec. (N. s.) 401.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 451 OF 1917.

July 17, 1918.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

MUKHRAM SINGH—APPELLANT

versus

Musammat SADASI KOER—RESPONDENT.

Landlord and tenant—Occupancy holding, transfer of, in favour of zarpeshgidar*—Landlord, right of re-entry of—Ejectment.*

Where a non-transferable holding is sold to a *zarpeshgidar* of the holding, the landlord has

a right of re-entry even where the *zarpeshgi* right of the purchaser had been recognized by the landlord prior to the sale.

Appeal from a decision of the Subordinate Judge, Chapra.

Messrs. *Nirsu Narain Sinha*, *Harnarain Pershad*, *Rajender Pershad* and *Rai Tribhuban Nath Sahay*, for the Appellant.

Messrs. *Fakhruddin* and *Sambhu Saran*, for the Respondent.

JUDGMENT.

COUTTS, J.—This was a suit for ejectment by the landlords in respect of a certain holding consisting of two plots measuring one *bigha*, and seven *kathas* respectively. The original holder mortgaged the one *bigha* plot to the defendants, who have since been in possession. In 1911 the plaintiff brought a suit for possession of this one *bigha* plot, on the allegation that the original holder had left no heir and that consequently the holding had reverted to him as landlord. It was found in that case, however, that the plaintiff had no right of re-entry in that he had recognised the *zarpeshgi* right of the defendants by accepting rent from them and from the *zarpeshgidars*. The suit was, therefore, dismissed. Subsequently the defendants purchased the entire holding from the original holder and the plaintiff brought this suit for possession of the holding, on the allegation that the original holder had abandoned it and that the plaintiff was entitled to possession. It is not now denied that there is no custom of transferability. *Prima facie*, therefore, the plaintiff has a right of re-entry.

It is contended, however, that the defendants can rely on their original *zarpeshgi* as preventing the plaintiff getting possession of the one *bigha* plot. This contention, however, has no force. What was originally mortgaged was the tenants' interest. It has now been found, however, that the tenants' interest is gone, consequently the mortgage of that interest is also gone. This is the view which appears to have been taken by the learned Subordinate Judge and agreeing with that view I would dismiss this appeal with costs.

ROE, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 211 OF 1916.

January 7, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

SHWE LON AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HLA GYWE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 54, 59—Contract Act (IX of 1872), s. 202—Mortgage by deposit of title-deeds—Possession transferred to mortgagee—Registration, whether necessary—Mortgagee, whether can be ejected without payment of mortgage debt.

In consideration of a loan advanced by the defendants to the plaintiffs the latter made over certain lands to the former together with their title-deeds, the arrangement being that the defendants should remain in possession of the lands and take the rents and profits thereof in lieu of interest. Subsequently the plaintiffs sued for possession of the lands on the ground that no interest in the lands had passed to the defendants in the absence of a registered document:

Held, (1) that there was nothing in the Transfer of Property Act or the Registration Act to require a registered document for such a transfer of possession as was effected in this case, inasmuch as the transaction was not one of sale or mortgage requiring such an instrument under sections 54 and 59 of the Transfer of Property Act; [p. 134, col. 2.]

(2) that the defendants had a charge on the land and were entitled to retain possession thereof until the charge was paid off, and in the meantime to take the rents and profits in lieu of interest as arranged at the time when they were put into possession; [p. 134, col. 1.]

(3) that from another point of view the defendants might be regarded as having received authority from the plaintiffs to manage the lands and to receive the rents and profits in lieu of interest, and as such authority was given to them in consideration of the loan to the plaintiffs, the authority could not be terminated under section 202, Indian Contract Act, until the loan was repaid. [p. 134, col. 2.]

Mr. *N. N. Burjorji*, for the Appellants.

Mr. *Higinbotham*, for the Respondents.

JUDGMENT.—The plaintiffs claim to recover certain paddy lands of which they are the original owners and which are now in the possession of the defendants. The plaint alleges that "the defendants purported to claim the said paddy lands by reason of fraudulent transfer on the 24th March 1909 from the plaintiffs, which came to the plaintiffs' knowledge on the 31st May 1915." The plaintiffs, admit that they mortgaged these lands to a Chetty by depositing the title-deeds with the Chetty in 1905 and that they afterwards made over the lands to the Chetty, agreeing that he

should work the lands and pay the land revenue and keep any surplus of the produce of the lands. The defendants' case was that they had paid off the debt to the Chetty at the plaintiffs' request, that the promissory notes in favour of the Chetty were thereupon made over to the defendants, that the title-deeds of the lands in suit had also been transferred to the defendants and that the lands were made over to the defendants with the plaintiffs' consent, the arrangement being that the defendants in succession to the Chetty should take the rents and profits of the lands in lieu of interest.

The District Court found that the plaintiff had failed to make out his case and accepted the defendants' account of the manner in which they had become possessed of the lands. The Divisional Court concurred in the findings of the District Court. It is not suggested that these findings of fact should be disturbed in second appeal. The argument of the learned Counsel for the plaintiff-appellant has been directed only to the question whether the defendants, being equitable mortgagees who are in possession of the mortgaged property with the consent of the mortgagors, can resist the plaintiffs' suit for possession on the ground that no interest in the lands has passed to the defendants in the absence of a registered document.

Assuming that a mortgagee by deposit of title-deeds is not entitled to possession, it does not follow that when such a mortgagee has been put into possession of the mortgaged property by or with the consent of the mortgagor he can be required to give it up before the mortgage-debt is satisfied. The defendants have a charge on the land, and are entitled to retain possession thereof until the charge is paid off and in the meantime to take the rents and profits in lieu of interest as arranged at the time when they were put into possession. This undoubtedly was the intention of the parties. If the mere putting of the defendants into possession in such circumstances does not give them the right to retain possession until payment, there must have been an implied promise that the plaintiffs would execute the legal documents necessary to give effect to such intention. The defendants would still have the right to sue for specific performance of that agreement, and, therefore, under the authority of the Calcutta case *Akbar Fakir* v. *Intail Sayal* (1), the plaintiffs would not be entitled to recover possession.

From another point of view the defendants may be regarded as having received authority from the plaintiffs to manage the lands and to receive the rents and profits in lieu of interest and as such authority was given to them in consideration of the loan to the plaintiffs, the authority could not be terminated under section 202, Indian Contract Act, until the loan is repaid.

It may be added that there is nothing in the Transfer of Property Act or the Registration Act to require a registered document for such a transfer of possession as was effected in this case, for the transaction was not one of sale or mortgage requiring such an instrument under sections 54 and 59 of the Transfer of Property Act. As the plaintiffs did not sue to redeem their mortgage and even denied the existence of any mortgage to the defendants, they are not entitled to a decree for redemption in this suit. On the grounds stated above, we decide that the plaintiffs are not entitled to recover possession of the lands. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 29 Ind. Cas. 707.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2851 OF 1916.

May 17, 1918.

Present:—Mr. Justice N. R. Chatterjea and Justice Sir Shamsul Huda, Kt.

PRAN KRISHNA NATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOHESH CHANDRA CHOUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Kabuliyat *fixing rent at certain amount of paddy or in default certain sum of money—Landlord, whether can recover price of paddy.*

PRAN KRISHNA NATH *v.* MOHESH CHANDRA CHOUDHURY.

Where a registered *patta* by which a tenancy was created provided that 52 *aris* of paddy would be delivered by the tenant every year as rent and on default of delivery of the paddy fixed the paddy, or its price Rs. 15 would be realised according to law with costs and interest:

Held, that under the terms of the *patta* the landlord was not entitled to recover more than Rs. 15 as the price of the paddy in case of its non-delivery. [p. 136, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Chittagong, dated the 30th of August 1916, modifying that of the Officiating Munsif, Additional Court at Patiya, dated the 14th of January 1916.

FACTS material to the report will appear from the following judgment of the lower Appellate Court :—

"This appeal has been preferred by the plaintiff against the decree in a rent suit, and the point for determination is what is the yearly rent payable by the defendant to the plaintiff.

"The tenancy of the rent sued for was created under the registered *patta* Exhibit A of 18th Chaitra, 1232 M. E., granted to the defendant's father, Dataram. Reading the above *patta*, it appears that the intention was to make over 52 *aris* of paddy as yearly rent. In one portion of the *patta* there was a stipulation that in default of delivery of the paddy fixed the paddy, or its price Rs. 15, would be realized according to law with costs and interest. The Court below has held, on the authority of the decision reported as *Afar* v. *Surja Kumar Ghose* (1), that in default of delivery of paddy, the plaintiffs can recover rent only at Rs. 15 per year and that paddy or its market price in case delivery cannot be had cannot be recovered. The decisions bearing on the point are conflicting [*vide Akbar Ali* v. *Durga Kripa Sen* (2) and *Sheik Isaf* v. *Gopal Chandra Dey* (3)]. There cannot, however, be any doubt that effect should be given to the intention of the parties and that what the intention was must be gathered in this case from the wording of the lease Exhibit A. In the heading of Exhibit A it is stated that paddy rent is payable at 52 *aris* and this is followed by a statement of instalments to the effect :—'On the 25th Poush 52 *aris* of paddy'. Details of the paddy to be delivered are also specified separately at the foot and there also the total quantity mentioned is 13 and 39 and 52 *aris*. In the body of Exhibit A it is mentioned that the lease is granted in settlement of *bagi* paddy as above mentioned, that is 52 *aris* of paddy, and that *bagi* paddy would be delivered each year as stated in the schedule, in which the quantity of paddy to be made over to each lessor is mentioned 'Jama *bagi* paddy 52 *aris* or its price Rs. 15,' and there is a stipulation to which reference has been made in the first part of this judgment. I think the intention was to make over 52 *aris* of paddy each year and that the main agreement to make over the above quantity of paddy as rent in kind is not affected by the statement as to its price, either in the margin or in one portion of Exhibit A. For the above reasons I find that the yearly rent payable by the defendants is 52 *aris* of paddy and that the plaintiffs are entitled to recover rents in kind at the above rate. In case delivery of paddy cannot be had, the plaintiffs are entitled to recover its price at the market rate and that rate is found to be 2 *aris* per rupee. It may be added that in the Record of Rights published in March 1896 the yearly rent payable was mentioned as 52 *aris* of paddy and its price was mentioned as Rs. 13, probably because paddy sold then at 4 *aris* per rupee (*vide* Exhibit 1). It shows that Rs. 15 was not the yearly rent. The point for determination is found in favour of the appellant and it is ordered that the appeal be allowed, the decree of the Court below be modified and the plaintiff's suit be decreed for recovery of rent in kind at 52 *aris* of paddy per year for the years in suit and damages at $12\frac{1}{2}$ Rs., that is for recovery of 234 *aris* of paddy in all, and costs of both the Courts and interest at 6 per cent. per annum. In case delivery of paddy cannot be had its price will be recovered at 2 *aris* per rupee, that is, the plaintiff will recover Rs. 117 and costs of both Courts and interest at 6 per cent. per annum. The defendants shall bear their own costs."

Babu *Nitish Chandra Lahiri* (with him Babu *Probodh Kumar Das* and *Apurba Chandra Mookerjee*), for the Appellants.—The plaintiffs-landlords brought

(1) 7 Ind. Cas. 842; 12 C. L. J. 649; 15 C. W. N. 249.

(2) 8 Ind. Cas. 944; 12 C. L. J. 589.

(3) 8 Ind. Cas. 896; 12 C. L. J. 593.

a suit against the defendants (tenants) for recovery of rent at the rate of 52 *aris* of paddy per year, on the strength of a registered *patta*. The plaintiffs fixed the value of the paddy at the then current market price. The defendants said that in case of default, they were not bound to pay the price according to the market rate, but according to the price fixed in the *pattah*, *i.e.*, Rs. 15 only.

In the first Court the plea of the defendants was accepted and it was held, on the basis of the lease and on the authority of *Afar* v. *Surja Kumar Ghose* (1), that the defendants were liable to pay only according to the terms stated in the *patta*, *i.e.*, Rs. 15.

The Subordinate Judge in appeal has modified the judgment and decree of the learned Munsif, holding that the authorities on the subject are conflicting, *e.g.*, *Afar* v. *Surja Kumar Ghose* (1) is at variance with *Sheik Isaf* v. *Gopal Chandra Dey* (3) and *Akbar Ali* v. *Durga Kripa Sen* (2). He has also held that the intention of the parties was to settle 52 *aris* of paddy as annual rent and in default the payment of its price at the current market rate. Accordingly he has decreed the appeal. The main provision of the lease is "you shall pay the aforesaid paddy rent year after year, according to the instalments mentioned below. If you do not pay and keep it in arrears, you shall not raise any objection to the realisation of the arrears (by means of the law in existence and such laws as may come into force) of the said paddy rent, or in default its price Rs. 15 and the costs of the suit and interest."

In the schedule of instalments, in the *patta*, only 52 *aris* were mentioned and in the heading the same fact. But in the margin, the rent annually payable was Rs. 15, that stated in the lease.

My submission is that the lease has been misconstrued by the lower Appellate Court. It ought not to have relied upon the things stated either in the schedule or heading of the lease without any reference to the provisions in the body of the lease, which clearly stipulated the payment of 52 *aris* or Rs. 15 in default. The intention of the parties to any deed can only be gathered by reading the whole lease and not any fragmentary part thereof.

Further, the cases on the subject were decisive. *Nilmadhab Mahapatra* v. *Keshab Lal Mahapatra* (4) is the latest case upon the subject. The presumption of the Record of Rights has been rebutted by the registered *patta*.

Babu *Khitish Chandra Sen*, for the Respondents, argued that the intention of the parties was to pay 52 *aris* or the price thereof at the current market rate, otherwise much hardship would occur to the landlord.

Moreover, the Record of Rights showed that money rent payable was Rs. 13, not Rs. 15. This shows that Rs. 15 stated in the *patta* did not represent the rent payable but the price of the paddy at the then market rate. The dominant intention was to get the paddy as rent and not a certain sum of money. No doubt the cases on the point are conflicting, see *Akbar Ali* v. *Durga Kripa Sen* (2) and *Sheik Isaf* v. *Gopal Chandra Dey* (3), but each case must be decided on its own facts and on the intention of the parties to be gathered from the instrument.

Babu *Nitish Chandra Lahiri* briefly replied.

JUDGMENT.—The only question raised in this appeal is, whether the plaintiff can claim the price of paddy stipulated to be paid at the market rate, or only the price of the paddy as mentioned in the Kabuliyat.

This turns upon the construction of the Kabuliyat; and as we construe it, we think the tenant agreed to pay 52 *aris* of paddy and on default to pay Rs. 15 as the price thereof. The price of the paddy, therefore, was fixed by the parties in the document. We are accordingly of opinion that under the terms of the Kabuliyat the plaintiff is not entitled to get anything more than Rs. 15 as the price of the paddy.

The decree of the lower Court must accordingly be set aside and that of the first Court restored. We make no order as to costs.

Appeal allowed.

(4) 40 Ind. Cas. 819; 26 C. L. J. 94.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 192 OF 1917.

April 16, 1918.

Present :—Mr. Lindsay, J. C.

RAMESHWAR DAYAL AND ANOTHER—DEFENDANTS—APPLICANTS

versus

GUR SAHAI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (*Act V of* 1908), *s.* 151—*Revival of suit—Inherent power of Court—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 181—*Revival application—Limitation, commencement of.*

During the pendency of a pre-emption suit the plaintiff lost his title to the property which qualified him for the exercise of the right of pre-emption, by virtue of a decree passed against him in another suit, and he filed an appeal from that decree. The Court trying the pre-emption suit thereupon dismissed it as not maintainable, but remarked in its judgment that if the plaintiff's appeal in the other suit was accepted, he might apply for revival of the pre-emption suit. The plaintiff won his appeal and within three years he applied under section 151, Civil Procedure Code, to the Court, which had decided the pre-emption suit, for its revival. The Court allowed the application:

Held, (1) that the Court had inherent power under section 151, Civil Procedure Code, to revive the suit; [p. 138, col. 1.]

(2) that the original order passed by the Court in the pre-emption suit was not the proper order to be passed in the circumstances, and that the proper course for the Court would have been to stay the proceedings until the pre-emptor had an opportunity of getting the decision of the Appellate Court on the question of title under which he was claiming pre-emption; [p. 138, col. 1.]

(3) that the application was governed by Article 181, Schedule I of the Limitation Act, and was, therefore, within time. [p. 138, col. 2.]

Revision against the order of the Subordinate Judge, Hardoi, dated the 17th September 1917.

Babu *Rudra Dat Singh*, for the Applicants.

Pandit *Harkaran Nath Misra*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed by the Subordinate Judge of Hardoi on the 17th of September last. The facts of the case are somewhat peculiar. It appears that in the year 1911 the opposite party Gur Sahai filed a suit for pre-emption in the Court of the Subordinate Judge of Hardoi. The two applicants in the present case were defendants in that suit, being the purchasers of the property sought to be pre-empted. The case came up for trial in the Court at Hardoi, and one of the issues which was raised on the pleadings was whether or not the suit was maintainable.

The plea of the defendants was that Gur Sahai could not maintain the suit on the ground that he was not a co-sharer in the village in which the property was situated. It seems that Gur Sahai's claim to be a co-sharer in this village was based upon his relationship to one Data Ram, who died leaving two widows. The last of these two widows died in the year 1906 and Gur Sahai who was the nephew of Data Ram took possession after the death of the last widow. Then one Nand Kishore came upon the scene. He brought a suit against Gur Sahai for possession of this property. This suit was brought in the year 1910 and was decreed in the Court of first instance on the 31st of October 1911, so that at the time when this suit for pre-emption was pending before the Subordinate Judge, the state of things was that the plaintiff Gur Sahai had lost his title to the property which qualified him for the exercise of the right of pre-emption. Gur Sahai had filed an appeal before this Court and that appeal was pending when the pre-emption suit was decided on the 5th of December 1911. The Subordinate Judge held that the suit was not maintainable and the concluding words of his judgment are as follows:—"At this moment the plaintiff owns no share and he cannot, therefore, sue for pre-emption. If his appeal is accepted he may apply for the revival of this suit, if he is so advised." Later on, that is to say, on the 24th of October 1913, Gur Sahai won his appeal in this Court and the result of the decree was that his title to the property was established from the beginning, in other words, it was held that he was the rightful heir of Data Ram who was entitled to succeed to possession of this property after the death of Data Ram's widows. Gur Sahai, having obtained this decree in his favour, might I think very well have gone at once to the Court of the Subordinate Judge and applied for revival of the suit as had been suggested to him. However, he held back for nearly three years and it was not till the 15th of September 1916, that he went to the Court at Hardoi and asked for the old suit to be revived. This application

purported to be one under section 151 of the Code of Civil Procedure. The right of Gur Sahai to make this application was contested on a variety of grounds. Eventually the Subordinate Judge decided that it was a case for the exercise of the inherent powers of the Court specified in section 151.

The defendants now come in revision and the ground is taken that the Subordinate Judge had no jurisdiction to make this order. I think that argument cannot be maintained. It seems clear to me that a wide power is conferred upon Courts by section 151, and it has been held by a Bench of the Allahabad High Court in the case referred to in the judgment of the Court below, *Bhagwan Dayal* v. *Param Sukh Dass* (1), that under section 151 the Courts have inherent power to revive suits. It is clear enough to me that the order which was passed by the Subordinate Judge on the 5th of December 1911, by which he dismissed the plaintiff's suit, was not the proper order to be passed in the circumstances. I do not go the length of saying that it was an absolutely illegal order, but clearly in the interests of justice the proper course was to stay the proceedings until Gur Sahai had an opportunity of getting the decision of this Court on the question of the title under which he was claiming pre-emption. However, the Subordinate Judge did not take that course. He dismissed the suit, at the same time giving the plaintiff the assurance that if he won his case in the Judicial Commissioner's Court he would be entitled to apply for revival. In the circumstances I think it is not to be denied that a great injustice would be caused to Gur Sahai if he were not allowed to go on with this suit. The only ground upon which it can be urged that this relief should be denied to him is that he has been guilty of great delay in making the application.

There is some force in this argument, for there is, so far as I can see, no reasonable explanation of the fact why Gur Sahai waited from the 24th of October 1913 till the 15th of September 1916 for the purpose of filing the application to have the suit revived. On the other hand it would be difficult to say that the application was liable to be dismissed on the ground that it was barred by time, for as pointed out by the Counsel for the opposite party an application of his kind would seem to be governed by Article 181 of the Schedule of the Limitation Act, and so it would appear that Gur Sahai had three years from the 24th of October 1913 to file the application. The application was admittedly filed within three years from that date.

On the whole I have come to the conclusion that this application should be dismissed. I think the argument that the lower Court had no jurisdiction to make the order cannot be maintained: on the contrary, I think, there was jurisdiction under section 151 of the Code.

As regards the other plea, namely, the delay in the presentation of the application, I am not prepared to say that it was barred by any Article of the Schedule to the Limitation Act and I should not feel justified in interfering with the order of the Court below merely upon the consideration that Gur Sahai was guilty of delay in moving the Court.

The application fails and is dismissed with costs.

Application dismissed.

(1) 36 Ind. Cas. 366; 39 A. 8; 14 A. L. J. 818.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 895 OF 1917.

March 4, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

Sheik SAMIR—PLAINTIFF—PETITIONER

versus

Sheik SYED ALI AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Contract Act (IX of 1872), s. 23—Public policy—Contract to engage dancing boy for a certain price, whether opposed to public policy.

The plaintiff engaged the services of a dancing and singing boy for a certain period. He next contracted with the defendant that for a monthly payment of a certain sum the boy should give exhibitions in accordance with arrangements made by the defendant. The defendant employed the boy for a period of one month and twenty four days but refused to make any payment to the plaintiff:

Held, that the contract between the plaintiff and the defendant was not contrary to public policy and

that the defendant was bound to pay to the plaintiff at the contract rate.

Rule against the order of the Munsif, 1st Court, Netrakona, exercising powers of a Court of Small Causes, dated the 20th August 1917.

FACTS appear from the judgment.

Babu *Annoda Charan Karkoon*, for the Petitioner.—This Rule was obtained on behalf of the plaintiff in a Small Cause Court suit. The suit has been dismissed on the ground that it is based on a contract to hire a boy for dancing and singing and that such a contract is not enforceable because it is illegal and opposed to public policy. There is not a bit of evidence on the record to show that the boy in question was hired for immoral or illegal purposes, and so the judgment of the Small Cause Court Judge cannot stand

Babu *Birendra Kumar De*, for the Opposite Party.—The contract is, on the face of it, for some immoral purposes and so having regard to the provisions of section 23 of the Indian Contract Act it cannot be enforced in a Court of Law. The evidence on the record goes to show that boys are treated as articles of commerce and they are let on hire to young men of low morals. If the object of the contract is immoral and illegal, the plaintiff cannot get any relief on the basis of the contract. The Court below has rightly proceeded upon the view that the contract is not enforceable because it is opposed to public policy.

Babu *Annoda Charan Karkoon*, in reply.—When the object of the contract has not been proved to be illegal and immoral, the Court below was not right in dismissing the suit on such a supposition.

JUDGMENT.—This Rule is directed against an order by which on the 20th of August 1917 the Munsif of Netrakona, exercising Small Cause Court powers, dismissed a suit brought by the plaintiff-petitioner.

It appears that the plaintiff engaged the services of a "Ghatu", or dancing and singing boy, for a period of 3 months at Rs 35 a month. He next contracted with the principal defendant that for one month for a payment of Rs. 45 the boy should give exhibitions in accordance with arrangements made by the defendants. The defendants in fact detained the boy for a period of 1 month and 24 days. After crediting a payment of Rs. 6 the plaintiff now sues the defendants to recover a sum of Rs. 76-8-0 at the agreed rate of Rs. 45 a month.

The Small Cause Court Judge finds all the facts in favour of the plaintiff, but dismisses the suit on the ground that the contract between the plaintiff and the defendants was contrary to public policy. In coming to this conclusion he appears to have been influenced by some suspicion that the employment of the boy was connected with immoral practices. But of any such user there is no evidence. There is further no suggestion that the engagement with the defendant or defendants was contrary to the wishes of either the boy or his parents. The plaintiff was then in the position of an impresario, and the contract having been fulfilled the defendant must pay the sum he agreed to pay in consideration of the artiste's services.

The order of the Small Cause Court Judge is, therefore, set aside, and the plaintiff's claim decreed against both defendants, with costs in the Court below and the costs of this Rule; the hearing fee we assess at one gold *mohur*.

Order set aside.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 186 OF 1916.

January 22, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

SAN PE AND OTHERS—APPELLANTS

versus

MA SHWE ZIN AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Succession—Suit by step-children for share in property of step-father, maintainability of—Thinthi *property—Limitation Act (IX of 1908), Sch. I, Art.* 123.

It is only where a step-father dies leaving no natural issue and no widow surviving him that the children of his deceased wife by a former husband

are entitled to his property under sections 294 and 295 of the Digest. [p. 141, col. 1.]

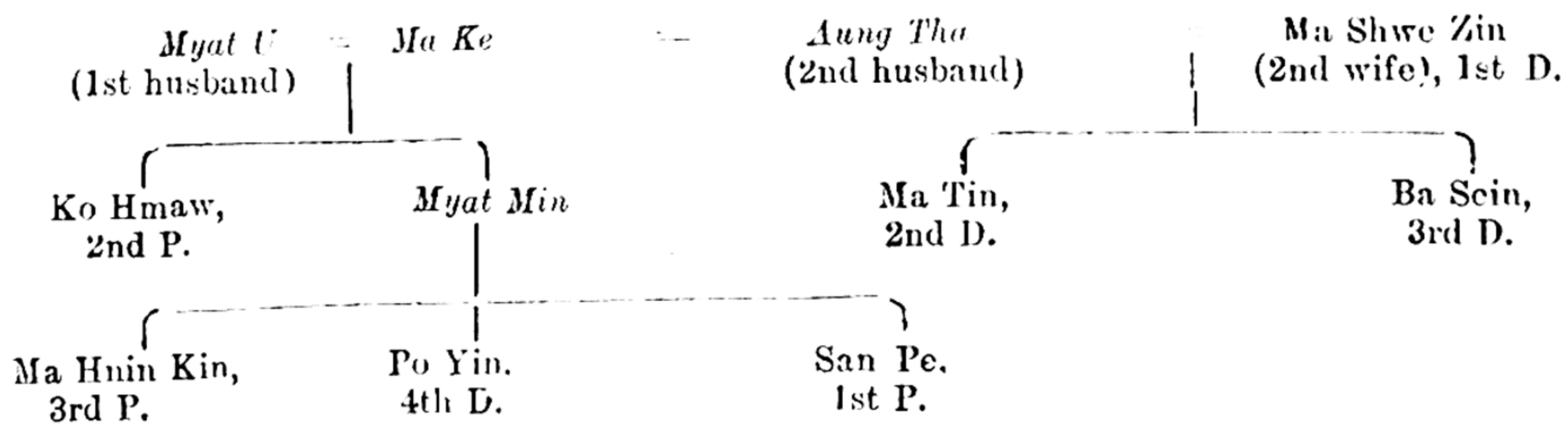
According to the ordinary rule for partition between a step-father and step-children, the latter can, immediately on their mother's death, claim a share of the property acquired jointly by their mother and step-father during their marriage, so that such a claim, if not made within 12 years of their mother's death, would be barred under Article 123 of Schedule I of the Limitation Act. [p. 141, col. 1.]

In respect of their mother's *thinthi* property, however, the claim can be made by the step-children even on the subsequent happening of their step-father's death. [p. 141, col. 1.]

Mg. *Kyaw Htoon*, for the Appellants.

Mr. *J. E. Lambert*, for the Respondents.

JUDGMENT.—This is a suit for a share of inheritance brought by the descendants of one Ma Ke against the widow and two surviving children of Ma Ke's second husband Maung Aung Tha, deceased. The relationship of the parties is shown in the following genealogical table :—



The persons whose names are italicized are dead. Ma Ke by her first husband Myat U had issue Ko Hmaw, 2nd plaintiff, and Myat Min, deceased. Myat Min left three children surviving him, 1st plaintiff San Pe, 3rd plaintiff Ma Hnin Kin and 4th defendant Po Yin, who was put in as a defendant because he refused to join as a plaintiff. Ma Ke's first husband Myat U died about 25 years before the suit and after his death Ma Ke married Aung Tha, by whom she had no issue. About 20 years before the suit she died and Aung Tha who survived her married as a second wife the 1st defendant Ma Shwe Zin, by whom he had issue Ma Tin, 2nd defendant, and Ba Sein, 3rd defendant. Aung Tha died in 1914. The suit by the descendants of Ma Ke's first marriage against Aung Tha's widow and children was for a share of (*a*) the jointly acquired property of Aung Tha's marriage with Ma Ke and (*b*) the property acquired by Aung Tha and Ma Shwe Zin during their marriage. It is not alleged that Ma Ke or Aung Tha brought any property to their marriage. A further claim was made that Ma Ke's grandson San Pe, 1st plaintiff, had been adopted by Aung Tha and Ma Ke as their *kittima* son.

The District Court held that the adoption of San Pe was not established and, though one of the grounds of appeal to this Court is that the District Court's decision on this point was wrong, the learned Counsel for the plaintiffs-appellants expressly waived this ground at the hearing.

As regards the remainder of the plaintiffs' claim the District Court found that the plaintiffs could not recover any part of the property jointly acquired by Ma Ke and Aung Tha during their marriage, because their suit was barred by limitation under Article 123 of the Limitation Act, more than 12 years having elapsed from the date of Ma Ke's death on the occurence of which the cause of action arose. The District Judge further held that there was no authority for giving the plaintiffs a share in the property left by Aung Tha, as Aung Tha left a widow and children surviving him.

As regards the property acquired by Aung Tha and Ma Shwe Zin jointly there can be no doubt as to the correctness of the District Judge's finding. I

is only when the surviving step-parent dies leaving no natural issue and no widow surviving him that the children of the step-parent's deceased wife by a former husband are entitled to the step parent's property under the Digest, sections 294 and 295. Thus it is only if Aung Tha had died without remarrying that the plaintiffs could have come in as his heirs under these sections.

We have to consider, however, whether the District Judge's decision is correct also as regards the property brought by Aung Tha to his marriage with Ma Shwe Zin. That property would presumably be, for some part at any rate, property acquired jointly by him and Ma Ke during his first marriage. The plaintiffs no doubt were at liberty to claim a share of this property at once after Ma Ke's death, according to the ordinary rule for partition between step-father and step-children (*see* section 211 of the Digest). They could have done so at any time within 12 years from the date of their mother's death but they failed to do so. The question is whether the Burmese law of inheritance allows them to claim the same or a smaller share of that property on the subsequent happening of their step-father's death. The texts from *Panam*, *Pyu* and *Sonda* in sections 216 and 222 of the Digest indicate that the step-children can claim, even at that late stage, their mother's property, if any, which was taken by the step-father to his subsequent marriage. But according to the *Panam* text, the claim could be only in respect of property which had been brought by the deceased widow (*i.e.*, in this case Ma Ke) to her second marriage, and the text expressly relates only to cases where the step father has no issue by his subsequent marriage. It must be held that the texts in sections 216 and 222 relate only to the mother's *thinthi* property, if any. As already noted, it is not claimed in this case that Ma Ke brought any such property to her marriage with Aung Tha.

We, therefore, find that the suit was rightly dismissed and we dismiss the appeal against 1st, 2nd and 3rd respondents with costs.

As the appellants were allowed to appeal as paupers, we further direct the plaintiffs appellants to pay the Court-fees on the memorandum of appeal which would have been paid by the plaintiffs appellants if they had not been permitted to appeal as paupers.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 56 OF 1918.

CIVIL REVISION NO. 46 OF 1918.

July 12, 1918.

Present:—Mr. Justice Mullick and Justice Sir Ali Imam, KT.

TEJU BHAGAT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DEOKI NANDAN PROSAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XLI, r. 27—Res judicata—*Litigating under same title —Suit for recovery of money on promissory note—Malicious prosecution—Cause of action—Appeal—Additional evidence, when can be taken—Appellate Court, power of.*

Plaintiff brought a suit against defendant for recovery of money on the basis of a promissory note. The suit was dismissed and the pro-note was found to be not genuine. Defendant then prosecuted plaintiff for forgery but the plaintiff was acquitted. He thereupon brought a suit for damages for malicious prosecution:

Held, that the finding as to the genuineness of the pro-note in the previous suit was not *res judicata* in the suit for malicious prosecution, inasmuch as the plaintiff was not litigating under the same title in both the suits. [p. 143, col. 1.]

It is not open to a Court of Appeal to order additional evidence to be taken except to cure an inherent defect in the evidence already recorded. [p. 143, col. 1.]

Appeal from a decision of the District Judge, Patna.

Mr. *D. N. Sarkar* (with him Messrs. *Asghar* and *Harihar Prashad Sinha*), for the Appellants.

Messrs. *P. C. Manuk* and *Rajendra Prosad*, for the Respondent.

TEJU BHAGAT *v.* DEOKI NANDAN PROSAD.

JUDGMENT.

MCLLICK, J.—On the 8th August 1912, the plaintiff brought a suit upon a hand-note alleging that defendant No. 2 had executed that hand-note on behalf of himself and defendant No. 1. The suit was dismissed on the 10th March 1913. There was then an appeal which met with a like fate on the 11th July 1913. The defendant No. 2 thereupon applied for sanction to prosecute the plaintiff for bringing a false suit. Sanction was granted by the Subordinate Judge on the 13th December 1913. There was an appeal against that order to the District Judge and a revision application to the High Court. The order, however, was affirmed, with the result that the plaintiff was committed for trial to the Court of Session on a charge of forgery in respect of the hand-note. The plaintiff, however, was acquitted by the Sessions Court on the 17th September 1914. He thereupon in 1915 instituted a suit against defendants Nos. 1 and 2 claiming damages for malicious prosecution. The Subordinate Judge dismissed the suit. There was then an appeal to the District Judge who has remanded it for further evidence.

It appears that in the Court of the Subordinate Judge the plaintiff applied for permission to call Mr. Hardless, the hand-writing expert, to prove that the hand-note was signed by defendant No. 2. The Subordinate Judge held that the question as to the genuineness of the hand-note was *res judicata* as between the parties and, therefore, could not be re-opened in the suit for malicious prosecution. He accordingly disallowed the prayer for the examination of Mr. Hardless. There was another prayer before the District Judge in regard to an item of evidence which had come into existence since the dismissal of the suit by the Subordinate Judge. That item of evidence consists of an admission which is alleged to have been made by defendant No. 2 in another suit admitting that the hand-note was genuine. The District Judge held that in the interests of justice and equity the plaintiff should be allowed in the enquiry after remand to adduce evidence as to this alleged admission. The matter now comes before us in appeal against the order of the District Judge remanding the case.

Now the objection as to the power of the District Judge to order a remand and to direct further evidence to be taken has not been pressed before us by the learned Vakil for the appellant. He has directed the weight of his attack against the learned District Judge's finding on the point of *res judicata*.

The learned Vakil contends that the finding at the original trial regarding the genuineness of the hand note was a finding upon a question substantially in issue between the parties litigating under the same title and, therefore, it is not competent to the plaintiff to go behind that finding in the suit for malicious prosecution. The whole point depends on the question whether or not the parties were litigating under the same title. Was the suit for money against defendants Nos. 1 and 2 a suit in which the title of the plaintiff was the same as it was in the suit for malicious prosecution? In my opinion it was not. In the former suit the plaintiff was claiming as a creditor for money lent, and the question of the genuineness of the hand-note was incidental and even if the hand-note had been proved to be a forgery, the plaintiff would have been successful if he could have proved the debt otherwise. In the suit for malicious prosecution the cause of action was the false charge brought by the defendants against the plaintiff and the circumstance that the defendants had put the criminal law into motion against the plaintiff so as to bring about his trial before the Sessions Judge. How can it be said that in the two cases the plaintiff was litigating under the same title? The case of *Fitzjohn* v. *Mackinder* (1) is authority for the proposition that the suit is maintainable even though the prosecution was brought about on sanction obtained from a Court, but it is also authority for the further proposition that the cause of action is not the same in the two suits and that the suit for malicious prosecution is in no way based upon perjury committed

(1) (1861) 9 C. B. (N. S.) 505; 30 L. J. C. P. 257; 4 L. T. 149; 7 Jur. (N. S.) 1283; 9 W. R. 477; 142 E. R. 199; 127 R. R. 746.

in the original trial. The concluding portion of the judgment of Lord Cockburn makes this quite clear. His Lordship observes with regard to the argument that the action could not be maintained inasmuch as it was founded upon the perjury committed in the original trial as follows:—"The short answer is, that this is neither in form nor substance an action in respect of the perjury committed by the defendant to the plaintiff's damage. It is an action for preferring an indictment and carrying on a prosecution against the plaintiff on a charge which the defendant knew to be untrue, and which he knew could only be supported by perjured testimony. The perjury only comes incidentally into question as shewing that the whole proceeding was malicious and destitute of any pretence of probable cause".

In my opinion the suit for malicious prosecution was not founded upon the hand-note and, therefore, the question of the genuineness of the hand-note is a matter only incidentally in issue in this case. The finding as to the genuineness of the hand-note in the previous suit is, therefore, not *res judicata*.

Then as regards the question of the admissibility of the additional evidence in the shape of the admission, I think the learned Vakil for the appellant must succeed. This admission was made after the original trial and upon the accepted principle that it is not open to a Court of Appeal to order additional evidence to be taken except to cure an inherent defect or *lacuna* in the evidence already recorded, it seems to me that this additional evidence ought not to be allowed to go in. The learned Vakil for the respondents urges that the powers of an Appellate Court are very wide and in every case where it thinks additional evidence is necessary in the interests of justice it is open to it to order that additional evidence be received, no matter at what stage that additional evidence came into existence. In my opinion this is too wide an interpretation of Order XLI of the Civil Procedure Code and I prefer to interpret the decision of their Lordships of the Privy Council in this matter more strictly than their Lordships of the Madras High Court.

The learned District Judge's order, therefore, allowing this admission to go in will be set aside, but his order of remand will be affirmed and it will be open to the plaintiff to prove that the hand-note was a genuine document. The appeal is decreed in this modified manner. As both the parties have succeeded to a certain extent there will be no costs. The application for revision in Civil Revision No. 45 of 1918 is also dismissed.

IMAM, J. —I agree.

Appeal partly allowed;
Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 251 OF 1917.

June 10, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

SYAM CHAND MAITI—JUDGMENT-DEBTOR—APPELLANT

versus

BAIKUNTHA NATH MANDAL AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Mortgage, suit on—Decree absolute made on barred application, whether can be challenged in execution—Civil Procedure Code (Act V of 1908), s. 48, applicability of, to execution proceedings in mortgage suit which was pending at the date of coming into force of the Code.

A decree absolute in a mortgage suit made by a Court in the presence of both parties and on proper adjudication cannot be challenged in execution on the ground that the Court ought not to have made the decree absolute inasmuch as the application for it was barred by limitation. [p. 144, col. 2.]

The mere fact of the coming into force of the new Code of Civil Procedure pending a suit on a mortgage does not make the new section 48 applicable to proceedings in execution of the decree in that suit. [p. 145, col. 1.]

Appeal against the order of the District Judge, Midnapur, dated the 15th May 1917, reversing that of the Officiating Munsif, Midnapur, dated the 24th July 1916.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Jyotish Chandra Hazrah*), for the Appellant.—The appeal arises out of an appli-

SYAM CHAND MAITI v. BAIKUNTHA NATH MANDAL.

cation in execution of a mortgage decree. On 14th May 1902 two persons Ramanath and Baikuntha obtained a decree *nisi* against the present appellant. That decree was affirmed in appeal to the High Court on 19th August 1904. The application for order absolute was not made till 5th July 1913. When that application for order absolute was made, the present appellant put objections, namely, (1) the plea of payment and (2) limitation, *i. e.*, that the application was barred by time. The Court decided the question of the plea of payment against the present appellant, but did not decide the question of limitation. On 28th January 1916 the judgment-debtor, the present appellant, put in an application contending that the application for execution was barred by reason of section 48, Civil Procedure Code, the decree not having been executed within 12 years from the date of the decree *nisi*. The present appellant raised that objection when the application for decree absolute was made, but the Court did not decide that objection. My client is, therefore, entitled to raise the same objection, it is not *res judicata*. When there is no adjudication, it is open to the party to raise the same objection. *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and also an unreported decision in Civil Rule No. 76 of 1918 relied on.

[FLETCHER, J.—In that case attachment was not issued and only substitution order was made, and the lower Court refused to go into the question of limitation.]

Mere passing of an order directing order aboslute does not preclude me from raising the question of limitation.

The decree is barred by section 48 of the Civil Procedure Code. The question is whether the decree can be executed or not.

[FLETCHER, J.—The new Code does not affect the matter at all.]

Babu *Khetra Mohan Ghose*, for the Respondent, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by a judgment-debtor against the decision of the learned District Judge of Midnapur, dated the 15th May 1917, reversing the decision of the Officiating Munsif of the same place. The two mortgagees obtained a preliminary mortgage decree against the appellant. The decree of the Court of first instance was dated the 14th May 1902, and that decree was on appeal confirmed by this Court on the 19th August 1904. Subsequently, on the 5th July 1913, the order absolute was made under the terms of the Transfer of Property Act. The present appellant appeared in that application to make the decree absolute and he is stated to have raised two grounds, namely, of payment and limitation. As the law was then understood according to the current of decisions of this Court at that time, there was no period limited to make an order absolute in a foreclosure suit under the terms of the Transfer of Property Act. Those decisions have subsequently been dissented from by the Privy Council. What happened in this case was this: The Court held that there was no payment made by the appellant and apparently it did not give a decision on the question of limitation, because presumably the gentleman who conducted the case, recognising the existing current of decisions of this Court, did not press and argue the point. However, the order absolute was made and now in execution Dr. Mitter, who appears for the judgment-debtor appellant, says that he is entitled to question the fact that the order absolute was not properly made and to urge that the Court ought not to have made the order because the application to make the decree absolute was barred by limitation. I do not agree with that view at all. It seems to be altogether a novel view that an order of the Court made in the presence of both parties and on a proper adjudication should in execution be challenged and that it should be said that the Court had no jurisdiction to make the order, on the ground that the application for making the decree absolute was barred by limitation. As a matter of fact, the Court had ample jurisdiction to come to the conclusion that the case was not barred by limitation. It is said that because the Court did not, in fact, decide that the application was not barred by limitation, therefore, the question is open in execution. There seem to be two answers to that. *First* of all, it is quite clear that this

(1) 8 C. 51 at p. 59; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

point was not pressed. *Secondly*, even it was pressed, the order is conclusive. The case is altogether unsupported by authority. Moreover, the order absolute cannot be challenged in execution. The decision stated to support that proposition clearly does not support it.

Another point is raised that the present application for execution is barred under the provisions of section 48, Code of Civil Procedure. There is a short answer to that also, and that is this: This suit was brought under the provisions of the old Code of Civil Procedure to which the corresponding section to section 48 of the new Code did not apply, the proceedings being taken under the provisions of the Transfer of Property Act. It is quite clear that the mere fact of the coming into force of the new Code of Civil Procedure pending this suit does not make the new section 48 applicable to those proceedings in execution.

The present appeal, therefore, fails and must be dismissed with costs, one gold *mohur*.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 180 OF 1917.

February 19, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

VITHAL DHONDDEV RAIKAR—

PLAINTIFF—APPELLANT

versus

THE ALIBAG MUNICIPALITY—

DEFENDANT—RESPONDENT.

Bombay District Municipalities Act (III of 1901), s. 96—Application for permission to build privy—Permission granted—Subsequent order cancelling permission, legality of.

Plaintiff applied to the defendant Municipality on the 1st December 1913 for permission to build a privy on his own land, and the permission was granted by the Municipality on the 22nd of December. On the 8th of January 1914 the Municipality gave a notice to the plaintiff requiring him not to build the privy until a further order was made. The plaintiff thereupon brought a suit for a declaration that he had a right to construct the privy and also prayed for a perpetual injunction restraining the Municipality from preventing him from constructing the privy:

Held, that the order of the Municipality dated 22nd December 1913, granting permission to the plaintiff to build the privy, was a final order under subsection (2) of section 96 of the Bombay District Municipalities Act, and that the subsequent order of the Municipality was not justified under any section of the Act and was, therefore, illegal. [p. 146, cols. 1 & 2.]

Second appeal from the decision of the Assistant Judge at Thana, in Appeal No. 184 of 1915, reversing the decree passed by the Second Class Subordinate Judge at Alibag, in Civil Suit No. 393 of 1914.

Mr. *B. D. Desai*, for the Appellant.

Mr. *J. G. Rele*, for the Respondent.

JUDGMENT.

SHAH, J.—In this case the plaintiff applied to the Municipality of Alibag on the 1st of December 1913 for permission to build a privy on his own land. The permission was granted by the Municipality on the 22nd of December. On the 8th of January 1914 the Municipality gave a notice to the present plaintiff requiring him not to build the privy until a further order was made. The plaintiff gave notice to the Municipality on the 6th of June of the present action, and on the 7th of July 1914 filed the suit for the cancellation of the order of the Municipality dated the 8th of January 1914 based on a resolution of the Managing Committee of the 6th January and for a declaration that he had a right to construct the privy. He also prayed for a perpetual injunction restraining the defendant Municipality from preventing the plaintiff in the work of constructing the privy, and for damages.

The trial Court allowed the plaintiff's claim, holding that the second order was beyond the powers of the Municipality and that the permission granted on the 22nd of December was good. Accordingly, a decree was passed in favour of the plaintiff. The Municipality appealed from that decree. The learned Assistant Judge who heard the appeal came to the conclusion that the order of the 8th of January 1914 was within the powers of the Municipality and that it was binding upon the plaintiff. He was, however, of opinion that having regard to the preparation which the plaintiff had made by way of commencing the

work he was entitled to damages of Rs. 2. The decree of the trial Court was reversed on the main point and affirmed as to damages.

The present appeal is preferred by the plaintiff against that decree, and it is contended on behalf of the plaintiff that the second order made by the Municipality is *ultra vires*. It seems to me, on the facts of this case, that the first order made by the Municipality granting permission to the plaintiff to build the privy was a final order under sub section (2) of section 96 of the Bombay District Municipalities Act. The subsequent order which purports to be provisional in its character is not referable to sub-section (3) of that section. In the first place, it was not made within a month from the receipt of the notice given to the Municipality under sub section (1). Secondly, it did not purport to specify any period not exceeding a month. And indeed, from the omission of the Municipality to pass any further order after communicating this order to the plaintiff up to June 1914, it seems clear that though in form the second order was provisional in substance it was a cancellation of the permission already granted and practically a prohibition to the plaintiff against building the privy. But taking the order to be what it purports to be in form, it is clear that it is not covered by sub-section (3) because it is not a provisional order of the character contemplated by that sub-section. It was, in fact, made after the order granting the permission under sub-section (2). There is no other provision of the Act to which we have been referred on behalf of the Municipality as saving this order.

The only contention urged on behalf of the Municipality is that the powers of the Municipality under the Bombay District Municipalities Act are wide, and there is nothing in the Act to restrict its powers so as to make the order invalid. I am wholly unable to accept this argument.

In the absence of any power to cancel the permission once granted under sub-section (2) of section 96, I do not think that the order of the Municipality made on the 8th January 1914 is legal.

The view which I take of the powers of the Municipality is supported by the decision in *Kareem Ranjan Khoji* v. *Emperor* (1). The plaintiff, in my opinion, has succeeded in establishing that the second order of the Municipality is not binding upon him and that he is entitled to act under the permission which was granted to him before this order was made.

As to the relief to be granted, the Municipality did not contend in the lower Courts that even if the second order were bad the plaintiff would not be entitled to build the privy. Though the first permission in terms contains a condition that it shall not be in force after one year, I think that on the facts of this case the plaintiff is entitled to an injunction restraining the Municipality from interfering with the building of this privy. In my opinion, sub section 4 of section 96 has no application to the facts of the case, nor has it any bearing on the relief to be granted to the plaintiff.

I would, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the trial Court with costs throughout on the defendant.

MARTEN, J.—The three important dates here are: 1st December, application by the plaintiff under section 96; 19th December, permission granted; and 6th January, resolution of the Managing Committee, notice whereof was given to the plaintiff on the 8th January 1914. Having regard to the decision in *Kareem Ranjan Khoji* v. *Emperor* (1), it cannot in this Court be contended that the Municipality had a right by their resolution of the 6th January 1914 to cancel the permission given on the 19th of December 1913. Nor can that resolution of the 6th of January be justified under section 96 (3), for it was not issued within a month from the receipt of the plaintiff's notice of the 1st December.

Therefore, as far as the real point is concerned, namely, as to the legality of this resolution of the 6th January, the Municipality are, in my opinion, in the wrong. I think, so far, that both the lower Courts are really agreed. The

(1) 39 Ind. Cas. 298; 18 Cr. L. J. 458; 19 Bom. L. R. 65.

lower Appellate Court, however, refused to grant an injunction, because it said the work was not commenced within a year which ought to be done under section 96 (4) and that, accordingly, it would be improper to grant an injunction. On the other hand, it awarded damages to the plaintiff, which I think it could not have done unless it was of opinion that the plaintiff was right on the merits of the case and the Municipality were wrong. Now, as far as the point of commencing the work is concerned, it is a point which appears not to have been pleaded or taken in the Court of first instance. We also find that building materials were collected on the ground and workmen seem to have been employed there. I accordingly infer that there is, under all the circumstances, a sufficient commencement of the work within section 96 (4) of the Act, and that similarly there has been a compliance with the final clause of the permission given by the Managing Committee by their resolution of the 19th December and which was communicated to the plaintiff in the formal permission of the 22nd December.

That being so, I think, the injunction granted by the trial Court was right. I agree, therefore, that this appeal must be allowed and that the judgment of the trial Court must be restored and that the appellant must have all his costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 768 OF 1915.

May 17, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

WAHID ALI BHUYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHAMAD ANSAR ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C of 1885), s. 87—Landlord and tenant—Abandonment of holding—Landlord, right of re-entry of—Transfer of non-transferable occupancy holding—Settlement by landlord, effect of.

Wher a holding has in fact been abandoned, the landlord is entitled to re-enter without having recourse to the provisions of section 87 of the Bengal Tenancy Act. [p. 148, col 1]

The plaintiff purchased a non-transferable occupancy holding from the heirs of the original tenant; a few days later the defendant purchased the same holding from a relation of the original tenant who had no right, title or interest in the occupancy holding. Both the plaintiff and the defendant obtained settlement of the land from the landlord, the defendant's settlement being prior to that of the plaintiff:

Held, that the settlements made by the landlord might be regarded in the light that they signified the landlord's consent to the transfers respectively set up by the plaintiff and the defendant and that inasmuch as the transfer set up by the defendant was from a pretended owner, the consent of the landlord could have no validating effect upon the title derived by the defendant from that transfer but it operated to validate and confirm the title derived by the plaintiff from the true owners. [p. 148, col. 1.]

Appeal against the decree of the Subordinate Judge, 4th Court of Mymensingh, dated the 17th of December 1914, reversing that of the Munsif, 2nd Court at Bajetpur, dated the 16th of May 1913.

Babu *Dhirendra Lal Kastgir*, for the Appellants.

Babu *Gopal Chandra Das*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—As between the plaintiffs and the defendants, apart from any settlement by the landlords, the plaintiffs have the better title. The plaintiffs purchased what must be assumed to be a non-transferable occupancy holding from the heirs of Sadali, who is found to have been the original tenant, and their conveyance is dated the 11th January 1912. By a conveyance dated the 18th January of the same year the defendants purported to purchase the holding from Abdul Khan. The latter had married Sadali's granddaughter, but it is conclusively found that he had no right, title or interest in the holding. The defendants, therefore, purchased nothing.

But then the defendants were the first to obtain settlement from the landlord. It is true that the landlord a few days later again settled the land with the plaintiffs, but, says the learned Subordinate Judge, the plaintiffs took no advantage thereby. His reason is that upon

the sale of the holding by Sadali's heirs, the original tenancy came to an end and the land must be treated as having been abandoned. It was, therefore, open to the landlord to re-enter and settle the land with whom he pleased. Having settled it with the defendants, he had no right or power to grant a lease to the defendants. In that view the learned Subordinate Judge revised the Munsif's decree and dismissed the suit.

The plaintiffs have appealed to this Court and on their behalf it was argued that both the so called settlements took place before the end of the agricultural year in which the abandonment occurred. Reference was made to section 87 of the Bengal Tenancy Act. But it has been held that a landlord need not have recourse to the provisions of that section and is entitled to enter upon land which has in fact been abandoned, *Manohar Pal* v. *Ananta Moyee Dasya* (1).

Then it was argued that the Munsif was right in holding that what the landlord settled with the defendants was Abdul Khan's holding and as Abdul Khan had no holding the defendants got nothing. But if there was a settlement it related to the land and the description of it as Abdul Khan's holding would merely be *falsa demonstratio*.

I am disposed, however, to be of opinion that the Munsif was right, if not in his reasoning, at any rate in his conclusion. It seems to me that the so called settlements may be regarded in this light that they merely signify the consent of the landlord to the transfers respectively set up by the parties. In that view the consent operates to validate and confer the title derived from the true owner; but can have no validating effect upon the title derived by the defendants from the pretended owner.

I would, therefore, discharge the judgment and decree of the Subordinate Judge and restore the decree of the Munsif with costs in this Court and the Court below.

TEUNON, J.—I agree.

Appeal decreed.

(1) 20 Ind. Cas. 198; 17 C. W. N. 802.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 68 OF 1916.

January 10, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

KYIN WET—PLAINTIFF—APPELLANT

versus

MA GYOK AND OTHERS—DEFENDANTS—RESPONDENTS.

Burma Laws Act (XIII of 1898), s. 13, applicability of—Buddhist, Chinaman professing Buddhism, whether is—Confucianism and Buddhism, whether mutually exclusive—Chinese Customary Law, applicability of—Adoption, validity of.

Confucianism and Buddhism are not mutually exclusive religions. The former does not render a man incapable of following the latter religion as well. [p. 151, col. 2.]

It is not necessary for the application of section 13 of the Burma Laws Act that the person whose religion is under consideration should have been born a Buddhist, Muhammadan or Hindu, as the case may be. A Chinaman who professes Buddhism is a Buddhist within the meaning of this section. [p. 152, col. 1.]

Where on the death of a Chinaman who professed Buddhism the plaintiff claimed to succeed him as his adopted son:

Held, that the question of the plaintiff's adoption should be determined in accordance with the Chinese Customary Law. [p. 152, col. 1.]

Mr. *R. N. Burjorji*, for the Appellant.

Mr. *Ba Shin*, for the Respondents.

JUDGMENT.—The plaintiff-appellant claimed to be the adopted son of U Shwe Hla, deceased, who was a Chinaman. The decision of the District Court is contained in the following passage of the judgment:—

"U Shwe Hla, while adhering to his ancestral religion (Confucianism), conformed more or less to Burman Buddhist practices in subscribing to religious works and festivals, but I cannot hold that he was a Buddhist in the absence of definite evidence."

Unless the plaintiff-appellant could prove that Shwe Hla was a Buddhist, the law governing the devolution of Shwe Hla's estate would be the Indian Succession Act, 1865, which does not recognise adopted sons. (The definition of "son" in the General Clauses Act, 1897, does not apply to the Indian Succession Act, 1865—see section 4, General Clauses Act.) If Shwe Hla was a Buddhist, the law to be applied would be the Chinese Customary Law applicable to Chinese Buddhists. This was decided in *Fone Lan* v. *Ma Gyee* (1). In a later case of *Apana Charan Chowdry* v. *Shwe*

(1) 2 L. B. R. 95.

Nu (2) Mr. Justice Hartnoll observed that a Chinese plaintiff has to show that "there is a Chinese Buddhist Law in China applicable to Chinese Buddhists only as apart from the Customary Law...applicable to all the inhabitants, whether Buddhists or not". But this view does not appear to be well founded and it was not followed by the Bench in *Ma Pwa* v. *Yu Lwai* (3). In the latter case Sir C. Fox pointed out that "the Chinese customs as to adoption and inheritance have no connection with Buddhism, Confucianism or Taoism, but they appear to be based to a great extent on the veneration of ancestors which existed before the first teachers of the three religions appeared, and which still is the strongest influence with the majority of Chinese, whichever of the above faiths they profess". As the law stands, however, we cannot give effect to these customs unless the Chinaman concerned is found to be of one of the three religions mentioned in section 13, Burma Laws Act, *viz*, a Buddhist, Muhammadan or Hindu. There is no question of the deceased Shwe Hla being a Muhammadan or Hindu: the only question is whether he was a Buddhist.

The subject of Chinese religion was discussed at some length in the Special Court case of *Hong Ku* v. *Ma Thin* (4). The Court held that it would be wrong to presuppose of a Chinaman that he is a Buddhist, and various authorities were cited to prove that Confucianism, Taoism and Buddhism, are distinct religions and that Confucians and Taoists are not Buddhists. The Special Court judgment in that case may and probably has already given rise to serious misapprehension as it omits to notice a unique feature of Chinese religious life, namely, that most of the Chinese people are Confucians, Taoists and Buddhists all at once. The official state religion is Confucianism, and it appears that there are strictly orthodox Confucians who do not follow Buddhist doctrines and forms of worship. But that the bulk of the Chinese follow all three religions is clearly shown by the writings of missionaries and others who have made a special study of Chinese life. A standard work on the subject is "Religion in China," Volume 8, (5) by Joseph Edkins, D. D., and in Chapter V he writes:—

"China presents a fine field for observing the mutual influence and conflict of those ideas which have most to do with the formation of character—the religious and the moral. We have there three great national systems existing in harmony. Three modes of worship, and three philosophies underlying them, have been there for ages interacting on each other. Sometimes they have been in conflict, but usually they have preferred state of peace. The Chinese would rather have toleration than persecution. They did not drive out the intruding religion that came to them from India, as the Japanese did Christianity in its Roman Catholic form. Nor did Confucianism expel the Taonist religion, as the Brahmans did Buddhism from the land of its birth. The Chinese quietly adopted all the religions, after a limited period of persecution, and now they exist side by side not only in the same locality, but, what is more extraordinary, in the belief of the same individuals. It is quite a common thing in China for the same person to conform to all the three modes of worship."

The same Chapter contains the following passage:—

"The religions of Confucius, Buddha and Taou are truly national, because the mass of the people believe in them all. They are far from feeling it inconsistent to do so. Philosophers may not know what to do with a fact like this; but it is true nevertheless. Those who themselves have a devoted love of truth, and feel strong convictions of certain things, do not understand how any one should belong to three religions at once. Hence some writers have parcelled out the Chinese among these systems, assigning so many millions to one and so many to another. In estimating the number of Buddhists in the world, one hundred and eighty millions of Chinamen are placed by one author at the head of his enumeration of nations. He has obtained this number by halving the whole population; a process conveniently short, but

(2) 4 L. B. R. 124.

(3) 34 Ind. Cas. 99; 8 L. B. R. 404; 9 Bur. L. T. 187.

(4) S. J. L. B. 135.

(5) Published by Trubner & Co., London, 1878.

far from giving a true view of the case. If it serves for other races to refer every individual belonging to them to some one religion it will not answer for China. Some other mode of classification must be employed. The majority of the inhabitants in that country comply with the worship of more than one religion, believe in more than one mythology gods, and contribute to the support of more than one priesthood."

Commenting on Mr. Elkins' work the eminent Orientalist, Sir Alfred Lyall, wrote as follows in Chapter II of his Asiatic Studies (6 :—

"It is only in China that we find two mighty religious potentates, such as Confucius and Buddha, reigning with co-ordinate authority over one nation, and their ritual mingled with the adoration of the miscellaneous primitive divinities, who have elsewhere been usually extirpated, subdued or refined and educated up to the level of the higher and paramount religious conceptions. For, although the Chinese religions seem to have modified each other externally, and to have interchanged some colouring ideas, no kind of amalgamation into one spiritual kingdom appears to have ensued; it is at most a federation of independent faiths united under the secular empire. Whereas in other countries the chief religion is one, but the interpretations of it are many, so that the same faith is a moral system, a mysterious revelation or a simple form of propitiating the supernatural, in China a man may go to different religions, according to his needs or feelings, for specialities of various sides or phases of belief. Confucianism gives the high intellectual morality fortified by retrospective adoration of the great and wise teachers of mankind, and based on family affections and duties, but offering no promises to be fulfilled after death, except the hope of posthumous memorial veneration. Buddhism gives a metaphysical religion of infinite depth, with its moral precepts enforced by the doctrine of reward or punishment, according to merits or demerits acting upon the immaterial soul in its passage through numberless stages of existence. It contributes imposing ceremonial observances, the institution of monasticism, and a grand array of images and personified attributes for worship by simple folk who have immediate material needs or grievances. Buddha himself, having passed beyond the circle of sensation, is inaccessible to prayer, yet out of pity for men he has left within the universe certain disciples who, albeit qualified for Nirvanā, have consented to delay for a time their navishing into nothingness, in order that they may still advise and aid struggling humanity. Both Confucius and Buddha seem rather to have despised than denied the ordinary popular deities, and to have refrained, out of pity for weaker brethren, from open iconoclasm. Taouism has rewarded both these great teachers by apotheosis into a pantheon, which appears to be filled by every imaginable device, by personifications of everything that profits or plagues humanity, of natural phenomena, of human inventions, of war, literature, and commerce, by the deification of dead heroes and sages, of eminent persons at large, and of every object or recollection that touches men's emotions or passes their understanding. It is worth notice that the three persons who founded these three separate and widely divergent religions appear all to have lived about the same time in or near the sixth century B.C. And the impartial veneration accorded to them by the Chinese is shown by their being worshipped together, as the Trinity of the Sages."

A more recent work, "Buddhist China," by R. F. Johnston opens with a discussion of "The three religions of China" (7).

The following pasage at the beginning of the book confirms the account given by Dr. Edkins:—

"Within the grounds of one of the most famous Buddhist monasteries in China—Shaolin in Honan—may be seen two stone tablets inscribed with pictorial statements of a doctrine that is familiar to all students of Chinese religion and philosophy—the trinnity of the San Chiao, or three Doctrinal Systems of Buddhism, Confucianism and Taoism. On one of these tablets, the

(6) 2nd Series 1889. Published by John Murray, London.

(7) Published by John Murray, London, 1913.

date of which corresponds to the year 1565 of our era, there is the incised outline of a venerable man holding an open scroll on which a number of wavy lines like tongues of flame converge and blend. The old man's draperies are symmetrically arranged, and his crouching figure is skilfully made to assume the appearance of a circle, the centre of which is occupied by the open scroll. The whole drawing is surrounded by a larger circle, which signifies ideal unity and completeness, or represents the spherical monad of Chinese cosmological philosophy. The other tablet, which is more than seven hundred years old, is of a less symbolical or mystical character. It shows us the figures of the representatives of the three systems standing side by side. Sakymuni Buddha occupies the place of honour in the centre. His head is surrounded by an aureole, from which issues an upward-pointing stream of fire, and beneath his feet sacred lotus-flowers are bursting into bloom. On the left of the central figure stands Lao-Chun, the legendary founder of Taoism, and on the right stands China's 'most holy sage'—Confucius.

The words which are ordinarily used to sum up the theory of the triunity of the three ethico-religious systems of China are *San chiaoiti* —the three Cults incorporated in one organism or embodying one doctrine. The idea has found fanciful expression in the comparison of the culture and civilization of China with a bronze sacrificial bowl, of which the three 'religions' are the three legs, all equally indispensable to the tripod's stability.

"Such teachings as these are abhorrent to the strictly orthodox Confucian, who holds that the social and moral teachings of Confucius are all that humanity requires for its proper guidance; but they meet with ungrudging acceptance from vast numbers of Buddhists and Taoists, who, while giving precedence to their own cults, are always tolerant enough to recognise that Confucianism, if somewhat weak on the religious side, is strong and rich on the ethical side. They find an echo, indeed, in the hearts of the great majority of the Chinese people, who show by their beliefs and practices that they can be Buddhists, Taoists, and Confucians and all at the same time."

The only other quotation that we wish to make is from Professor Giles' "Confucianism and its rivals" (8) :—

"In 1908, when their mandate was already exhausted, the Manchus foolishly elevated Confucius to the rank of a god, an honour which the old sage himself would have been the very first to repudiate. Still, during all their tenancy of the empire, Manchus kept Buddhism (an importation), and Taoism (an imitation) well in hand, and away from political aspirations.

"Confucianists will not readily avow any faith in either one or the other; at the same time, it is customary for all families to visit Buddhist or Taoist temples—often both, and to employ the priests—also of both, to recite masses for their dead."

It is probably true that every Chinaman who is not a Christian or a Muhammadan is a Confucian. He may be a Buddhist as well, but we cannot assume that he is without evidence of the fact. The important point, to establish which it has seemed desirable to set out the above extracts, is that the two religions are by no means mutually exclusive. On the contrary it appears to be exceptional for a Chinaman to be a Confucian and nothing else.

In enquiring whether a particular Chinaman is a Buddhist or not, one of the test questions might well be whether he worships Kuan-Yin also known as Kuan-Shih-Yin. As explained in the Special Court judgment Kuan-Yin is an object of almost universal reverence both in China and in Japan (where the name becomes Kwannon). In "Buddhist China" Mr. Johnston describes Kuan-Yin as one of the attendant *bodhistas* of the Buddha Amitabha, and this author says that "Kuan-Yin (Avalokitesvara) probably receives a larger amount of willing reverence in China to-day than any other object of Chinese worship."

In the present case the evidence as to the religion professed by Shwe Hla before he came to Burma is merely that he was of "the Chinese religion." One witness

(8) Hibbert Lectures. Second Series. Published by Williams and Norgate, London, (1915) (Page 258).

said that he worshipped "Ti-gaung," but I have been unable to trace this object of worship and there is nothing to show that it is connected with Buddhism. No mention is made of Kuan-Yin. It is not established that Shwe Hla was of the Buddhist religion before he came here. It is admitted, however, that he professed Buddhism after he came to Burma and that he followed Buddhist practices. The admissions of the defendant Ma Gyok herself and of her witness Maung Twe confirm the evidence of the plaintiff's witnesses that Shwe Hla in Burma professed Buddhism in addition to his "Chinese religion". Assuming that his "Chinese religion" was the official religion Confucianism, it would not render him incapable in Burma any more than in China of following the Buddhist religion as well. Like the bulk of his fellow countrymen he was probably a Buddhist before he came to Burma: but assuming that he was not, the fact that he became a Buddhist after he came to Burma, would be sufficient under section (3), Burma Laws Act. It is not necessary for the application of that section that the person whose religion is under consideration should have been born a Buddhist, Muhammadan, or Hindu, as the case may be. It follows that the question of the plaintiff's adoption should be determined in accordance with the Chinese Customary Law. The Succession Act does not apply to U Shwe Hla's estate.

The decree of the District Court is set aside, and the case is remanded for determination of the remaining issues and for disposal accordingly.

The costs of this appeal will come out of the estate. A certificate will be granted to the appellant under the Court Fees Act for the refund of the Court-fee on the memorandum of appeal.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No 226 OF 1917.

June 4, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

BANOMALI DUTTA AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

LALIT MOHAN GHOSAL—DECREE-HOLDER—RESPONDENT.

Execution—Judgment-debtor declared insolvent—Order in execution that certain properties were fraudulently concealed by judgment-debtor—Appeal, right of.

A judgment-debtor who has been adjudicated an insolvent, cannot maintain an appeal against a decision in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the Official Receiver [p. 152, col. 2]

Appeal against an order of the District Judge, Hoogly, dated the 15th May 1917, affirming that of the Sub-Judge, Howrah, dated the 10th June 1916.

Babu *Amarendra Nath Bose*, for the Appellants.

Dr. *Jadunath Kanjilal*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by two of the judgment-debtors, who have been adjudicated insolvents, against the decision of the learned District Judge of Hoogly, affirming the decision of the Subordinate Judge at Howrah. These judgment-debtors appeal with reference to certain property that the learned District Judge, agreeing with the Subordinate Judge, has found to have been fraudulently concealed from the creditors and the Official Receiver. That obviously they cannot do. If this property belonged to the insolvents, then they were bound to disclose it and, under the provisions of section 16 of the Provincial Insolvency Act, that property vested in the Official Receiver. If it was not the property of the insolvents, of course, they had no right to appeal as regards thereto. In this case, if anybody has got a right of appeal, he is the Official Receiver who is quite satisfied with the means by which this decree-holder has managed to discover and recover this property from the fraudulent insolvents. The procedure that has been adopted in this case is not an uncommon procedure in this country with reference to the Provincial Insolvency Act. No pro-

per establishment has been created in the subordinate Courts for the working of this Provincial Insolvency Act, and the practice has grown up of discovering property fraudulently retained by the insolvent by means that appear in the present case. Of course we presume that the sale in this case was made with the concurrence of the Official Receiver. If the Official Receiver did not concur in the sale, his rights are not interfered with. The order provides for the sale proceeds to go to his hands. So, presumably, he knew and approved of the course of action adopted by the decree-holder, the respondent to the appeal.

The appeal, therefore, fails and is dismissed with costs one gold *mohur*.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 989 OF 1916.

February 27, 1918.

Present :—Sir Stanley Batchelor, KT., Ag. Chief Justice, and Mr. Justice Kemp.

MALKARJUN MAHADEV BELURE —PLAINTIFF—APPELLANT

versus

AMRITA TUKARAM DAMBARE AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 141, 144 —*Alienation by Hindu widow—Suit to set aside alienation by heir of reversioner—Limitation applicable.*

A Hindu died leaving two widows *K.* and *R* and two daughters *S.* and *T.* In March 1897 *K.* sold the property in suit to the defendant. *K.* died in July 1902 and *R.* died on the 17th January 1903. On the death of *R.*, *S* and *T.* took severally an estate absolute. *S.* died in 1907, leaving the present plaintiff, her son. *T.* died in 1911. On the 13th January 1915, the plaintiff brought a suit to recover possession of the property:

Held, (1) that the suit was governed by Article 144 and not by Article 141 of the Limitation Act, inasmuch as the plaintiff claimed as the heir of *S.* who was an absolute owner; [p. 154, col. 1.]

(2) that the reversioners not being entitled to immediate possession during the lifetime of *K* and *R.*, the defendant's possession did not become adverse as against the plaintiff till the death of *R.* and that, therefore, the suit was within time. [p. 154, col. 1.]

Second appeal from the decision of the District Judge, Sholapur, in Appeal No. 208 of 1916, confirming the decree passed by the Subordinate Judge at Barsi, in Civil Suit No. 25 of 1915.

Mr. *Coyajee* (with him Mr. *G. S. Mulgaokar*), for the Appellant.

Mr. *Strangman*, Advocate-General (with him Mr. *K. N. Koyajee*), for Respondents Nos. 1 and 2.

JUDGMENT.

BATCHELOR, AG. C. J.—This is a suit brought on behalf of an infant for possession of immoveable property. The circumstances attending the suit are these:—

One Daji Giram, who died some time before 1897, left two widows, Kashibai, who died in 1902, and Rangubai, who died in 1903. He left also two daughters, the elder, Shantabai, who died in 1907, leaving the present plaintiff, her son, who was born in 1905, and Triveni, who died in 1911. In March 1897, the senior widow Kashibai sold the property in suit to the 1st defendant. In July 1902, Kashibai died. Thereupon her surviving co-widow Rangubai took the property for a widow's estate, and the reversion did not fall in until the death of Rangubai on the 17th January 1903. On the occurrence of that event the reversioners were the two daughters, Shantabai and Triveni, and under the law in this Presidency they took severally an estate absolute. The lower Courts have dismissed the suit on the ground that it is barred by time.

On behalf of the plaintiff appellant, Mr. Coyajee's first contention was that the Article of the Limitation Act correctly applicable to the suit was 141, and not 144. That argument, however, cannot, in my opinion, be substantiated in the circumstances which I have set out. The plaintiff claims as the heir of Shantabai and the suit is not, in my opinion, one brought by a Hindu entitled to the possession of immoveable property on the death of a Hindu female. This Article, as the decided cases show, is restricted to suits by a plaintiff whose right and title to sue for possession occurs upon the death of a female holding the limited woman's estate. The point was so decided in *Azam Bhuyan* v. *Faizuddin Ahamed* (1)

(1) 12 C. 594; 6 Ind Dec. (N. S.) 403.

by Mr. Justice Wilson and Mr. Justice Ghose and these learned Judges, in considering the argument now under notice, observed that "Article 140 (of the Limitation Act) dealing with remaindermen, reversioners, and others, deals with a class of persons who claim under a title quite independent of the particular limited estate upon which the remainder, reversion, or other estate is dependent. And we think the case is the same under Article 141. . . We think it refers to persons who claim under an independent title on the death of a Hindu or Muhammadan female. It would be straining the language and introducing a rule inconsistent with the principle of the Act, if we were to hold that this Article applies to the case of a person suing on the very same cause of action which accrued to a Hindu female, and who acquires his right to sue as her heir." To the same effect is the decision in *Hashmat Begam* v. *Mazhar Husain* (2). On this point, therefore, the argument for the appellant must be disallowed.

But, secondly, it is contended that even if Article 144 applies, the defendant has not had that twelve years' adverse possession against the plaintiff which, under the Article, would be required for the invalidity of the plaintiff's suit. Here, I think, the plaintiff is entitled to succeed. It may be conceded that the defendant's title was adverse to Rangubai until her death in 1903 and, as contended by the learned Advocate-General, it would have been open to the presumptive reversioners even during the lifetime of the widows to sue for a declaration that the alienation by the elder widow was void. That, however, in my opinion, is not enough. The classical definition of the term "adverse possession" is that given by Mr. Justice Markby in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3), where the learned Judge said: "By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession." These last words are of capital importance, because, as pointed out by Mr. Justice Batty, in *Tarubai* v. *Venkatrao* (4), they express the well-known rule which is conveyed in the maxim *contra non valentem agere nulla currit præscriptio*, that is to say, prescription does not run against a man during the time when he is not entitled to immediate possession.

The learnd Advocate-General frankly admits that he cannot urge that during the lifetime of the widows any of these reversioners would have been entitled to immediate possession. That being so, the defendants' possession, however adverse against Rangubai, cannot be regarded as adverse against the plaintiff. The suit, therefore, is in time.

The result is that the appeal is allowed, the decree of the lower Court is set aside and the suit must be remanded to the trial Court to be heard out and decided according to law.

The appellant must have his costs of this appeal.

This judgment disposes also of Second Appeal No. 988 of 1916.

KEMP, J.—I agree that Article 141 does not apply to the facts of this case, and assuming that the possession of the defendants was adverse to Kashibai, still I consider that no adverse possession runs against the plaintiff until the death of Rangubai on the 17th of January 1903. The suit is, therefore, within time.

Appeal allowed.

(2) 10 A. 343; A. W. N. (1888) 38; 6 Ind. Dec. (N. S.) 229.

(3) 4 C. 327 at p. 329; 2 Shome L. R. 106; 2 Ind. Dec. (N. S.) 207.

(4) 27 B. 43 at p. 51; 4 Bom. L. R. 721.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 252 OF 1917.

July 1, 1918.

Present:—Mr. Justice Mullick and Mr Justice Thornhill.

RITU KUER—DECREE-HOLDER—APPELLANT

versus

ALAKHDEO NARAIN SINGHA—JUDGMENT-DEBTOR—RESPONDENT

Execution—Application dismissed for default—Restoration—Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9, applicability of—Jurisdiction—Res judicata.

Order IX of the Civil Procedure Code does not apply to execution proceedings. [p. 155, col. 1.]

An application for execution dismissed for default

cannot be restored either under Order IX or under section 151 of the Code of Civil Procedure. [p. 155, col. 2; p. 156, col. 2.]

There is nothing in the Civil Procedure Code which ousts the jurisdiction of an executing Court to go into the merits of the judgment-debtor's objection even though the executing creditor is absent. [p. 156, col. 2.]

Where, rightly or wrongly, a Court with jurisdiction has disposed of the judgment-debtor's objections on the merits and has decided that the decree-holder is not competent by reason of a defect of parties to proceed with the execution, the decision is binding on the decree-holder till it is set aside. [p. 157, col. 1.]

Appeal from a decision of the Subordinate Judge, Gaya.

Mr. *Shoroshi Charan Mitra*, for the Appellant.

Mr. *Ganesh Dutt Singh*, for the Respondent.

JUDGMENT.

MULLICK, J.—This appeal arises out of the execution of a decree for costs passed so far back as 1904. The amount of costs allowed by the decree was a sum of Rs. 1,058, and the claim with interest and other expenses now amounts to Rs. 1,950 12-0. The course of the litigation is instructive.

The original judgment-debtors were Alakhdeo Narain and his sister Anant, who is now dead, and the execution is proceeding against Alakhdeo alone. The decree-holder was a man named Bhagwat Prasad. He, on the 17th July 1908, filed an execution petition which was dismissed on the 22nd February 1909, because he had died subsequently to the filing of the execution petition and no substitution of his heirs had been made in the execution proceedings. Bhagwat Prasad left a widow and two daughters, one of whom, *Musammat* Ritu Kuer, claimed the decree in question on the ground that Bhagwat during his lifetime had made a gift of it to her and on the 24th February 1911 she took out Letters of Administration in respect of her father's estate.

On the 13th June 1911, Ritu Kuer as administratrix filed the execution petition. That petition was dismissed on the 25th October 1911. The third execution petition was filed by her on the 6th January 1913, and the judgment-debtor Alakhdeo preferred an objection under section 47, Civil Procedure Code, contending that the decree could not be executed by Ritu Kuer in the absence of the widow and the other daughter of Bhagwat.

On the 28th June 1913, after several adjournments, the execution case came up before the Subordinate Judge, who made the following order:—

"It is clear from the testimony of the judgment-debtor's witness, Mahadeo Singha, that the mother of the applicant for execution is alive. Their plea is that as the decree stands in the name of her deceased father Bhagwat Pande she has no right to execution. The execution petition is dismissed with costs. Pleader's fee Rs. 8 *ex parte*. Decree-holder's Pleader is absent."

The creditor Ritu Kuer does not appear to have taken any steps to set aside this order; she simply ignored it and filed another execution petition on the 3rd March 1914, before the Subordinate Judge. That execution petition was dismissed because she failed to prove service of notice upon the judgment debtor. The next and last execution case was filed on the 16th November 1916, and in it the Subordinate Judge has given effect to the judgment-debtor's contention that so long as the order of the 28th June 1913 stands, it is a bar to all future execution proceedings in respect of this debt.

The present appeal is preferred by the creditor against the order of the Subordinate Judge dismissing the execution petition.

Now the first ground urged by the learned Vakil for the appellant is, that Order IX, Civil Procedure Code, applies to execution proceedings and that under rule 8 of that Order, even though the judgment debtor appeared the Court should have simply recorded an order of dismissal for default and was not in any way competent to go into the merits of the objections raised by the judgment-debtor. It is urged that in going into the merits of the objections the Court acted without jurisdiction, and, therefore, the order made on the 28th June 1913 is a nullity.

Now I am quite satisfied that Order IX of the Civil Procedure Code does not apply to execution proceedings. Section 141, Civil Procedure Code, has been distinctly interpreted as meaning that it is not necessary for Courts to apply the provisions of Order IX to proceedings in execution and

we have the clear authority of Sir Lawrence Jenkins in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1) supporting this view.

There has been, it is true, some attempt on the part of other Courts to distinguish this case and to apply Order IX, Civil Procedure Code, to cases which seemed to those Courts to be proceedings of an original nature, but in my opinion it is impossible in view of the ruling of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (2) as interpreted by Sir Lawrence Jenkins in the case cited above, to make any distinction between proceedings in execution which are of an original nature and those which are not. This is also the view taken by their Lordships of the Calcutta High Court in *Bharat Chandra Nath* v. *Yasin Sarkar* (3).

The learned Vakil for the appellant has drawn our attention to the case of *Satya Narayan Lal* v. *Gobind Sahay* (4) but that case does not touch the present case. In that case a claim was made by a person who was not a party to the proceedings, and it was held by their Lordships of this Court that the proceeding was of an original nature and that Order IX, Civil Procedure Code, would apply for restoring the case after it had been dismissed for default. It is not necessary for the purposes of the case now before us to consider how far that decision is consistent with the view previously taken by their Lordships of the Privy Council in *Thakar Prasad* v. *Fakir Ullah* (2). It is sufficient to say that the proceeding before the execution Court was not a proceeding similar to that in *Satya Narayan Lal's case* (4). In my opinion a decree-holder, whose case is dismissed for default, has his remedy by way of fresh applications within the period of limitation or by resort to the provisions of Order XLVII for review. There is no reason why additional facilities should be given to him by applying the provisions of Order IX.

(1) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 313.
(2) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).
(3) 41 Ind. Cas. 586, 21 C. W. N. 769.
(4) 43 Ind. Cas. 951; 3 P. L. J. 250; 4 P. L. W. 102.

Then it has been contended that although Order IX, Civil Procedure Code, may not apply the inherent powers of the Court should be invoked for the purpose of restoring the case, and reliance has been placed upon *Bharat Chandra Nath's case* (3) in support of the view that it is open to this Court to direct the Subordinate Judge to consider whether or not he should use his powers under section 151, Civil Procedure Code. Speaking for myself I should be entirely averse to any Court's using its inherent powers for the purposes of restoring execution cases. Execution creditors as well as the judgment-debtors have ample facilities under the existing law for restoring cases dismissed for default, and there is no reason why the extraordinary and vague jurisdiction given by section 151 should be resorted to for supplementing those facilities. I hold, therefore, that Order IX, Civil Procedure Code, was not applicable. It was, therefore, not illegal for the Subordinate Judge to go into the merits of the judgment debtor's objection. Moreover, if the Court has acted illegally by contravening Order IX, that would have been at best an error of law made by a Court with jurisdiction. The Court had the right to apply the law as it understood it and if in doing so it made a mistake, it cannot be said that the Court acted without jurisdiction.

In order to support his argument as to the want of jurisdiction on the part of the Subordinate Judge, the learned Vakil has also brought to our notice rule 57 of Order XXI, which says that if after attachment the decree holder fails to appear the attachment is void. That is an additional penalty but it has no bearing on the question of jurisdiction. In my opinion there is nothing in the Civil Procedure Code which ousts the jurisdiction of the executing Court to go into the merits of the judgment-debtor's objections even though the executing creditor is absent. I cannot, therefore, accept the contention that even though the judgment-debtor is anxious to have the case decided on the merits, the Court cannot proceed in the absence of the executing creditor. It cannot be the intention of the law that judgment-debtors should be placed in this unsatisfactory and insecure position,

Finally it is contended that there is no principle of law under which the order of the 28th June would be a bar to future executions.

Now, the learned Subordinate Judge has based his order on the principle of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (5). In that case the judgment-debtor was absent and in his absence the Court decided that a decree which was manifestly barred by law was not so barred, and proceeded to execute the decree under that erroneous view of the law. Their Lordships held that it was not open to the judgment-debtor in a subsequent execution to challenge the decree-holder's right to execute the decree by showing that the previous proceedings were incompetent.

Here, rightly or wrongly, a Court with jurisdiction has disposed of the judgment-debtor's contention on the merits, and has decided that the decree-holder was not competent, by reason of a defect of parties, to proceed with the execution. The principle of *Mungul Pershad Dichit's case* (5) clearly applies and it is not open to the decree-holder to come in and say that the previous order was wrong. The learned Vakil contends that in *Mungul Pershad Dichit's case* (5) the judgment-debtor, though he did not appear before the order was passed, did do so subsequently and accepted the order of attachment. That may be so, but the principle upon which their Lordships decided *Mungul Pershad Dichit's case* (5) was not founded upon any subsequent ratification by the parties.

The learned Vakil next relies on the case of *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry* (6). In that case *Mungul Pershad Dichit's case* (5) was distinguished by their Lordships of the Calcutta High Court on the ground that there was in fact no adjudication upon the merits, and the execution case was dismissed merely by reason of the absence of the decree-holder. Their Lordships held that as there had been no adjudication upon the merits, the principle of *res judicata* did not apply. Therefore, that case is no authority for the contention that the principle of *Mungul Pershad Dichit's case* (5) does not apply in every case where a judgment-creditor is absent. It was open to the decree-holder to appear on the day fixed for the hearing of the judgment-debtor's objections. The Court might certainly have dismissed the case without going into the merits, but it chose to go into the merits and its decision is, therefore, binding till it is set aside. The appeal is dismissed with costs.

THORNHILL, J.—I agree.

Appeal dismissed.

(5) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(6) 28 C. 122; 5 C. W. N. 80.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 149 OF 1917.

June 12, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

SAIAD SHA MAIDAL—PLAINTIFF—APPELLANT

versus

SRIDHAR DULEY—DEFENDANT—RESPONDENT.

Landlord and tenant—Occupancy tenant executing fresh lease—Landlord, right of, to eject tenant.

Where a *raiyat* acquires a right of occupancy in his holding by virtue of twelve years' possession and cultivation and subsequently executes a fresh lease, he cannot be ejected by the landlord on the expiry of the term of the lease. [p. 158, col. 2.]

Appeal against the decree of the Sub-Judge, Hooghly, dated the 8th of June 1916, affirming that of the Munsif, Serampur, dated the 30th April 1915.

FACTS appear from the judgment.

Babu *Shib Chandra Palit* (with him Babu *Jatindra Mohan Ghose*), for the Appellant.—This appeal is on behalf of the plaintiff and it arises out of a suit for ejecting the defendant from a piece of agricultural land and a tank held by him under a *kabuliyat* for a term. The Courts below have given a decree for ejecting the defendant from the tank but not from the land, on the

ground that he has been in possession of the land from before the execution of the *kabuliyat* and, therefore, has acquired a right of occupancy in it which entitles him to remain in occupation of the land. I submit that the Courts below have erred in holding that the defendant has acquired a right of occupancy in the land, because as soon as the defendant began to hold the land by executing a *kabuliyat* a new tenancy came into existence. The Courts below have relied on a case reported in 3 C. L. J.'s notes portion, but that case is distinguishable from the facts of the present case. Further, the Courts below have erred in law in making a division of the holding by giving a decree for ejectment as regards the tank and disallowing ejectment as regards the land. The defendant must show that he has acquired a right of occupancy after the new tenancy came into existence and as he has failed to show that, he is liable to ejectment.

Babu *Nani Lal De*, for the Respondent.—The evidence on the record shows that the defendant has been holding the land separately from the tank for more than twelve years prior to the execution of the *kabuliyat*, and so he having acquired a right of occupancy in the land the Courts below have rightly held that the defendant is not liable to ejectment from the land.

Babu *Shib Chandra Palit* replied.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Hooghly, dated the 8th June 1916, affirming the decision of the Munsif of Serampur. The plaintiff brought the suit to recover possession of a piece of agricultural land and a tank, on the ground that the term under which the defendant held the property had expired. Both the Courts below have decreed the suit so far as regards the tank. The question arises only with reference to the agricultural land; and that turns on a consideration as to whether the defendant has a right of occupancy in the land. Both the Courts below have found that the defendant has a right of occupancy. The only question we have got to consider is, whether the findings are sufficient to dispose of the case. It is quite clear when one reads the judgment of the Munsif and the judgment of the Subordinate Judge that the period of years for which the defendant and his father have been in possession and cultivating the land extends back far beyond the date when the lease was executed, that is, 1314. The rent receipts which were accepted by the first Court as genuine—and that finding has not been displaced or doubted by the lower Appellate Court—commenced from the year 1300. On that evidence, the Court obviously meant to find that the defendant and his father had been in possession and cultivating this land for more than twelve years prior to the execution of the lease. That being so, the provisions of the Bengal Tenancy Act prohibit the plaintiff from contracting with his tenant that the tenant should give up the benefit of the right of occupancy, which the Statute expressly reserves to the tenant, and prevents the landlord from getting any relief on such a contract. The present appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 736 OF 1915.

March 19, 1917.

Present:—Mr. Battan, A. J. C.

LAKHPAT SAHAI—PLAINTIFF—APPELLANT

versus

TIKARAM—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 8—Transfer of share along with profits already accrued due, validity of—Suit to recover profits, maintainability of.

Under section 8 of the Transfer of Property Act only profits accruing after the transfer pass with the land. Profits already accrued due are not a beneficial interest in the land, since the land cannot be transferred with retrospective effect. [p. 159, col. 1.]

A suit, by an assignee of a village share along with the profits accrued due prior to the sale, to recover such profits is not maintainable, inasmuch as it is a suit for the enforcement of a mere right to sue within the meaning of clause (*e*) of section 6 of the Transfer of Property Act. [p. 159, col. 1.]

Appeal against the decree, dated 15th September 1915, passed by the District Judge

Chhindwara, in Civil Appeal No. 144 of 1915.

Mr. *R. B. Gadgil*, for the Appellant.

Mr. *M. K. Padhye*, for the Respondent.

JUDGMENT.—In this case the plaintiff sues for profits as assignee of a co-sharer. The assignor sold to the plaintiff (1) his village share; (2) the right to profits prior to the sale. The suit is brought under (2). The question is, whether the right to village profits prior to the transfer is a mere right to sue within the meaning of clause (*e*) of section 6 of the Transfer of Property Act, or whether it is an actionable claim within the meaning of Chapter VIII of the Act, and of the definition in section 3. The only suit that can be brought on the assignment, and the suit that has in fact been brought, is one of the nature described is *Mohammad Farrukh* v. *Kadir Ali Khan* (1). The cases cited by the learned District Judge are not helpful as they were suits for damages. The present is a suit for accounts from an agent. Such a suit, for an unascertained amount, cannot, I think, be called a suit for a debt. The observations of Blackstone quoted in paragraph 95 of Gour's Work on the Law of Transfer, 4th Edition, seem to me to be in point. There are duties and responsibilities of the co-sharer as well as of the *lambardar*. The mutual rights of the parties can be settled only between themselves. It is argued, with reference to paragraph 227 of the work cited, that what has been transferred is not a mere right to sue, since the share itself has been transferred. But under section 8 of the Transfer of Property Act only profits accruing after the transfer pass with the land. Previous profits are not a beneficial interest in the land within the meaning of the definition in section 3, since the land was not and could not be transferred with retrospective effect.

I am of opinion, therefore, in the absence of any cases directly to the point, that the suit has been brought on an assignment of a mere right to sue. The appellant must pay his own costs and those of respondent No. 1.

Appeal dismissed.

(1) 10 C. P. L. R. 98.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2848 OF 1916.

June 6, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

BRINDABAN CHANDRA DE AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

KRISHNA MOHAN DE AND OTHERS — DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Map and chitta showing allotments on partition, whether require registration—Appeal, second—Appellate Court, shutting out admissible evidence, effect of—Remand.

A map and a *chitta* put in to prove that the land in dispute was allotted on a partition to a certain person, cannot be said to be instruments falling within the purview of section 17 of the Registration Act and thus requiring registration. [p. 160, cols. 1 & 2.]

Where certain documents having some bearing on the case were improperly excluded from consideration by the Appellate Court on the ground that they were inadmissible in evidence:

Held, that as it was impossible to say what effect the consideration of those documents, as evidence, might have had upon the judgment of the Appellate Court it could not be said that the Appellate Court had properly considered all the evidence in the case and that, therefore, the decree of the Appellate Court must be set aside and the case remanded for a re-hearing of the appeal on consideration of the whole of the evidence including those documents. [p. 160, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Mymensingh, dated the 1st of September 1916, reversing that of the Officiating Munsif, 3rd Court at Tangail, dated the 26th of February 1915.

FACTS appear from the judgment.

Babu *Jogesh Chunder Roy* (with him Babu *Madhab Govind Roy*), for the Appellants.—The learned Subordinate Judge has held that the map and the *chitta*, being unregistered, are not admissible in evidence and consequently he has held that section 91 of the Evidence Act excludes other evidence in support of the partition. The view taken by the lower Appellate Court is wrong. The case cited by the lower Appellate Court [*Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (1)] is distinguishable. There the document in question was a deed of partition but in the present case the map and the *chitta*, produced by the plaintiffs, cannot be called deeds of partition.

(1) 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C. W. N. 375.

They do not purport to operate, create or declare any right, title, or interest in immoveable property. So they do not come under section 17 of the Registration Act. It is difficult to say what would have been the decision in the present case, had these two documents not been excluded.

Dr. *Sarat Chunder Bysack* (with him Babu *Annoda Charan Karkoon*), for the Respondents.—Even conceding for the sake of argument that the map and the *chitta* were wrongly held to be inadmissible in evidence, there are findings of facts in the judgment which conclude this appeal.

[CHITTY, J.—Can you assure us that these two documents have no bearing on the case? Is there any plot in the map which is recorded in the name of the plaintiffs?]

There is one plot in the name of the plaintiffs.

[CHITTY, J.—Then how can you say that the learned Subordinate Judge has considered the whole evidence?]

Babu *Jogesh Chunder Roy* was not called upon to reply.

JUDGMENT.—In this case the plaintiffs sued for a declaration of title and for *khas* possession of certain land, of which they alleged they had taken settlement from the *maliks*, known as the Chhoto Taraf of the 8-annas share of Kismat Bennouri. In the Court of first instance the plaintiffs obtained a decree. In appeal that judgment was reversed and the plaintiffs' suit was dismissed. At the outset of his judgment the learned Subordinate Judge considered the admissibility in evidence of two exhibits tendered on behalf of the plaintiffs, a map (Exhibit 1) and a *chitta* (Exhibit 2). They were put in to prove that the land in dispute was allotted on a partition in 1318 to the Zemindars of the Chhoto Taraf of Delduar. The learned Subordinate Judge held that these documents were inadmissible in evidence under the provisions of section 49 of the Registration Act. This decision of the learned Subordinate Judge is, in our opinion, clearly erroneous. These documents could not be said to be instruments falling within the purview of section 17 of the Registration Act and thus requiring registration, for one was a map and the other a *chitta* or memorandum of the allotments made to the proprietors. Both documents, as we understand, were signed or alleged to be signed by the Amins who made the survey at that time. The documents were denied by one of the Amins who was called in the first Court, but the first Court held that they were signed by these Amins and were genuine documents. That question was not gone into in the lower Appellate Court. Having regard to the decision of the learned Subordinate Judge as to their admissibility, it is impossible for us to say what effect the consideration of these documents as evidence might have had upon the judgment of the learned Subordinate Judge. If the respondents had been able to assure us that they had no bearing on the case and could not have affected that judgment in any way then only could we have ignored the fact that they were shut out in appeal. That is not the case. It appears that in the map there is a plot which is recorded in the name of the plaintiffs and the same occurs in the *chitta*. As to the value of these documents as evidence, we can of course say nothing. But, if they were improperly excluded, it can hardly be said that the learned Subordinate Judge has properly considered all the evidence in the case. We, therefore, set aside the decree of the lower Appellate Court and remand the case to that Court for a re-hearing of the appeal and for a fresh judgment on consideration of the whole of the evidence including these two documents. Costs of this appeal will abide the result.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 19 OF 1916.

September 11, 1917.

Present:—Mr. Stuart, A. J. C.
and Pandit Kanhaiya Lal, A. J. C.

PRAG—DEFENDANT—APPELLANT

versus

Babu MOHAN LAL—PLAINTIFF AND GAYA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—'Year,' meaning of—Mortgage, usufructuary—Redemption before fixed date, whether can be allowed—Accounts, stipulation, not to claim—Mortgagee failing to pay off prior encumbrance—Accounts, whether can be claimed—Mortgagor paying off incumbrance—Suit for re-imbursement—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Arts. 62, 116.

It is not desirable to impute repugnancy to the terms of a document where a consistent intention can be found from the study of the document as a whole. [p. 162, col. 2.]

A year usually means a period of 12 months, but the context of a document may show that a particular year, ending with a specified month or season, was intended. [p. 162, col. 2.]

A mortgagee has no right to remain in possession of the mortgaged property after the mortgage money is satisfied from the usufruct, even though the parties may have miscalculated that the liquidation of the mortgage money from the usufruct shall take a longer period and may have said so in the deed. [p. 162, col. 2.]

Where in consequence of an usufructuary mortgagee's failure to pay the money left with him for payment to a prior encumbrancer, the mortgagor has to satisfy the prior encumbrance, the mortgagor is entitled to claim at the time of redemption accounts of the realizations made by the mortgagee in spite of a stipulation to the contrary contained in the mortgage-deed. Such accounts should not be adjusted on the footing of the consideration actually advanced by the mortgagee, but the mortgagor is entitled to a set-off for the amount paid by him in satisfaction of the prior encumbrance [p. 162, col. 2; p. 163, col 1.]

Where a mortgagee who is bound to pay off a prior incumbrance fails to do so and the mortgagor is compelled to pay it off and then sues the mortgagee for re-imbursement the suit is governed by Article 62 and not by Article 116 of the Limitation Act and limitation would begin to run from the date on which the plaintiff paid off the prior incumbrance. [p. 163, col. 2.]

Appeal from the decree of the Subordinate Judge, Hardoi, dated 7th January 1916.

Mr. *J. Jackson* and Babu *Ram Chandra*, for the Appellant.

Babu *Basudeo Lal*, the Hon'ble Pandit *Gokaran Nath Misra*, the Hon'ble Mirza *Sami Ullah Beg* and Pandit *Harkaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—The appeal arises out of a suit brought by the plaintiff-respondent for the redemption of a mortgage, effected by Gaya Singh and his wife *Musammat* Sundar, acting as the guardian of her sons Kaptan Singh, Dirgaj Singh and Sheobaran Singh, in favour of Prag on the 8th September 1905 and a deed of further charge executed by Gaya Singh and *Musammat* Sundar, acting as the guardian of Dirgaj Singh, in favour of the same person on the 7th December 1907. Kaptan Singh and Sheobaran Singh died during their minority without leaving any issue.

The mortgage was effected in lieu of Rs. 4,000, out of which Rs. 300 were left with the mortgagee for payment to Baiju about his prior mortgage, dated the 18th August 1903. The deed of further charge was executed in lieu of Rs. 2,404, out of which Rs. 225 were left with the mortgagee for payment to Jutta Sah about his mortgage of the 14th June 1907. By virtue of the mortgage, the mortgagee was given possession over the mortgaged property. The mortgage money carried interest at Re. 1 per cent. per mensem, and the covenant between the parties was that the mortgagee shall take the entire profits of the mortgaged property and after paying the Government revenue and village expenses chargeable on the same deduct the amount of annual interest due to him and credit the balance year after year in reduction of the principle money secured by the mortgage. In regard to the time fixed for redemption, the terms were not so clear. At one place it was stated that the mortgage shall be redeemable after ten years (*bad muddat das sal*); and at another place it was said that within the fixed period of ten years, the entire sum, comprising the principal and interest due to the mortgagee, would be fully paid up out of the annual net profits of the mortgaged property, and that the property mortgaged would be redeemed in the month of Jeth in the fallow season without the payment of any mortgage money or interest thereof. There was also an agreement that at the time of redemption the parties to the

mortgage shall have no claim against each other for interest or for surplus profits. The money secured by the deed of further charge was re-payable with interest at Rs. 1-8-0 per cent. per mensem after six months (*bad muddat chhe mah*), and if not so paid, at the time of the redemption of the mortgage, previously mentioned.

The property mortgaged in both these deeds has since been purchased by Mohan Lal. On the 4th June 1914 he deposited Rs. 3,247-2-0 on account of the said deeds of mortgage and further charge; but the mortgagee refused to accept the same. The present suit was, thereupon, filed by him for redemption, resulting in a decree in his favour subject to the payment of Rs. 1,873-5-10 to the mortgagee. In the memorandum of appeal, filed by the mortgagee several pleas were taken, but the learned Counsel who appears for him, has confined his arguments to only two matters. In the first place he contended that the possessory mortgage was not redeemable before the expiry of 10 years, and that the suit, filed by the plaintiff, was consequently premature. In the second place, he argued that the sum of Rs. 1,291 paid by the plaintiff to the heirs of Baiju in satisfaction of their prior mortgage on the 18th June 1913 was improperly debited against him in the accounts, inasmuch as the claim of the mortgagors for damages, caused by the failure of the mortgagee to pay the money left with him for payment to Baiju, was barred by Article 116 of the Indian Limitation Act.

The mortgage deed is very inartistically worded, and there is a certain amount of apparent inconsistency between the earlier and later clauses. If the mortgage was not redeemable till after the expiry of ten years from the date of the mortgage, the suit would be premature by about three months. If, on the other hand, effect be given to the covenant in the mortgage-deed that redemption should take place in the month of Jeth in the fallow season, the computation of full ten years from the date of the mortgage would give possession to the mortgagee for a period of nearly ten years and eight months or 11 agricultural years of two harvests each. It is not desirable, however, to impute repugnancy, where a consistent intention can be found from the study of the document as a whole. An agricultural year ordinarily ends with the 30th of June, after which the land is brought under fresh cultivation. On the date on which the possessory mortgage in suit was executed, the collection of rents for the Kharif harvest had not commenced, so that the mortgagee must have in the ordinary course realized the entire rent for the agricultural year 1905-1906. By the end of Jeth 1915, ten full agricultural years were completed, and from the fact that redemption was to take place in that month in the fallow season after the expiry of ten years, it is reasonable to presume that agricultural years were intended. A year usually means a period of 12 months, but the context may show that a particular year, ending with a specified month or season, was intended. It could hardly have been the intention of the parties that the mortgagee should remain in possession of the mortgaged property and collect rents for the same for full 11 agricultural years or 22 harvest seasons, and the tender, which was made in Jeth 1915, and the suit, which followed it, cannot, therefore, be regarded as premature.

A mortgagee has, moreover, no right to remain in possession of the mortgaged property after the mortgage money is satisfied from the usufruct, even though the parties may have miscalculated that the liquidation of the mortgage money from the usufruct shall take a longer period and may have said so in the deed. "Any stipulation in a mortgage," says Ashburner, "is invalid, if it prevents the mortgagor from redeeming, or allows the mortgagee to retain for his own benefit any part of or any interest in the mortgaged property after the mortgage has been discharged" (Ashburner on Mortgages, Indian Edition, page 341). The important thing in such cases is to ascertain whether it was the intention of the parties, as expressed in the deed, to postpone redemption till the mortgagee had enjoyed the usufruct for the full period mentioned. As pointed out in *Gopal Singh* v. *Karan Singh* (1), such

(1) 25 Ind. Cas. 303; 17 O. C. 218.

term may not form an essence of the contract, where the mortgagee is only to take interest at a specified rate from the profits of the mortgaged property and to credit the rest towards the principal money. In *Bakhtawar Begam* v. *Husaini Khanam* (2) where a mortgage-deed provided for redemption in nine years and the mortgage debt was satisfied earlier, it was held by their Lordships of the Privy Council that limitation for a suit for the redemption of such a mortgage should be computed from the date of its satisfaction and not from the date when the period of nine years, fixed for redemption, had expired. Section 62 of the Transfer of Property Act lays down that in the case of a usufructuary mortgage the mortgagor has a right to recover possession of the mortgaged property, where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property, when such money is paid. It makes no reservation in favour of any contract to the contrary and, as the mortgage money was paid up from the usufruct long before the suit, the mortgagee has no right to withhold possession of the mortgaged property or to resist a suit brought for redemption of the same.

It is contended on behalf of the mortgagee that the plaintiff was not entitled under the terms of the mortgage to claim accounts of the realizations made by the mortgagee. But the conduct of the mortgagee in this case in not paying the mortgage money left for payment to Baiju, the prior encumbrancer, renders accounting essential. He did not pay the entire consideration money secured by the mortgage, and failed to carry out his part of the contract in so far as it related to the payment of the prior encumbrance due to Baiju. Baiju, accordingly, sued for the recovery of his money, making the mortgagee a party to his suit, and got a decree for sale, which was satisfied by the present plaintiff for the protection of the rights which he had purchased from the mortgagors. Whatever the terms of the original contract may have been, the mortgagee had no right in the circumstances to appropriate the entire profits of the mortgaged property for a period of ten years, in whichever manner that period may be calculated, when he failed to pay a portion of the consideration secured by the mortgage. He who seeks equity must do equity, and a person cannot expect another to abide by a contract which he has himself broken. In either view of the case, the plaintiff was justified in claiming accounts and seeking redemption as soon as the mortgage money advanced by the mortgagee, with the interest due thereon, was satisfied.

The next point for consideration is whether the accounts ought to be adjusted on the footing of the consideration actually advanced by the mortgagee, or whether the plaintiff is entitled to a set-off for the amount paid by him to the heirs of Baiju in satisfation of their prior mortgage, which the mortgagee had undertaken to pay out of the consideration money left with him for the purpose. A suit for compensation for breach of a contract in writing registered ordinarily lies under Article 116 of the Indian Limitation Act (IX of 1908) within six years from the date of the breach. But the plaintiff does not claim damages for the breach of that contract. He only claims recoupment for the amount actually paid by him to the prior encumbrancer on the defendant's account. Article 62 of the Indian Limitation Act applies to such a case, and the plaintiff is entitled to a set-off for the amount paid by him on the defendant's account on paying the requisite Court-fee. The suit was filed within three years from the date of the payment. The allegation of the mortgagee that he had offered the money to Baiju and that Baiju had refused to take it was disbelieved by the Court below, and no argument has been addressed to us to contest the correctness of that finding. In *Hakim Ali Khan* v. *Dalip Singh* (3) it was held in somewhat similar circumstances that the limitation for a suit for re-imbursement would run from the date on which the plaintiff paid the decretal money due on the first mortgage.

In *Rani Raghubans Kuar* v. *Raunak Ali* (4), where a mortgagee brought a suit for the recovery of money due on his mortgage, and had not paid a portion of the mortgage money left with him for payment to a prior mortgagee, it was held that the

(2) 23 Ind. Cas 355; 36 A. 195; 26 M. L. J. 474; (1914) M. W. N. 411; 18 C. W. N. 586; 16 Bom. L. R. 344; 12 A. L. J. 473; 19 C. L. J. 477; 1 L. W. 813; 41 I. A. 84; 15 M. L. T. 389 (P. C.).

(3) 19 Ind. Cas. 676; 11 A. L. J. 478.

(4) 10 O. C. 69.

mortgagee was entitled to recover such portion of the principal amount, as was actually paid by him, with interest thereon, and that the mortgagor could in a separate suit sue the plaintiff for the recovery of such damages as might have accrued to him owing to the failure of the mortgagee to carry out his part of the contract. But in that case no payment had actually been made by the mortgagor to save the mortgaged property from sale in satisfaction of the prior mortgage, and the damages did not form an ascertained sum, in regard to which a set-off could have been claimed under section 111 of the then Code of Civil Procedure. It is true, as pointed out in *Raghubar Rai* v. *Jaij Rai* (5), that a mortgagor may file such a suit before he has suffered any loss by reason of the failure of the mortgagee to carry out his part of the contract. But a suit for re-imbursement is different in its nature from a suit for damages, and Article 116 of the Indian Limitation Act can only apply to the latter. The plaintiff has now been directed to pay the requisite Court-fee on the claim for re-imbursement.

The other points taken in the memorandum of appeal have not been pressed.

The plaintiff has filed a cross-objection, urging that no interest ought to have been allowed to the mortgagee after the 4th June 1914, when Rs. 3,247-2-0 were tendered under section 83 of the Transfer of Property Act. If the tender was sufficient no interest should have been allowed to the mortgagee after the date of that tender. It is not possible, however, to determine whether that tender was sufficient or to settle the account finally, till it is ascertained whether the mortgagee had paid Rs. 225 to Gaya Singh, on Jutta Sah refusing to receive the same as he now alleges. The learned Subordinate Judge has since his decision under appeal allowed an application for a review of his judgment with a view to inquire into that matter; but it does not appear whether he has come to any finding on that point.

The Court below is, therefore, directed to determine, after taking such additional evidence as the parties may adduce,—

1. Whether the mortgagee tendered Rs. 225 to Jutta Sah as alleged by him, and, on his refusal to receive the same, paid that sum to Gaya Singh?

2. What is the amount remaining due to the mortgagee on the deed of further charge, calculated on the footing of the consideration actually paid by him, after crediting the surplus profits received by him from the mortgaged property up to the date of the suit and excluding from the account Rs. 1,342 or any portion thereof which has been found to have been paid to the heirs of Baiju?

Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

Issues remitted.

(5) 14 Ind. Cas. 244; 34 A. 429; 9 A. L. J. 534.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2952 OF 1916.

May 28, 1918.

Present:—Mr. Justice Fletcher, and Justice Sir Syed Shamsul Huda, Kt.

MURARI MAHAN DAS—PLAINTIFF—APPELLANT

versus

TOFEL SHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Chowkidari chakran *lands within* putni, *resumption of*—*putnidar and zemindar, rights of.*

Chowkidari Chakran lands included within a *putni* belong to the *putnidar* after they are resumed, so that the *zemindar's* settlement of those lands after their resumption with a third person is ineffective as against the *putnidar*. [p. 16, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 14th of September 1916, affirming that of the Subordinate Judge of that District, dated the 30th of September 1915.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Moninatra Nath Banerjee*), for the Appellant.—The plaintiff is the appellant and the appeal arises out of a suit for recovery of khas possession of Chowkidari Chakran lands belonging to the three Zemindars. The lands were resumed by the Government and made over to the Zemindars. With regard to the 15-annas landlord, the plaintiff holds under a settlement. The one-anna landlord Gora Chand Roy let out his

share in Putni lease to one Bibi Azimunnissa in 1890. Thereafter Gora sold his share to Kali Prosonno in 1899 and the plaintiff took settlement from Kali Prosonno. The present defendants purchased the right of Azimunnissa in Putni; the Putni was sold away for arrears of rent and purchased by the defendants in 1312 B. S. corresponding to 1905 A. D. The plaintiff was in possession of the lands for more than 12 years from 1303 to 1319 B. S., when he was dispossessed by the defendants. The defence is that as the Chowkidari Chakran land was included in the Putni purchased by the defendants at the rent sale, the Zemindar had no right to settle it with the plaintiff. From the lease it appears that the Chowkidari Chakran lands did not pass to the Putnidar. There is an express mention in the lease that the Chowkidari Chakran lands would not pass by the demise. The plaintiff is, therefore, entitled to recover the lands in suit. Refers to *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (1). The words in the lease are "on resumption you will be entitled to get settlement." Refers to *Surendra Mohan Sinha* v. *Rajendra Nath Roy* (2).

The next point is that as trespasser the plaintiff has been holding the land for more than twelve years and so he has acquired a right to the lands by virtue of adverse possession for the statutory period. If the plaintiff is not a person who has been inducted into the lands lawfully, then he is a trespasser, and he having held the lands as trespasser for more than twelve years has acquired a right by adverse possession.

Babu *Hira Lal Sanyal*, for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the plaintiff against the decision of the learned District Judge of Birbhum, dated the 14th September 1916, affirming the decision of the Subordinate Judge of Suri. The suit was brought to recover possession of certain Chowkidari Chakran lands lying within two Mouzas. The plaintiff admittedly has got a fifteen-annas share of these Mouzas under leases granted to him by the owners of the property. The question arises as to the remaining one-anna share; and the way that question arises is this: The defendants are Putnidars claiming through one Gora Chand Roy who originally owned this one-anna share, and the question is whether in the Putni lease granted by Gora Chand Roy the resumed Chowkidari Chakran lands were included, because if they were included it is quite clear that the subsequent lease of the one-anna share of the Chowkidari Chakran lands to the plaintiff was ineffective. The first point is what passed by the lease? The words of demise in the lease are purely general words. But it is said that these general words are cut down by reason of certain words that appear subsequently in the Putni lease, and those words have been translated by the learned Judge in this way: That if the Chowkidar's Chakran lands were resumed, the Putnidars would get them. Dr. Mitter wishes to translate them in this way: That if the Chowkidar's Chakran lands were resumed, then a lease of the resumed lands would be granted to the Putnidars. Of course, in that view, to give full effect to the demise, you have got to exclude from the demise the resumed Chowkidari Chakran lands because the parties provided by express terms that, if they were resumed, a new and independent lease would be given to the Putnidars. Apparently the words do not bear the meaning that Dr. Mitter wishes them to bear. The learned Judge, according to Mr. Justice Shamsul Huda, gives more or less an accurate translation of those words. That being so, the words were simply put in to explain that the lease was to include all Chowkidari Chakran lands that might be resumed, so as to conclude any question that might be raised subsequently between the parties. If that is so, it is quite clear that the plaintiff at the time he took this lease of the one-anna share got nothing because his lessor's predecessor-in-title had already parted with all his interest in the Chowkidari Chakran lands by the Putni in favour of the defendants.

(1) 40 Ind. Cas. 981; 25 C. L. J. 499; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 19 Bom. L. R. 462; 2 P. L. W. 1; (1917) M. W. N. 459; 6 L. W. 101; 44 C. 841; 22 M. L. T. 489; 44 I. A. 117 (P. C.).

(2) 46 Ind. Cas. 435; 22 C. W. N. 660; 28 C. L. J. 160.

SECRETARY OF STATE *v.* HIRANAND OJHA.

Then another point has been raised, and that is that the plaintiff has got a title by adverse possession. The learned Judge remarked that that case was never raised in the lower Courts and I think that is probably right, because, if the defendants are co-sharers with the plaintiff, there is no allegation that there was any act by the plaintiff which would render his possession adverse as against his co-sharers. His case was that the defendants had no interest in these Chowkidari Chakran lands. He never set up any case that, if the defendants had any interest, they had lost it by reason of having been excluded by the plaintiff. I think the learned Judge was right in saying that no case of adverse possession arose in the present case and that that case had never been made. In that view, the present appeal fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 12 OF 1916.

July 26, 1918.

Present:—Mr. Justice Jwala Prasad and Justice Sir Ali Imam, KT.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

HIRANAND OJHA AND OTHERS—PLAINTIFFS AND *proforma* DEFENDANTS—RESPONDENTS.

License—Permanent structure built upon land—Revocation of license.

Where by an oral agreement the plaintiff allowed the defendant to execute and work out on the plaintiff's land an irrigation scheme of considerable permanent benefit to a very large number of villages at a considerable amount of expense:

Held, that the agreement created a license which could not be revoked at the instance of the plaintiff. [p. 169, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Palamau.

Mr. *Fakhruddin*, for the Appellant.

Mr. *Naresh Chandra Sinha*, for the Respondents.

JUDGMENT.—The facts and circumstances from which this appeal arises are as follows:—

The plaintiffs-respondents and the *pro forma* defendants are owners of a village called Man-Ahar, in which is situated a reservoir bearing the same name. The plaintiffs-respondents have an eight-anna share in this village. It appears that there are some estates in the neighbourhood of this village that are owned by Government.

An irrigation scheme known as Sadabha scheme was mooted in the year 1905. The project was to bring a channel from the Sadabha stream to the Government villages and such other villages as wished to participate in the benefits of the scheme. It appears that a number of villages through which the proposed channel was to come were admitted into the scheme and on the 26th of February 1908 a memorandum of agreement was drawn up fixing the rights and liabilities of all those that wished to join. The memorandum is marked as Exhibit A in the case. The plaintiffs-respondents, among others interested in the scheme, it is alleged, signed this agreement. It was agreed amongst the parties that lands lying or situate in the respective villages or shares of villages required for the purposes of the said scheme would be given free of cost. It was also agreed upon that the Deputy Commissioner of Palamau representing the Government estates was to distribute the water that was to be brought from the Sadabha river among all who were admitted to the benefits of the scheme in such a way as would meet all the requirements for irrigating the fields, and that he should not obstruct in any way the flow of water through the main channel of the said scheme, provided no waste was committed in the use of the water; nor it was agreed upon, the Deputy Commissioner or others who signed the agreement should have the right to obstruct the flow of the water in any of the subsidiary channels of the scheme with a view to divert water into any reservoir or reservoirs, but that each of them should be at liberty to prevent all excess flow of water into any reservoir, provided that by so doing he did not in any way unduly interfere with the proper supply of water to any person entitled to be supplied. After parties had so agreed the work of

construction was taken up, and it appears that the channel made from the Sadabha river was taken down through the plaintiffs-respondents' village Man-Ahar skirting the eastern side of their reservoir called Man Ahar to the villages to the south of it including the Government estates. The agreement included a stipulation for the proprietors of the villages concerned to pay towards the construction of the scheme in the same proportion to the total cost of construction as the road-cess payable by each of these villages was to the road-cess of all the villages admitted to the benefits of this scheme. It was further stipulated that the maintenance of the scheme and its preservation were to be carried on by further contribution upon the same basis. On the completion of the work it transpired that a portion of the channel (colored "red" in Exhibit C, the map on the paper-book) was found to be of such a level that the water brought from the Sadabha river could not freely flow down to the south. This necessitated a slight diversion of the channel and the diversion in question was effected, as is shown in the map, Exhibit C, by cutting a channel from the main channel into the reservoir known as Man-Ahar at its north-eastern corner and taking out another channel from its south-eastern corner further south again to the main channel. This arrangement resulted in converting the reservoir, Man Ahar, into an important and integral part of the scheme, as the water brought down in the channel from the Sadabha fell into this reservoir at the north-eastern corner and flowed down again from the south-eastern corner falling into the main channel lower down. The inclusion of this reservoir as a part of the old scheme was effected at a cost of Rs. 688-7-6, which was met by the funds raised for the purposes of the carrying out of the scheme. The embankments of the Man Ahar reservoir were for this reason raised and strengthened.

The plaintiffs' case is that the construction of the channel on the land belonging to them and the inclusion of Man-Ahar reservoir into the scheme by cutting the two new channels, raising and strengthening the embankments were acts done by the Deputy Commissioner of Palamau without their knowledge or consent. It is also alleged by them that the construction of the channel has stopped the supply of surface water from the north-east into their reservoir and that they were also prevented by the Deputy Commissioner from taking water from their Man Ahar reservoir to other reservoirs owned by them for the purposes of irrigating their fields and that thereby they have suffered loss of crops. The relief claimed is the declaration that the defendant No. 1, Secretary of State for India in Council, has no right to the use of the water of the reservoir called Man Ahar and for an order directing him to remove all structures made by him on plaintiffs' land and the award of damages for loss of crops due to his having prevented the plaintiffs from irrigating their fields from the water of Man Ahar.

The defendant denies generally the allegations of the plaintiffs and rests his suit principally on the ground of estoppel, alleging that the Sadabha scheme with the subsequent inclusion of Man Ahar was carried out with the knowledge and consent of the plaintiffs. He also denies that there has been any loss of crops suffered by them.

The learned Subordinate Judge who tried the case gave his decision as follows:—

"The suit be decreed to the effect that on payment of Rs. 636 into Court in favour of defendant No. 1 within 4 months from this day the plaintiffs shall have free and uncontrolled use of the Ahar called Man Ahar and its water as against defendant No. 1 from the 1st of October 1915 and that the defendant No. 1 shall have no right to the use of the same from the 1st of October 1915. On failure to deposit the amount within the period fixed the plaintiffs shall have no right to prevent the defendant No. 1 from the use of the said Ahar and its water.

"No damages allowed, parties are to bear their own costs."

We have to consider whether this order passed by the learned Subordinate Judge can be sustained. Before we deal with the points of law raised by the learned Government Pleader we wish to express our entire concurrence with the finding of the lower Court regarding the knowledge and

consent of the plaintiffs and with reference to the carrying out of the original Sadabha scheme and the subsequent inclusion of Man Ahar in it. The evidence on the record on this point is overwhelming. Exhibit A of the Commissioner appointed to take the evidence of Mr. Hignell, who was Deputy Commissioner of Palamau in 1908, is a note, dated the 4th of April of that year, written by the witness. This document read with the evidence of Mr. Hignell leaves no room for doubt that the plaintiffs were willing parties to the completion of the Sadabha irrigation scheme by the inclusion of their reservoir Man Ahar. It is also abundantly proved that the plaintiff Hiranand Ojha gave his consent to the raising and strengthening of the embankments of the Ahar for the purposes of the scheme. Exhibit F is a note, dated the 15th of March 1908, submitted by the District Engineer to the Deputy Commissioner of Palamau. This note shows that the entire work was completed with the exception of a few subsidiary channels at a cost of Rs. 18,126-10-6, Exhibit B is a petition of the plaintiff Hiranand Ojha, dated the 10th of November 1909. This was in reply to a notice served on him to pay up the proportionate cost of construction in respect of some villages admitted to the benefit of the Sadabha scheme. A perusal of this petition is sufficient to show that he had willingly joined the supporters of the scheme and had actually accepted the liability to pay cost of construction in proportion to such share or shares of villages as were in his direct possession and were benefited by the scheme. Exhibit K is a copy of a judgment in money Appeal No. 13 of 1913, given by the Judicial Commissioner of Ranchi on the 4th of January 1914. It appears that the plaintiff Hiranand Ojha failed to contribute his share of the cost of the Sadabha irrigation scheme and a suit had to be instituted against him by the Secretary of State for India in Council for the realization of the amount due from him. The suit was decreed and the finding of the Judicial Commissioner in that case was that Hiranand Ojha had fully participated in the benefits of the scheme and was accordingly liable for his share of expenses incurred in giving effect to that scheme. It is unnecessary to labour with this part of the case and it would be sufficient to say that we have no hesitation in holding that the Sadabha scheme, as originally agreed to and the subsequent inclusion of the reservoir Man Ahar in it, had been carried out with the full knowledge and consent of the plaintiffs. The learned Subordinate Judge having found against the plaintiffs on the question of their knowledge and consent arrived at his decision from the point of view as to whether an oral agreement or contract between the plaintiffs and the Deputy Commissioner in respect of an immoveable property worth more than Rs. 100 could be given any effect to. It is true that in the absence of a registered instrument making a gift of the land on which the Sadabha scheme was executed according to the memo. of agreement, there remains nothing but an oral contract. This view of the learned Subordinate Judge is not seriously challenged, as the contention of the learned Government Pleader is that even if the provisions of the Contract Act and the Transfer of Property Act have no application to the suit, it deserved to be dismissed on other grounds

The learned Vakil presses upon our consideration that if the agreement between the plaintiffs and the Deputy Commissioner of Palamau did not amount to a gift of the land in village Man Ahar over which the scheme was carried out, under any circumstances it was a grant which fulfilled all the legal conditions of a license. License has been defined as "a grant by one person to another or to a definite number of other persons of a right to do or continue to do in or upon the immoveable property of the grantor something which would, in the absence of such right, be unlawful and such right not amounting to an easement or an interest in the property." This definition is contained in section 52 of the Indian Easements Act (Act V of 1882). This Act does not apply to this Province, but the definition is borrowed from the English Law and there can be no question that in the absence of an enactment of the Indian Legislature we must be guided by the principles of the English Law. A license may be created

by parole [*vide*, *Hewlins* v. *Shippam* (1), *Fentiman* v. *Smith* (2)]. We have, therefore, no hesitation in holding that the facts proved in this case establish the grant of a license by the plaintiffs to the defendant represented by the Deputy Commissioner of Palamau.

The next question for consideration is, whether a license is revocable. Section 60 of the Act referred to above provides for its revocation by the grantor, unless (*a*) the license is coupled with a transfer of property and such transfer is enforced, and

(*b*) unless the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution.

In the present case we are not concerned with any question of transfer of property, and there can be no doubt that the defendant through the Deputy Commissioner of Palamau acting upon the license has executed the Sadabha irrigation scheme which is of a permanent character and has incurred expenses in the execution.

In the present case, however, what we have to consider is whether on the facts and circumstances of the case the license granted by the plaintiffs to the defendant should be revoked. If the case were governed by the Indian Easements Act, it would, under section 60 of that Act, be irrevocable, but that Act does not apply to the Province of Bihar and Orissa. We have, therefore, to come to a decision on consideration of what is reasonable and just [*Plimmer* v. *Wellington Corporation* (3)] The decision, therefore, does not rest on regard for the strict legal rights of the parties so much as on the supervening equities of the case. There can be no question on the evidence that the Sadabha irrigation scheme is a work of considerable permanent benefit to a very large number of villages and that a considerable amount of money has been spent upon its construction. There can also be no doubt that on the consent given by the plaintiffs and reliance having been placed upon the same a scheme of this magnitude was carried out, of which the reservoir known as Man Ahar has been an integral part and on which a very large sum of money has been spent. These are grave considerations in the case. It is also evident that if the prayer of the plaintiffs is granted, whatever new method may be adopted to re-construct the scheme on a fresh basis, the loss in money and convenience would accrue not only to the defendant but to a large number of proprietors of villages other than Man Ahar that are at present receiving benefit from the existing scheme. The revocation of the license is a matter of discretion with the Court and it can only be exercised on a balance of the consideration of the equities of the case. On a careful consideration of the facts and circumstances of this case we have no hesitation in holding that the equities are on the side of treating the license as irrevocable. It does not also appear to us on the evidence that the plaintiffs resent the bringing of the Sadabha water into Man Ahar reservoir but what is disliked by them is its control by the Deputy Commissioner of Palamau. If the plaintiffs claimed to take this water into other reservoirs of their own without any reference to the Deputy Commissioner they seem to have wholly ill-conceived their remedy in instituting the present suit. The result is that the decree of the lower Court is vacated and the plaintiffs' suit stands dismissed with costs throughout.

Appeal decreed.

(1) (1826) 5 B. & C 221 at p. 229; 7 D. & R. 783; 4 L. J. K. B. (o. s.) 241; 108 E. R. 82.

(2) (1803) 4 East 107; 102 E. R. 770; 7 R R 533.

(3) (1884) 9 A. C. 699; 53 L. J. P. C. 104; 51 L. T. 475; 49 J. P. 116.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2598 OF 1917.

June 20, 1918.

Present:—Justice Sir Charles Chitty, K.,
and Mr. Justice Walmsley.

LAKSHMI KANTA DE—PLAINTIFF—APPELLANT

versus

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE NAIHATI MUNICIPALITY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Municipal Act (III B. C. of 1884), s. 57—

LAKSHMI KANTA DE *v.* CHAIRMAN OF THE NAIHATI MUNICIPALITT.

Person holding office of profit under Municipality, whether qualified to be elected Commissioner—Election Rules, r. 13, *meaning of.*

A person who is disqualified under section 57 of the Bengal Municipal Act is *ipso facto* disqualified for election as a Municipal Commissioner. [p. 171, col. 1.]

A person who held and still holds an office of profit under the Commissioners of a Municipality, such as a teachership in a Municipal School, is not qualified to be elected as a Commissioner. [p. 171, col. 1.]

Rule 13 of the Election Rules means that only those persons should be included in the list of candidates who are qualified to be elected. [p. 171, col. 1.]

Appeal against the decree of the Additional District Judge, 24-Parganas, dated the 18th July 1917, affirming that of the Munsif, 2nd Court at Barasat, dated the 20th June 1916.

FACTS.—The plaintiff-appellant, who was a teacher in the Municipal School, was a voter in one of the wards of the Naihati Municipality. He offered himself as a candidate for election as a Municipal Commissioner in a ward where there were two other candidates, *viz.*, defendants Nos. 2 and 3. There were two vacancies in that ward. The Chairman, a voter of the Municipality, thought that the plaintiff was not eligible for election under rule 13 of the Election Rules read along with section 57 of the Bengal Municipal Act (III B. C. of 1884), because he held an "office of profit" under the Municipality, and referred the matter to the District Magistrate for decision. The District Magistrate supported the view of the Chairman and the nomination paper was rejected. The plaintiff, being dissatisfied with the action of the Chairman, brought this suit. The Courts below dismissed the plaintiff's suit and the present appeal has been preferred by the plaintiff.

Babu *Manmohan Bose* (with him Babu *J. M. Mitter*), for the Appellant.—The plaintiff is a school master in a school which received grant from the Municipality. The question is whether being a teacher of the school, the plaintiff held an office under the Municipality? It is a private school. A fund, when made up of grants and other sources, does not retain its character of any of those sources. The question is whether section 57 of the Bengal Municipal Act (III B. C. of 1884) applies to any person other than what the section clearly says. The disqualification mentioned in section 57 applies only to a Commissioner and not to a candidate and that the Commissioner can only be removed by the Commissioner of the Division under section 20) of the Act (see Pargiter's book on Bengal Municipal Act, 2nd Edition, page 86, paragraph 3).

The Act does not empower the Chairman to reject the nomination paper, because the candidate may give up the office of profit just before the election.

Mr. *J. M. Mitra* and Babus *Ram Chander Majumdar*, *Rishendra Nath Sarkar* and *Samarendra Nath Datt*, for the Respondents, were not called upon.

JUDGMENT.

CHITTY, J.—This is an appeal by the plaintiff arising out of a suit brought by him against the Chairman of the Naihati Municipality and two persons who were elected as Commissioners for the ward for which the plaintiff considered himself a candidate. The election was to be held on 9th October 1915. Defendants Nos. 2 and 3 were duly nominated as candidates. We may assume that the nomination of the plaintiff was also in order but we find nothing as to that on the records. The Chairman was in doubt whether the plaintiff was qualified having regard to section 57 of the Bengal Municipal Act. He referred it on 17th September 1915 to the Magistrate, presumably under rule 29 of the Election Rules; and the Magistrate on the same day ruled that the plaintiff was not qualified to be elected as a Commissioner. An appeal to the Commissioner of the Division by the plaintiff was, we understand, unsuccessful. On 21st December 1915 the plaintiff filed this suit praying for a declaration, *first*, that the cancellation of his candidature was *ultra vires* and illegal; *secondly*, that defendants Nos. 2 and 3 could not sit as duly elected Commissioners; and, *thirdly*, that the action of the Chairman in rejecting his application was illegal and *ultra vires* and that the election of the defendants was also *ultra vires* and void. Later on, a prayer was added for a permanent injunction restraining the defendants Nos, 2 and 3 from sitting.

Both the Courts have found, as a matter of fact, that the plaintiff held and still holds an office of profit under the Commissioners. That finding we cannot question in second appeal. The question then arises whether the Chairman, in these circumstances, was justified in excluding the plaintiff's name

from the list of candidates which he was bound to prepare and publish under rule 14.

It has been argued here that the disqualification of a Commissioner under section 57 could only be determined by the Commissioner of a Division under section 20 of the Act. Section 20, however, has no bearing on the present case. That section only provides for the removal by the Commissioner of a Division of any Commissioner under various circumstances, one of which is—if, in the judgment of the Commissioner of the Division to be recorded in writing, he has become disqualified to continue in office under section 57. This is not a case of becoming disqualified after election or being disqualified to continue in office. Rule 13 which was amended in 1898 now runs: "Any person qualified to vote under these Rules, and not disqualified under section 57 of the Act, shall be qualified to be elected as a Commissioner." One would think, reading that rule in the ordinary meaning of the English words, that a person who is disqualified under section 57 would be *ipso facto* disqualified for election. It is, however, argued that there is no rule against a disqualified person becoming a candidate and that he should be allowed to be elected and have his election forthwith cancelled or—possibly if it so pleased him—allowed to give up the office of profit or the contract or whatever it might be which disqualified him from continuing as a Commissioner. I do not think that the rules were framed with such an object in view, nor do I think that that is a reasonable view to take. They must, I think, mean that only those persons shall be included in the list of candidates who are qualified to be elected: otherwise a list of candidates would be of no use whatever. In that view of the Rules, the present appeal fails and must be dismissed. It may be mentioned that it would be useless to make any order in this case, as it is now one of purely academic interest having regard to the lapse of time since the election took place. The appeal is dismissed with costs, one set to the defendant No. 1 and one set by the defendant No. 2.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1930 OF 1917.

June 18, 1918.

Present:—Mr. Justice Wilberforce.

BEHARI LAL—DEFENDANT—APPELLANT

versus

KHAN CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (f), scope of, Sch. II, paras. 1, 15, 17, 20—Order refusing to file award on private reference, nature of—Application to file award on private arbitration—Subsequent reference to new arbitrator through Court—Application to file second award—Order setting aside award, whether decree—Appeal—Revision.

Clause *(f)* of section 104, Civil Procedure Code, refers to cases where a matter has been referred to arbitration without the intervention of the Court. [p. 172, col. 2.]

There is an inherent difference between orders refusing to file an award on a matter referred to arbitration without the intervention of the Court and those referred to under paragraph 1 of the Second Schedule of the Civil Procedure Code. In the former case, if the Court refuses to file an award, its order amounts to a formal adjudication on the matter in controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under paragraph 15 of the Second Schedule, the order is only of an interlocutory nature and is in no way a conclusive adjudication of the matter in dispute [p. 172, col. 2; p 173, col 1.]

A dispute between members of a firm was privately referred by them to arbitration. An award being given, an application was made for filing it. Objections were raised and an issue as to the misconduct of the arbitrators was framed. Meanwhile the parties agreed to refer the whole matter in dispute to a new arbitrator and made an application to the Court to that effect. The new arbitrator was then appointed and gave his award. Objections were made to this second award and the Court, finding that one of the parties had not signed the application of reference to the arbitrator and that the first award had not been superseded, set aside the second award. An appeal to the District Judge was dismissed as incompetent and a second appeal was filed in the Chief Court:

Held, (1) that inasmuch as the application for the filing of the first award was numbered and registered as a suit between the parties, a suit was pending at the time the second reference was made and the order of the first Court was not, therefore, an order referred to in section 104, Civil Procedure Code; [p. 172, col. 2.]

(2) that the order in question setting aside the award did not amount to a decree and was not appealable as such; [p. 173, col. 1.]

(3) that the order of the lower Appellate Court disposed of a question of law and, even if wrong, was not open to revision as no material irregularity had been committed. [p. 173, col. 1.]

Second appeal from the decree of the District Judge, Multan, dated the 11th June 1917, affirming that of the Subordi-

nate Judge, Multan, dated the 11th May 1917, setting aside the award.

Lala *Durga Das*, for the Appellant.

Lala *Moti Sagar*, R. S, and Mr. *N. C. Mehra*, for the Respondents.

JUDGMENT.—A dispute arising between five persons, members of a firm, was privately referred by them to arbitration. An award was duly made and an application was made under paragraph 20 of the Second Schedule of the Civil Procedure Code for the filing of the award in Court. Objections were made and an issue framed as to whether the arbitrators were guilty of any misconduct Meanwhile, the parties apparently did not wish to proceed further in the matter of the award and the disputes connected with it, and they agreed to refer the whole matter in dispute from the beginning to a new arbitrator. They made an application to the Court to this effect, and the matter in dispute was referred to this arbitrator who put in his award. Objections were then made to the second award and the first Court, finding that one of the parties had not signed the application of reference to the arbitrator, and that the first award had not been superseded, ordered that this second award should be set aside and that the case should proceed from the stage when the second reference was made. Against this order an appeal was preferred to the District Judge who held that the order was not appealable, and could be traversed in the eventual appeal against the decree. Against this decision of the District Judge a second appeal has been preferred to this Court, and it is requested that in case it be held that no appeal is competent, the appeal may be treated as a revision.

I have heard lengthy arguments on the question whether the decision of the first Court was appealable or not. Counsel for the appellant argued that his appeal was covered by clause (*d*) or clause (*f*) of section 104, Civil Procedure Code, or that if this was not the case, the order setting aside the award was tantamount to a decree. It appears evident that section 104 (*d*) can have no reference to the present appeal, as the order under appeal has not refused to file an agreement to refer to arbitration. It appears equally evident that clause (*f*) has no application to the present case. As pointed out in *Ram Jawaya Mal* v. *Devi Ditta Mal* (1), clause (*f*) refers to paragraphs 20 and 21 of the Second Schedule namely, to cases where a matter has been referred to arbitration without the intervention of the Court. In the present case an application had already been made under paragraph 20 for the filing of the first award, and this application was numbered and registered as a suit between the applicant and the other parties. A suit was, therefore, pending between the parties and it was during the trial of this suit that the second reference to arbitration was made. It would be a far-fetched argument that the second reference and the second award had taken the place of the first reference and the first award and that, therefore, paragraph 20 had no application. It is plain from the wording of the schedule itself and from many authorities, *e. g.*, *Ram Jawaya Mal* v. *Devi Ditta Mal* (1), that a suit was pending and that the second reference and award were made in connection with that suit. For the above reasons, I hold that the order of the first Court is not an order referred to in section 104.

It is next argued that in any case the order of the first Court refusing to file the award is tantamount to a decree and in support of this view, *Ram Jawaya Mal* v. *Devi Ditta Mal* (1) is referred to. The judgment relied upon deals with the question whether orders rejecting applications under sections 523 and 525 of the old Code of Civil Procedure, corresponding with paragraphs 17 and 20, respectively, of Schedule II of the present Code, are decrees. It is not applicable to the present case as the reference can only be considered to have been made under paragraph 1 of the Second Schedule. Moreover there is an inherent difference between orders refusing to file an award on a matter referred to arbitration without the intervention of the Court and those referred to under paragraph 1. In the former case if the Court refuses to

(1) 34 Ind. Cas. 192; 117 P. R. 1916; 107 P. W. R. 1916; 70 P. L. R. 1917.

file an award, its order amounts to a formal adjudication on the matter in controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under paragraph 15 of the Second Schedule, the order is only of an interlocutory nature and is in no way a conclusive determination of the matter in dispute. In my opinion, therefore, *Ram Jawaya Mal* v. *Devi Ditta Mal* (1) does not in any way assist the appellant. I hold that the order of the first Court setting aside the award does not amount to a decree and is not appealable as such.

The matter is not free from difficulty, as in ordinary cases of suits in which a reference is made to arbitration, the order of the Court setting aside the award can be questioned on an appeal from the decree. In the present case, whatever the result, it will be difficult or impossible to re-open the question now decided in any future appeal. There is, therefore, more ground for treating the present appeal as an application for revision than usually exists. But I do not consider that sufficient grounds exist in the present case for entertaining such an application. The principles governing such cases are discussed at length in *Ram Jawaya Mal* v. *Devi Ditta Mal* (1) and *Ahmad Din* v. *Atlas Trading Company of Delhi* (2). The order of the lower Appellate Court in the present case disposes of questions of law and even if wrong, no material irregularity can be said to have been committed. As a matter of fact, the views of the first Court on the questions of law involved appear *prima facie* correct.

I, therefore, hold that no appeal lay to the District Judge and that there is no sufficient ground for revision. I dismiss the appeal with costs.

Appeal dismissed.

(2) 31 Ind. Cas. 80; 63 P. R. 1915; 146 P. W. R. 1915.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2325 OF 1916.

June 17, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

HAR KUMAR SEN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAJ KUMAR HALDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Rent suit—Decision as to rate of rent, whether operates as* res judicata.

A judgment in a suit for rent deciding the question of the annual *jama*, even where it does not operate as *res judicata* on the same question in a subsequent suit for rent, is good evidence as to the rate of rent [p. 174, col. 1.]

Semble.—The tendency of the more recent decisions of the Calcutta High Court is that when the question of the annual *jama* has been raised in a suit for rent and decided, it will be regarded as *res judicata* in later suits for rent of the same holding. [p. 174, col. 1.]

Appeal from a decision of the Subordinate Judge, Barisal, dated the 30th June 1916, modifying that of the Munsif at Barisal, dated the 31st March 1915.

FACTS appear from the judgment.

Babu *Kali Prasanna Piplai* (with him Babu *Atindra Nath Mukherjee* and Moulvi *A. K. Fazlul Huq*), for the Appellants.—The only question is whether the decision in the previous suit for rent is *res judicata* as to the amount of rent which is in dispute in this case. After that decree, there was a preparation of the Record of Rights under the Bengal Tenancy Act showing the annual *jama* of the holding: and I submit that due weight should be given to the certificate of final publication, which is binding upon the parties. The decision in the previous suit for rent is not *res judicata* in this suit. Refers to *Kali Roy* v. *Pratap Narain* (1), *Maharani Beni Pershad Koeri* v. *Raj Kumar Chowbey* (2) and *Srinarain Singh* v. *Sundarbati Kumari* (3). Where the rent is fixed by a contract, oral or written, and a decree is given on the contract, then and then only the doctrine of *res judicata* is applicable. In this case no contract has been set up in the plaint. The plaint only states that the *jama* is only so much.

(1) 5 C. L. J. 92.
(2) 6 C. W. N. 589.
(3) 6 Ind. Cas. 860; 13 C. L. J. 653 at p. 655.

Then after the previous rent-decree in question when there is a certificate of final publication, then, in the absence of any evidence to the contrary, the entry in the Record of Rights must be taken to be correct. The Record of Rights was prepared after the previous decree for rent in question, and, therefore, the amount of rent stated in the Record of Rights must be taken to be correct.

Babu *Nakeleswar Mukherjee*, for the Respondents.—All these cases on the question of *res judicata* in a suit for rent are summarized in *Mane Muhammad Nasya* v. *Dhani Muhammad* (4) and it appears that there is a conflict of decisions on the point. Your Lordships will, therefore, be pleased to refer the case to a Full Bench, if your Lordships do not agree with the Judge in the Court of Appeal below.

Babu *Kali Prasanna Piplai* replied.

JUDGMENT.—This is an appeal by the plaintiffs arising out of a suit for rent. The only question raised before us is whether the decree of the Subordinate Judge is right, based as it is on the principle of *res judicata*. The Judge has, however, not relied entirely on the question of *res judicata* but, on the evidence, has found that the plaintiffs' contention must fail. On the question of *res judicata* the authorities of this Court are not entirely unanimous. There are no doubt cases to be found taking more or less contrary views. The tendency, however, of the more recent decisions appears to be that when the question of the annual *jama* has been raised in a suit and decided. it will be regarded as *res judicata* in later suits for rent of the same holding. We need not, however, go into that question now, because in this case the Judge has distinctly found that even if the previous judgment does not operate as *res judicata*, it is good evidence as to the rate of rent. That evidence he weighs against the Record of Rights and the presumption arising therefrom and decides against the plaintiffs. It cannot be said that the learned Judge was wrong in that conclusion. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(4) 16 Ind. Cas. 22; 17 C. W. N. 76 at p. 78; 17 C. L. J. 71.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 3169 OF 1916.

February 2, 1918.

Present:—Mr. Justice Leslie Jones.

Musammat BHAGIRTHI—PLAINTIFF—APPELLANT

versus

GHISA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will—Execution, proof of—Disposing mind of testatrix—Evidence in support of Will.

In an application for Letters of Administration with the Will annexed, it was not denied by the caveators that the testatrix had a disposing mind on the date on which the Will was alleged to have been executed. Expert evidence proved decisively that the impression on the Will was the thumb-mark of the testatrix, but it was contended that though a Will was, in fact, executed, it was lost and that the Will propounded was a forgery, having been written to the thumb-impression which already existed on a piece of paper in possession of the applicant's husband, who held a general power-of-attorney from the testatrix. The Will was supported by the scribe and the three attesting witnesses. The applicant herself testified that she had seen the Will written, that it had been made over to her by the testatrix and that she had kept it with herself:

Held, (1) that it was not proved that the original Will was lost and that the theory of a dishonest conspiracy to forge a Will could not be sustained in view of the positive evidence produced in support of the Will; [p. 176, col. 2.]

(2) that the Will was a genuine document duly executed by the testatrix. [p. 177, col. 1.]

First appeal from the order of the District Judge, Delhi, dated the 19th of August 1916, rejecting the application.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—Shiv Charn bequeathed his property by a registered Will to *Musammat* Mewan, the widow of his deceased son. *Musammat* Mewan died at Delhi on the 29th October 1915. On 6th January 1916, *Musammat* Bhagirthi, her brother's daughter, applied for Letters of Administration with a Will annexed, the Will being one alleged to have been executed by *Musammat* Mewan on the 29th July 1914. The application was opposed by two caveators, Ramji Das, the nephew, and Ghisa Singh, the sister's son of Shiv Charn.

The District Judge of Delhi has held that the execution of the Will has not been proved and *Musammat* Bhagirthi has, therefore, filed the present appeal to this Court.

BHAGIRTHI *v.* GULSA SINGH.

It is not now denied that on the 29th July 1914 *Musammat* Mewan had a disposing mind and the only question which is still in dispute is that of execution.

In support of the Will numerous witnesses were produced, among them being Kanshi Nath, the scribe of the Will, and Udmi Ram, Nanak Chand and Nanhe Mal, the three attesting witnesses. *Musammat* Bhagirthi herself testified that she had seen the Will written, that it had been made over to her by *Musammat* Mewan and that she kept it at Ludhiana. There was other evidence concerning the despatch of the Will from Ludhiana to Delhi for the purpose of the present application.

The District Judge has remarked that it cannot be said that the evidence of these witnesses has been materially shaken in cross-examination, and the only criticism of it which he has himself made is that one of them Udmi Ram is in the same employment as Puran Singh, the husband of *Musammat* Bhagirthi.

He also conceded that it was very probable that *Musammat* Mewan would make a Will in favour of *Musammat* Bhagirthi whom she had brought up as her daughter from babyhood, and there is good evidence that she had been ill at the end of the preceding June and was, therefore, likely to make a Will about that time.

The District Judge has, however, given several reasons for his view that the Will is not proved. His theory seems to be that *Musammat* Mewan did, in fact, execute a Will but that it was lost or stolen after her death and that the Will propounded is a forgery. He has further stated a view that the thumb-impression at the bottom of the Will is in all probability a reprint from some original in the possession of Puran Singh and that the Will has been written to the thumb impression instead of the thumb impression being appended below the Will. He was also of the opinion that as the thumb-impression was very faint and fine, the story of the witnesses that it was obtained by an application of soot from the bottom of a frying-pan was unlikely.

Counsel for the respondents does not support all these arguments. It is not at all likely that the witnesses to the Will would commit themselves to the story of the soot if they knew that the thumb-mark was a transfer from an ink impression. Moreover, experiment in this Court has shown that an application of soot gives an impression exactly like that on the Will and very unlike the sort of impression obtained from the application of country ink. There is, of course, no doubt that an ink impression can be transferred by the exercise of a certain amount of skill but traces of the process are likely to be left. Here there are no such traces. On the other hand I have no evidence or knowledge that an impression from dry soot can be clearly transferred, and though an expert has been examined with regard to the thumb-impression on the Will, no question has been put to him with the object of showing that the impression is not the result of an application of soot or that such an application could be transferred. His evidence, however, proves decisively that the impression on the Will is the thumb mark of *Musammat* Mewan.

Counsel for the respondents accordingly now accepts the proposition that the impression is one from soot and abandons the theory of transfer from an original. His own theory now is that *Musammat* Mewan did execute a Will which was stolen or lost and that Puran Singh having in his possession a piece of blank paper with a genuine thumb-impression of *Musammat* Mewan at the bottom of it got the Will forged and attested above the thumb-impression.

The theory that the original Will was lost depends entirely upon the statement of Lala Murari Lal, Extra Assistant Commissioner, who was consulted by Puran Singh shortly after the death of *Musammat* Mewan. Puran Singh told him that all her papers, including a Will, had been stolen. Lala Murari Lal thought that Puran Singh was referring to a Will by *Musammat* Mewan. There is no doubt that that was his genuine impression. Puran Singh has, however, explained that the Will to which he then referred was that by Shiv Charn. The District Judge thinks that Puran Singh was not likely to have mentioned the loss of Shiv Charn's Will, because it was registered and its loss would, therefore, be unimportant. It is not denied, however, that that Will was lost, and although, of course

a copy of a registered Will could always be obtained it might not in all circumstances be as valuable as the original. At any rate a man in the position of Puran Singh might quite well think that the original would be important. Granting, as is now conceded, that *Musammat* Mewan did in fact execute a Will, I do not think that it can be legitimately held on the basis of the evidence of Lala Murari Lal that it is proved that her Will was ost.

Then there is the matter of the suggestion that the Will was filled up after the thumb-impression had been attached. It is admitted now that the thumb impression could not have been obtained after death, as Puran Singh had no opportunity of so obtaining it. It follows, therefore, if the theory of the Counsel for the respondents is correct, that he had already in his possession this piece of paper with a genuine thumb mark attached to it. *Ex hypothesi* he did not obtain this paper with the object of getting a forged Will written upon it, because he could not know that the original will be lost or destroyed; nor has Counsel offered any explanation why he should have obtained this thumb-impression from *Musammat* Mewan before her death, especially seeing that he held from her a general power-of-attorney. Granting, however, that he might have had such a piece of paper and was both ready and able to get four other persons to assist actively in the forgery, I still do not think that it would be safe to draw from the manner in which a sheet of paper has been filled up the emphatic conclusion at which the District Judge has arrived, because "the scribe has begun in a fine rather cramped style, until finding that the material would not fill the paper has expanded into an extended scrawl which again he has had to contract somewhat at the end".

If this document was to be forged in the manner suggested by the Counsel for the respondents, the natural thing to do would have been to get the scribe to write out a draft on another piece of paper of the same size as that bearing the thumb-mark and then, when he had ascertained how much space was required, to copy it in handwriting of the requisite size, thus avoiding all grounds for the suspicion since raised.

But although the scribe went into the witness box, not a single question was put to him on this subject. He was not asked why he had varied the size of his handwriting. If he had been so asked, it is surely possible that he might have replied that he was writing to fill so much of the sheet as to leave space for signatures. In any case as the matter stands, the character of the writing does no more than lend colour to a suggestion that the page had been filled up after the thumb-impression had been attached. It goes no further than that, but it is on this suggestion, to a very large extent, that the theory of a dishonest conspiracy with regard to the preparation of this Will has been built up There may be another explanation, and the respondents have made no effort to show that there is the only one. In this connection I would refer to *Arunachellam Chetty* v. *Ramaswami Chetty* (1), a case in which the Privy Council rejected a similar suggestion, in face of the oral testimony of a witness who stated that he saw the Will signed by the testator. In the present case we have the positive evidence of the scribe and three attesting witnesses, not to mention *Musammat* Bhagirthi herself, that this is a genuine document As already remarked, there does not appear to be any good reason why those witnesses should not be believed, and in view of what is now known, their inclusion in their story of the application of soot from the frying pan is an indication of exact knowledge which they would not have had if this Will were a forgery, unless Puran Singh not only remembered how he obtained the thumb impression but had also communicated his knowledge to them.

There does not appear to me to be anything in the argument that, if *Musammat* Mewan had executed a Will, she would have got it registered. In fact in view of the theory now set up by the Counsel for the respondents, that argument goes by the board as according to his theory there was an original Will which was not registered.

(1) 35 Ind Cas. 1; 20 C. W. N. 673; 30 M. L. J. 555; 3 L. W. 508; (1916) 1 M. W. N. 399; 18 Bom. L. R. 408; 23 C. L. J. 632; 20 M. L. T. 50 (P. C.).

Nor do I think that any argument adverse to the Will can be derived from the date which it bears. The District Judge thinks that that date may be attributed to the dates of the two contemporary post cards on the subject of *Musammat* Mewan's health. Those post cards are, however, dated the 25th and 28th of June respectively. If the forgers were using those post cards for the purpose of fixing their date, why did they postpone the date till the 29th of the following month?

On the whole, therefore, it appears to me that the Will has been rejected on the basis of suspicions some of which were unquestionably ill-founded. Those that remain are not sufficient to rebut the positive and apparently reliable testimony given in support of it. Accordingly I hold that the Will is proved, and accepting the appeal I remand the case to the District Judge for disposal according to law. The appellant will get her costs of this appeal.

Appeal accepted;
Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT

EXECUTION OF DECREE APPEAL NO. 19 OF 1918.

May 9, 1918.

Present:—Mr. Lindsay, J. C.

Nawab HAIDER MIRZA—JUDGMENT-DEBTOR—APPELLANT

versus

Pandit KAILASH NARAIN DAR

DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (1)—Execution of decree—Payment certified by decree-holder, effect of—Judgment debtor, whether can object—Court, duty of—Limitation, extension of.

Order XXI, rule 2 (1), of the Civil Procedure Code does not contemplate an inquiry being made into the truth of the statements made by the decree-holder when he comes to Court to certify a payment and the judgment-debtor has no *locus standi* to question the right of the decree-holder to make an application under that provision of the law. [p. 178, cols. 1 & 2.]

No particular time is fixed during which the decree-holder is bound to certify payments to the Court. [p. 178, col. 1.]

When a decree-holder comes and informs the Court that certain payments have been made to him in satisfaction of the decree, all that the Court has to do is to make a note of the statement made by the decree-holder and no notice need issue to the judgment-debtor even if the decree-holder asks this to be done. [p. 178, col. 2.]

The certifying of a payment under Order XXI, rule 2 (1), Civil Procedure Code, is not conclusive in any way. On an application for execution of the decree being made, the judgment-debtor is entitled to show either that no such payment was in reality made or that if it was, it did not operate to extend the period of limitation for execution of the decree. [p. 178, col. 2; p. 179, col. 1]

Appeal against the order of the Sub-Judge, Tahsil Mohanlalganj, Lucknow, dated the 19th March 1918.

Babu *Hari Kishen Dhaon*, for the Appellant.

Mr. *Jagmohan Nath Chak*, for the Respondent.

JUDGMENT.—This is an appeal against an order passed by the Subordinate Judge of Tahsil Mohanlalganj. The facts may be briefly stated. In the year 1909 a decree was obtained by Mumtaz Begam against one Nawab Haider Mirza, who is the appellant in the present case. This decree was affirmed in appeal on the 28th of November 1910 and was for a sum exceeding Rs. 5,000. In the year 1911 the decree was assigned to the present respondent Pandit Kailash Narain Dar. It is admitted that in previous execution proceedings between the parties the respondent has been recognized as the person entitled to execute the decree in question.

In October 1914 the respondent filed an application in the Court, stating that he and the judgment-debtor had come to terms regarding the payment of the balance of the decretal sum, which then amounted to Rs. 4,000 odd. The arrangement was that the money was to be paid in monthly instalments and the first instalment fell due on the 15th of November 1914.

The present application has been made by the decree-holder under Order XXI, rule 2. He filed a petition in the Court on the 1st of February 1918, stating that under the arrangement for payment by instalments he had received up to the month of December 1917 a sum of Rs, 1,080. The application further stated that a sum of Rs. 3,095 was still owing from the judgment debtor. In this petition the decree-holder asked that the

judgment-debtor might be summoned and that payment of Rs. 1,080 might be recorded and certified.

The judgment-debtor appeared in answer to the summons and denied that these payments had ever been made. His contention was that the decree-holder was not in a position to ask the Court to certify these payments on the ground that the decree had become barred by time, and that no money was payable the satisfaction of which could be certified to the Court. The judgment-debtor pleaded that default had occurred on the 15th of November 1914 and that consequently the execution of the decree was now barred.

The Subordinate Judge in a lengthy order came to the conclusion that the decree-holder was entitled to make the application to have the payment certified; and having disposed of this preliminary point, he fixed a date for the taking of evidence to be produced by the parties. That stage has not yet been reached and meantime the judgment-debtor has come here in appeal, contending that the Court below was wrong in holding that the decree-holder had a right to apply for the purpose of having these payments certified, that the decree is time-barred and that no such application can now be made.

I think the appeal must fail; in my opinion the appellant has no *locus standi* to question the right of the decree-holder to make the application under Order XXI, rule 2. I may say at the same time that I think the Subordinate Judge was wrong in holding that any inquiry regarding payments was necessary at this stage. From the language of Order XXI, rule 2, it is apparent that a duty is cast upon the decree-holder to certify all payments which are made to him out of Court. It is also apparent that no particular period of time is fixed within which the decree-holder is bound to give this information to the Court; and it has been laid down in a number of cases [*cf.* *Tukaram* v. *Babaji* (1)] that no period of limitation is prescribed for the performance of this duty by the decree holder.

(1) 21 B. 122; 11 Ind. Dec. (N. S.) 84.

It is further apparent that Order XXI, rule 2, sub rule (1), does not contemplate any inquiry made into the truth of the statements made by the decree-holder when he comes to the Court to certify a payment. The only case in which an investigation is prescribed is when the judgment-debtor makes an application under Order XXI, rule 2, sub-rule (2). In that case a notice issues to the decree-holder calling upon him to show cause why the payments alleged by the judgment-debtor should not be recorded. It seems to me, therefore, that the procedure contemplated by Order XXI, rule 2, is that when the decree-holder comes and informs the Court that certain payments have been made, all that the Court has to do is to make a note of the statement made by the decree-holder. That is what Order XXI, rule 2, sub rule (1), says: "The decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly." Consequently although the Subordinate Judge was asked in this instance to issue notice to the judgment-debtor there was no occasion for this being done; and what the Subordinate Judge ought to have done was to accept the statement made by the decree-holder and record the payments as indicated by him.

As regards any question of limitation in connection with the execution of a decree, all that is to be said is that no such question can arise at the present stage. There is no application before the Subordinate Judge for the execution of this decree. When such an application is made, the judgment-debtor will be in a position to raise a plea of limitation, if he is so advised; and although under the present application the payments mentioned by the decree-holder will be recorded and certified, it does not necessarily follow that these payments will be conclusive evidence in favour of the decree-holder for the purpose of showing that any subsequent application for execution is within time. When the question of limitation does arise, if it ever does, the mere fact that certain payments have been certified will not be conclusive in any way against the judgment-debtor; and it will, in the execution proceedings, be open to the judgment-debtor to show either that no such payments were in reality

made or that if they were, they do not operate to extend the period of limitation for execution of the decree.

I dismiss this appeal accordingly and direct the Subordinate Judge to abstain from any further inquiries at this stage. He will do what is laid down in Order XXI, rule 2, sub-rule (1), that is to say, record the payments certified to him by the decree-holder, and there the present proceedings will end. The appellant will pay the respondent's costs of this appeal.

Appeal dismissed.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 89 AND 151 OF 1915.

July 9, 1918.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

IN No. 89 OF 1915

Rani KESHOBATI KUMARI —APPELLANT

versus

SATYA NIRANJAN CHAKRABERTY AND OTHERS—RESPONDENTS

IN No. 151 OF 1915

Kumar SATYA NARAIN SINHA —APPELLANT

versus

Kumar SATYA NIRANJAN CHAKRABERTY AND OTHERS—RESPONDENTS.

Santhal Parganas Regulation (III of 1872), s. 6—Interest on interest, whether can be allowed—Mortgage suit—Paramount title, whether can be enquired into—Decree, form of—Civil Procedure Code (Act V of 1908), O. XXXIV.

Under Order XXXIV of the Civil Procedure Code a mortgage decree must set fourth the amount due on the latest date of payment. This is the decree which is contemplated by section 6 of the Santhal Parganas Regulation. [p. 188, cols. 1 & 2.]

Section 6 of the Santhal Parganas Regulation is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit. [p. 188, col 2.]

In mortgage suits the paramount title of parties other than the mortgagor or his representative-in-interest cannot be gone into. [p. 187, col. 2.]

Appeals from a decision of the Subordinate Judge, Bhagalpore.

IN No. 89 OF 1915.

Mr. *Naresh Chandra Sinha*, for the Appellant.

Messrs. *Syed Hassan Imam*, *Sami*, *D. N. Sarkar*, *C. S. Sircar*, *Ranjit Sinha*, *Lal Mohan Ganguli* and *Surendra M. Dass*, for the Respondents.

IN No. 151 OF 1915.

Messrs. *P. C. Manuk*, *S. P. Sen*, *Rajendra Porashad*, *Sarat Ch. Mukherji*, *Mohendra Nath Ray*, *Jagannath Prosad*, *Surendra Mohan Das*, *Hari Bh. Mukherji* and *Lakshmi Kanta Jha*, for the Appellant.

Messrs. *Syed Hasan Imam*, *Sami*, *D. N. Sircar*, *Chandra S. Sircar*, *Ranjit Sinha*, *Lal Mohan Ganguli*, *Bipin Bihari Ghose* and *Harendra Nath Ganguli*, for the Respondents.

JUDGMENT.

ROE, J.—These two appeals arise from a suit upon a mortgage-deed executed by the late Udit Narayan Singh securing an advance of four lacs of rupees upon the 16 annas of the Mukarrari Istamrari Estate Perganna Handwa. The defendants to the suit were Rani Keshobati Kumari and her adopted son Kumar Satya Narain Singh, and certain subsequent mortgagees. Separate defences were filed by the Rani and by the Kumar and on them the following issues were framed :—

1. Is the mortgage bond in suit genuine and was the consideration money recited therein advanced by the plaintiff to the late Rajah Udit Narain Singh?

2. Are the defendants Nos. 1 and 2 or either of them estopped from pleading that the mortgaged property in Pergannah Handwa is incapable of transfer by reason of its being a Ghatwali tenure?

3. Is the finding of this Court in suit No. 363 of 1905 *res judicata* in regard to the question whether the mortgaged property in Pergannah Handwa is a Ghatwali tenure, and, therefore, inalienable?

4. Was the late Udit Narayan Singh recorded as Mukarrari Istamrardar in respect of the mortgaged property in the Record of Rights framed and published under Regulation III of 1872? If so, is it open to the defendant to plead that the said Udit Narayan Singh's right in the said property was that of a Ghatwal?

5. Was the defendant No. 1 recorded as Istamrari Mukararidar of the mortgaged properties in the Record of Rights framed

and published under Regulation III of 1872 in the year 1900? If so, is it open to the defendants to claim that the property is a Ghatwali tenure?

6. Is the mortgaged property in said Pergannah Handwa a Ghatwali tenure subject to the performance of any public service duty and whether it is inalienable, and was the interest of the said Rajah Udit Narain Singh in the said property terminable with his life?

7. Can the defendants Nos. 1 and 2 or either of them set up any right or interst to or in the mortgaged premises in derogation of the disposition, if any, contained in the Will of Raja Udit Narayan Singh? If so, whether the Rajah had any right to make any such disposition?

8. Is the bond in suit binding as against both the defendants or any of them? Should the mortgage be binding on one of the defendants, but not the other defendant, what are the rights of the plaintiff?

9. Is the plaintiff's right to recover compound interest or interest exceeding the principal amount secured by the said bond barred by section 6 of Regulation III of 1872?

10. Is any portion of the claim for interest barred by limitation? What amount, if any, is due to the plaintiff under the said mortgage bond?

11. To what relief or reliefs, if any, is the plaintiff entitled?

The learned Subordinate Judge found upon the first nine issues in favour of the plaintiffs and on the 11th issue, applying section 6 of Regulation III of 1872, made a decree for eight lacs of rupees with interest from the date of the suit. At the hearing the suit was contested only by the Kumar, the Rani having filed a petition of compromise whereby she agreed to pay the sum of eight lacs by instalments of Rs. 50,000, the first instalment to be paid in Chaitra 1320. The learned Subordinate Judge's judgment is dated the 14th September 1914. He has held that the compromise is not now binding upon the plaintiff, for the reason that Chet of the Bengal year 1320 had already passed and the promised instalment had not been paid. Against the decree made both the Rani and the Kumar appeal. I propose to deal first with the appeal of the Kumar.

The finding of the lower Court upon the first issue is now accepted. It is also admitted that no amount of the claim is barred by limitation, the date of payment being the 15th July 1910. For a consideration of the remaining issues it is necessary to give a history of Pergannah Handwa. This Pergannah is situated between Perganna Pachite and Pergannah Lachmipur. The question whether prior to the Permanent Settlement it formed part of the Kharagpur Estate will be the main question for consideration. The Kharagpur Estate was held at the time of the assumption of the Dewani by the East India Company by Rajah Muzafar Ali under the Moghul Empire. The whole country was in a state of insurrection in 1774, and an armed force was sent by Warren Hastings under the command of Captain Brooke to restore order. Raja Muzafar Ali was superseded and Captain Brooke was given the powers of a Military Zilladar acting under Martial Law over a tract of country then known as the Jungle Terai Mahal. Captain Brooke was succeeded by Captain Brown and in 1776 Captain Brown gave a Sanad to Raja Subhao Singh, the ancestor of Udit Narain Singh. It is the defendant's case that this Sanad created a Ghatwali analogous to the Birbhum Ghatwalis and that, therefore, the Raja had no alienable interest in it and the mortgage made by him was invalid as against his successor to the Ghatwali. It is the plaintiff's case that in the first place the Sanad does not create a Ghatwali at all, and in the second place that if it did create a Ghatwali, the Ghatwali created was one of the Kharagpur Ghatwalis, and that the great grandfather of Udit Narain, Jagan Singh, having secured by litigation of the years 1809 to 1819 exemption from liability to military service under the Kharagpur Raj, there was now no bar to the alienation of the lands attaching to the tenure. It is further the plaintiff's case that in the event of our finding that the tenure is a Ghatwali tenure analogous to the Birbhum tenures, the conditions of military service have either been waived by Government or have so fallen into disuse as to be no longer

enforcible. The first question for consideration, therefore, is, whether the tenure is a Ghatwali tenure at all, and the second whether the appellants have succeeded in proving that the tenure is analogous to the Birbhum tenures. It is admitted on behalf of the appellants that if indeed the tenure is a Kharagpur tenure, the litigation which ended in 1819 destroyed the service character of the tenure.

Wherever it has been necessary for the proprietors of Pergannah Handwa to state the origin of their rights, that origin has always been asserted to be the grant made by Captain Brown. It is admitted that revenue is now paid through Kharagpur, with the reservation that this is an arrangement made only for convenience of payment and that the tenure was in reality held directly under the Government. There is in Exhibit (H), the judgment of the District Judge of Bhagalpur in suit No. 728 of 1910, a full statement of the claims of Jhabban Singh, the then proprietor of the Pergannah. The history of this litigation is important. The plaintiff's claim was that Parandar Singh had been, under a Sanad bearing the seal of the plaintiff, appointed to the post of Ghatwal of Pergannah Handwa situated within the Mahal of Kharagpur which was the Zemindari of the plaintiff: that Parandar Singh had died in Chet 1215 and that on his death the plaintiff was entitled to appoint a Ghatwal in his place; that Kallan Singh had refused to admit the plaintiff's right to appoint a Ghatwal and the matter had been taken up before the Acting Judge, who had issued a Parwana to the plaintiff intimating that it was improper for the plaintiff to appoint a Ghatwal other than Jhabban Singh without instituting proceedings under the provisions of Regulation IV of 1793, the first Code of Civil Procedure. Accordingly a suit was brought as provided by the said Regulation for a declaration that the plaintiff was entitled to appoint as Ghatwal any person he might select. Jhabban Singh stated in reply that his Somi Zemindari Milkiat of Perganna Handwa had been held from the time of Raja Bijoy Singh and that Subhao Singh was the sixth holder of the office, and for several hundred years the defendant and his predecessors had been in possession of the said Zemindari; that in 1184 F. S. Captain Brown Zilladar, who was appointed for the purpose of making settlement of the Jungle Terai Perganna by the Hon'ble Members of the Council, came to this place; that the said Subhao Singh under perpetual Mukarrari Pattah paid the rent to Captain Brown and subsequently to Mr. Norman and to Mr. Cleaveland up to 1187, and that when in 1188 the settlement of Mahal Kharagpur with the plaintiff was taken up the plaintiff put in an assessment Dowl, that is to say. an application for Goshwara Settlement with him; that the settlement of Pergannah Handwa, the Milkiat Zemindari of the defendant, and that of Pergannah Chandan Passye, the Milkiat Zemindari of Rup Narayan Deo, were under the *patta* bearing the signature of the said Captain allowed to stand good; but subsequently the said (Saheb), in view of the fact that the country was jungli and there was danger in carrying the revenue, directed the Amla of the said Raja Subhao Singh to deposit with Raja Kadar Ali (who was the son of Muzafar Ali) the land revenue due from his lands under the Istamrari Mukarrari Patta and from there, (that is from Kharagpur) the revenue becoming one item should be paid into the treasury of the East India Company, and that consequently from that time Raja Subhao Singh and Raja Parandar Singh have been depositing down to 1215 F. S. the rent of their Zemindari property, according to the perpetual Mukarrari Patta and the Sanad bearing the seal of the August Khalsa and granted by Mr. Dickson, the Collector.

The plaintiff produced various Sanads and the Parwana of Captain Brown, dated the 5th November 1775, and the defendant Jhabban Singh filed the following documents:

(1) A Taslimnama, date uncertain.

(2) A Parwana from Mr. Tawney, dated 17 Moharram, 14th year.

(3) A Parwana of Captain Burkit, dated 16 Safir of the 8th year.

(4) Another Parwana by Captain Burkit, date uncertain.

(5) A Perpetual Mukarrari Pattah granted by Captain Brown. dated 11th September 1776.

(6) Receipts for payment of revenue direct to Captain Brown, dated 29th February 1777, 16th June 1777, and 13th September 1779, and 13th September 1780.

(7) Parwana bearing English signatures, dated 1791 to 1793.

(8) A Sanad bearing signature in English, dated 20th January 1794, and many other papers.

The finding of the Court on these papers was that in fact the predecessors of the defendant and the defendant have been from time immemorial Zemindars and Istamrari Mukarraridars with the title of Raja of Pergannah Handwa and that up to this time they have been paying the rent of the said Pergannah in accordance with the perpetual Mukarrari Pattah, bearing the signature and the seal of Captain Brown, to the plaintiff in his capacity as the Mufassal Talukdar, and in his own time the defendant has been paying the rent to the authorities for the time being: that his Istamrari Mukarrari was never cancelled and that he has during the times of all the present and past Hakims received Zemindari documents in the form of Istamrari Mukarrari, and finally that it does not appear that the predecessors of the aforesaid defendant have been appointed to the post of Ghatwal of the said place at the instance of the plaintiff. This decision was taken in appeal to the Provincial Court at Murshidabad. Jhabban Singh's plea is, by the Court of appeal, stated to be that in 1184 F. S. Captain James Brown Zilladar, who was appointed for the purpose of making settlement of Pergannah Jungle Terai, had granted the Istamarari Mukarrari Patta in respect of Pergannah Handwa to Raja Subhao Singh, uncle of the defendant, together with other Ghatwals who were in his *ilaqa* and that while Hardat Singh and four of the defendants relied upon the defence set up by Jhabban Singh, the remaining defendants described themselves as the servants of Jhabban Singh's predecessors. The Appellate Court called for a report from the Collector of the district of Bhagalpur with regard to the change of Ghatwals and the settlement of the Mahals, and on receipt of that report the Judge was directed to make an enquiry as to whether the aforesaid Mahals had been the Ghatwali appertaining to the Zemindars of Raja Qadir Ali and of the fact that the practice was that on the death of the Ghatwal, if any person is appointed in his place, information of the same is given to the Collector and whether on the death of Raja Subhao Singh Parandar Singh was appointed as Ghatwal on behalf of Raja Qadir Ali Khan, Zemindar, and whether information of the same was given to the Collector. The report of the District Judge was forwarded in due course. It was then declared by the Provincial Court that Raja Qadir Ali himself admitted the fact of the disputed property being the perpetual Mukarrari right of Raja Jhabban Singh and that the documents filed by the plaintiff purporting to be *pattas* and Kabuliyats and security bonds given by Parandar Singh to Raja Muzafar Ali were not worthy of reliance, and that the report sent by the Collector upon the facts of the case was incorrect. For these reasons the judgment of the District Court was affirmed. Among the documents filed by the plaintiff was the Rubkari of the Court of the Collector, dated the 29th January 1810. In the plaintiff's pleadings it was stated that a Rubkari was sent to the Court of the Collector of Bhagalpur for enquiry as to the title of the Zemindari of Pergannah Handwa, that the reply of the Collector to the District Judge had been that the Mahal Kharagpur together with Pergannah Handwa constituted the Zemindari of the plaintiff and that the said Raja is competent to appoint Ghatwals in his own Zemindari. We may presume that it was this reply that was declared to be incorrect. This finding is not *res judicata* as between the plaintiff and the defendant now before us, but it is of interest as showing the opinion of the Courts of that date based upon a mass of documents which are not now available. The opinion, however, does not go so far as to say that Raja Subhao Singh was not a Ghatwal at all. It says only, as I understand it, that he was not a Ghatwal serving under Kharagpur, but held a Milkiat Zemindari independent of the Kharagpur Estate. The Judges of those days were fully aware of the distinction between a Milkiat and

a subordinate "Mukararri tenure', and it is impossible to believe that they would have decided that the tenure was a Milkiat tenure unless upon the documents before them they were satisfied that the estate was held directly under the ruling power.

Mr. Hasan Imam contends that the real position was that the Rajas of Handwa, if indeed they were independent of Karagpur, were not Ghatwals at all, and that the Ghatwals mentioned in the Sanad did not include the Handwa Raja, but were Ghatwals holding Sikmi Ghatwalis under the Raja of Handwa. For an elucidation of this point it is necessary to examine carefully the Sanad granted by Captain Brown which is Exhibit (K) and the schedule attached to that Sanad which is Exhibit 105. In Sutherland's report, Exhibit 126, is an extract from a report made by Captain Brown himself. This report is interesting as showing that Captain Brown recognised three classes of holders of land. (1) The Zemindars of the low country, (2) Chief Manjhis bound by a Muchalka and holding Jagir lands in the plains; and (3) Subordinate Manjhis holding Chaukis in the hills. His proposals were that the Sardars or Chiefs of Divisions should be restored to their authority and receive Sanads from Government specifying the duties they were to perform and that similar engagements should be taken from the Manjhis binding them to their Sardars. Police establishments should be set up in each Tappa of the Zemindars and the Thanadars put under the control of Sazawals. His suggestions were approved by Government and a line of Police posts established in Bhagalpur, Colgong, Raj Mahal, etc., to the north and east of the Jungle Terai Mahal. The Jagirs given by him were approved by Mr. Cleaveland. Many of them are still in existence and have been the subject of consideration by the Judicial Committee. It is necessary in considering the real meaning of Brown's Parwana to bear carefully in mind his views of the policing of these tracts. The Parwana Exhibit K is headed as follows:—*Patta* in terms of Kabuliyat granted to Raja Subhao Singh, Babu Udit Singh, Gopal Singh, Babu Lal Singh and other Ghatwals of Perganna Handwa appertaining to Kharagpur Jungle Terai Mahals, Sirkar Monghyr, in the Province of Bihar. The terms of the grant are that these people should pay their revenue direct to the treasury and by means of the Barkandazes, who hold Jagir grants, should patrol the villages, and when called upon by Government should produce an army of seven Sardars and three hundred archers and Barkandazes. Then follows the schedule Exhibit 105, in which the details of the grant are set forth. Raja Subhao Singh takes five Taluks with a total rent of Rs. 2,075. Udit Singh takes three Taluks with a rent of Rs. 549, Gopal Singh takes two Taluks with a rental of Rs. 270. Udit and Gopal are in subsequent documents specifically described as Ghatwals. The duties of Subhao Singh were precisely similar to those of Gopal and Udit and we find from Exhibit (L) that Udit and Gopal were closely related to Subhao. It is clear, I think, that Udit and Gopal held these lands as did Raja Subhao Singh by virtue of their descent from Bijoy Singh. It is also clear, from the terms of the Parwana in which allusion is made to Jagirs held by Barkandazes already in existence and from the fact that all the grantees except Subhao are specifically described as Ghatwals, that Captain Brown was not conferring a new grant, but confirming an old one, and that he was not imposing new duties, but merely stating the existing conditions upon which the tenure was already held. The Sardars mentioned as having Jagirs may be taken to be the Sardars mentioned in his report. The Barkandazes to be employed were the Barkandazes mentioned in Regulation XX of 1817. It is to be noted that in his report to Government the word "Ghatwal" is not used. Nor in Grant's report of 1786 [see *Raja Lelanund Singh Bahadoor* v. *Government of Bengal* (1)] was the word Ghatwal used, but "there is no doubt", their Lordships say, "that the tenures here spoken of are Ghatwali tenures though they are not mentioned by that name." There is nothing in the use of the word Zemindar to support Mr. Hasan Imam's contention. At the time of granting this Parwana to Subhao Singh and the other

(1) 6 M. I. A. 101 at p. 122; 4 W. R. P. C. 77; 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 E. R. 38.

Ghatwals, Brown's intention was to hold them responsible, as they had hitherto been responsible, for the performance by the Sardars and Barkandazes of their duties as head Manjhis and hill Policemen. There were no Police posts then in existence in the Zemindari Tappas. Subsequently when he submitted his whole scheme to Government he left out of account the Zemindars in whose Tappas these outposts were to be set up, and when they were set up, those Zemindars were exempted by Regulation XXII of 1793 from Police duties. But it is most significant that to this day no outpost has been set up in Pergannah Handwa, which is still a non-Police tract.

The Parwana granted by Captain Brown received no confirmation from Mr. Cleaveland. It did receive confirmation from Mr. Cleaveland's successor. In Exhibit (L) Mr. Dickson or Dickenson, on the application of Parandar Singh stating that Raja Subhao Singh and other Ghatwals holding under Brown's Sanad of 1184 are dead, declares Raja Parandar Singh to be in possession of the share of his uncle Subhao Singh and of his grand-uncles Udit Narain Singh deceased and Gopal Singh (who is still living but unable to pay the rent of his Taluk), and the terms of the *patta* are reiterated, requiring Subhao Singh and the other Ghatwals to go round each village with the Barkandaz of the village and when required by the Sirkar to appear before the Hazur with 7 Sardars and three hundred Barkandazes and pay the fixed *jama* of Rs. 2,701 less Saraf Rs. 59-2-0 directly into the treasury. This Parwana is inconsistent in the last two respects with that granted by Cleaveland to Raja Kader Ali, Exhibit 58 (1), dated 1st May and 13th May 1781, for in the latter Parwanas it is ordered that the revenue of Handwa Rs. 2,818 (not Rs 2,641-14-0) shall be paid not directly into the treasury, but through the Raja of Kharagpur. And this Parwana is signed by Warren Hastings himself. Dickson's directions in this respect were again negatived by the Permanent Settlement, Exhibit (60), dated the 5th January 1796, in which Pargannah Handwa is mentioned as one of the 21 Mahals upon which revenue is assessed as appertaining to Pargannah Kharagpur. In Exhibit G, the general register of estates paying revenue to Government prepared under section 2 of Regulation XLVIII of 1793, we find Pargannah Handwa shown as paying revenue jointly with 14 other Pargannahs and the name of Raja Lilanand Singh Bahadur entered as the Malik. On the other hand in Exhibit F, memorandum of *jama* of the permanent Mukarrari right to the Mahals in district Bhagalpur dated 1209, we find it stated that the Mukarrari Patta was granted after the Dewani subject to Ghatwali and reference made to Mr. Dickson's orders granting a new Sanad to Raja Parandar Singh for the Taluks granted by Brown to Subhao Singh, Udit Singh and Gopal Singh. It is urged by Mr. Hasan Imam that the Permanent Settlement changed—if not the character—at least the incidents of the tenure. We have, therefore, to consider firstly what were the incidents and character of the tenure before the Permanent Settlement and next whether by the Permanent Settlement its incidents and character were changed. An Istamarari Mukarrari tenure was regarded as a grant made for life to an individual and on the death of the life-holder the sanction of Government was necessary to validate the succession. The tenure was held at a fixed rate instead of on an annual agreement. This is clear from the fact that by Regulation I of 1815 the Istamrari Mukarrari tenures outside the permanently settled districts were declared to be resumable on the death of the life-tenant. Captain Brown's intention was to create Subhao Singh a principal land-holder (a position which he no doubt already held) for the political purpose of guarding the frontiers on the west against the incursions of the barbarous Paharias by means of a war-like peasantry entertained as a standing militia with suitable territorial allotments under him [see *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1)]. The office was granted to Subhao Singh personally and was resumable on his death. It was, therefore, necessary for Parandar Singh to report the death of Subhao Singh to Mr. Dickson and to obtain a renewal. This renewal was obtained in 1794. The position in 1794, therefore, was that the Handwa Ghatwali was a Zemindari Ghatwali held directly under Government resumable at the death of the life tenant.

KESHOBATI KUMARI v. SATYA NIRANJAN CHAKRABERTY.

It has been the contention of the appellant's family for generations, and strongly pressed by Mr. Manuk, that the payment of revenue through Kharagpur was an arrangement made for the sake of convenience only, but on reference to the map it will be observed that Kharagpur is no nearer to Handwa than was Bhagalpur and it cannot be possible that for the sake of convenience only the revenue of Handwa should have been sent first to Kharagpur and then on to Bhagalpur. The Collector of Bhagalpur in 1813 [*Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1)] reported to the Magistrate of Birbhum that at the time of the Decennial Settlement the Ghatwals were not treated as independent Talukdars, no settlement was made with them and they were included in the settlement of the Zemindar of whom their lands were held. The appellant's ancestors have, however, also frequently said their tenure is in all respects similar to that of Chandan Passye or Lachmipore. This also was Word's view (Exhibit 63), dated 1833. The Sadar Dewani Adalat in the case of *Rup Narayan Deo* v. *Raja Qadir Alee*, decided in 1809, pointed out that the revenue of Chandwa Passye had been included in the revenue of Kharagpur by mistake, and suggested (a suggestion that was not adopted) that the Board of Revenue should exclude Chandwa Passye from the Revenue Roll of Kharagpur. At page 123 of Volume VI, Moore's Indian Appeals [*Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1)], a report of 1813 is quoted in which it is stated that the Ghatwals attached to the Kharagpur estate held their lands by virtue of Sanads granted by the Zamindars of Kharagpur, except some who have recieved theirs from the former authorities. The inference is justified upon all the evidence available that, Chandwa Passye and Handwa were like Kharagpur, Birbhum and Pachit Crown Ghatwalis. They were not analogous to the Kharagpur Ghatwalis nor to the Birbhum Ghatwalis. They were Moghul Ghatwalis. The effect of the Permanent Settlement upon military tenures was discussed in *Raja Venkata Rao* v. *Court of Wards* (2): "The provisions of the Sanad," their Lordships say, "differed in no respect from those which are contained in every ordinary deed of Permanent Settlement. The feudal or military tenure was at an end. The six Pergannas to which the Sanad related became new Zemindaris subject to the payment of fixed land revenue and subject to the ordinary stipulation and the performance of the duties ordinarily imposed upon Zemindars." And their Lordships go on to quote as a correct statement the 11th paragraph of the written statement of that case: "That under the Empire of the Muhammadans the ancient Zemindari of Nuzvid was extensive and was governed by its Chiefs with absolute power and independence; but under the policy of the British Government the same has become divested of its military character and dwindled into a large Peshkash paying Zemindari." Their Lordships, therefore, advise Her Majesty that the lands in suit be declared to be a part of the Zemindari above mentioned." And in the case of *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (3), their Lordships say: "In this case the Istamrar Zemindar was put in his place by the Proclamation of 1801, it is to the terms of that document that we must look in order to find the quality of his estate. The Madras Government were no doubt in a position to grant out the estate on other than the old terms. The question is whether they did so." I have no hesitation in saying that in the Permanent Settlement of 1796 the Governor General did not grant all the estate created by Captain Brown's Sanad on other than the old terms. He was not dealing with Parandar Singh at all. In the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (4) (at pages 204 and 205) the following statement of the law is made: "The Permanent Settlement of the lands did not alter the nature of the Jagir or of the tenure upon which the lands were held, nor could it convert the services which were public into private services under the Zemindar. The Zemindar became entitled only to the rent or revenue which was previously payable to the Government and in respect of which he was

(2) 2 M. 128; 3 Suth. P. C. J. 725; 6 C. L. J. 153; 4 Ind Jur. 133; 3 Shome L. R. 175; 7 I. A. 38; 4 Sar. P. C. J. 81; 1 Ind. Dec. (N. S.) 361 (P. C.).

(3) 3 M. 290; 8 I. A. 99; 4 Sar. P. C. J. 239; 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757 (P. C.).

(4) 9 C. 187; 9 I. A. 104; 5 Shome L. R. 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.).

assessed, and not to the services in respect of which the 1/3rd of the rent or revenue was allowed to the tenant as compensation for the services. Those services continued to be due to the Government."

This is conclusive. The Permanent Settlement might destroy a military tenure by a new contract with the holder of the tenure. It could not affect the position of a tenure-holder with whom the new settlement was not made.

The case of *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1) is no authority for the contrary proposition. It decided only that land once assessed with revenue as a part of Kharagpur could not be resumed or re-assessed.

The Handwa tenure was prior to the Dewanee a Moghul Ghatwali. The effect of assumption of jurisdiction over the Jungle Terai Mahals by the East India Company was at most to convert the allegiance of the Ghatwal from an allegiance to the Moghul Empire to an allegiance to the East India Company. The Permanent Settlement did not destory the Company's right to enforce, nor relieve Parandar Singh from liability to render, that allegiance. Nothing that has since been done has altered the position. The decision of Mr. Travers (Exhibit C) that the tenure could not be resumed had no higher effect than the decision of Mr. Alexander which gave rise to the suits of *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1). The descendants of Parandar Singh have never specifically refused to render services as Ghatwals. Exhibit E, dated the 24th December 1816, was not such a specific refusal. It was merely a protest by Jhabban Singh against the omission of his title of Raja in Parwanas addressed to him. The entry of the Ghatwali service attached to the Mahal in Exhibit F still stands. So late as 1880, the Deputy Commissioner of the Santhal Pergannahs (Exhibit AAI) was trying with the idea of enforcing the services, as Ghatwal, of the proprietor of the Handwa estate. It may be that the power to enforce these services has lapsed by limitation. That question was not argued at the Bar and could not be raised in this suit. I am satisfied that the right has not been destroyed by any definite act. Buchanan (McPherson's Settlement Report, Appendix, page xli) may have been historically correct, but he erred on the point of law.

This by no means ends the matter. The tenure may be a Ghatwali tenure. A person holding it as a Ghatwali tenure might have no power to alienate it. The real question is, whether the mortgagor Udit Narayan Singh held it as a Ghatwali tenure.

Mr. Manuk asserts that this case is in no respect different from that of the Dhimsain Jagir in the Zemindari of Pachit dealt with in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (4). His revenue is payable to Government; his services are to be rendered to Government and the penalty for failure to render service is enforcible by Government. The revenue is clearly not payable to Government. It is payable to the Raja of Kharagpur. No services have been rendered to Government since 1796. There is no penalty in Captain Brown's Sanad attached to the failure to perform Police duties. The only penalty suggested is that if any body lodges any complaint, then on proof of the matter after enquiry punishment will be inflicted on you. That was a condition imposed upon every Zemindar prior to Regulation XXII of 1793. It is further said that he who will give bad advice to others and will interfere with the affairs of Government will be held guilty and will be turned out of his *ilaqa* and will not be allowed to come back. This was a penalty to be imposed not upon the grantees under the Sanad, but upon any body residing within the Taluk who might misbehave himself. The penalty to be incurred by the Dhumsain Jagirdar was not attributable to his original Sanad, but to the Muchalka or security bond executed at the time of the appointment. The question decided in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (4) was whether the Mauzas in question, which had been held by the plaintiff's father during his lifetime and which at his death had descended to the plaintiff as his heir and to which the plaintiff was appointed by Government, were liable to be attached in execution of a decree against the father as assets by descent in the hands of the plaintiff his son. In the case before us the appellant has not been appointed by Government. Mr. Imam asks us to attach importance to this and to the fact that he has given no Muchalka nor Kabuliyat. I would attach even greater importance to the fact that his father was not appointed by Government. His grandfather, Madho Singh,

was not appointed by Government. His great-grandfather, Jhabban Singh, was not appointed by Government. The last appointment made by Government was that of Parandar Singh and when an attempt was made to assert the right of appointment on the decease of Parandar Singh, the Collector declined to make the appointment and the Zemindar of Kharagpur was held by the Courts not competent to do so.

Never since the death of Raja Parandar Singh has any propietor of Handwa applied for a renewal of the Istamrari Mukarrari Ghatwali grant. For a hundred years no Muchalka or Kabuliyat undertaking military service has been given. No suggestion that the tenure was liable to military service was made until after the death of Udit Narayan Singh it became desirable to avoid paying Udit Narayan Singh's debts. On only one occasion has mutation of names even been applied for, and on that occasion mutation of names was refused (Exhibit B). All that was done was that a note was made in the Register of Raja Udit Singh's application and the report made thereon. Whenever it has been necessary to prepare a list of the Ghatwali tenures of the Santhal Pergannahs, Parganna Handwa has been omitted. In successive settlement reports no mention is made of any Ghatwali duties to be performed. On what basis can the appellant claim that he or his father were Ghatwals ?

At the outset of the argument we suggested to Mr. Manuk that the real issue involved was: Did the appellant succeed to his father's estate by inheritance or by appointment. If he succeeded by inheritance as his father's representative-in-interest he was estopped from denying his father's right to alienate the estates. If he succeeded to the estate by appointment his father's interest in the estate was dead and could no longer be pursued. For this view I find support in the *obiter dictum* of Mookerjee, J., in *Bhagwat Buksh Roy* v. *Sheo Pershad Sahu* (5) and in the judgments of Mullick, J., and Jwala Prasad, J. (equally *obiter*), in the case of *Jadab Lal* v. *Debi Lal Singh* (6). I place the case bafore us on a different, and, as I think, a higher plane than these two cases. Udit Narayan Singh was not appointed to the post of Ghatwal. He was merely *de facto* holder without license from the ruling power of the lands attached to the post of Ghatwal, and as such mortgaged his right, title and interest. His son (or his wife) has succeeded by inheritance or under his Will to such rights as he had. They cannot successfully impugn his title, or even ask that the question of his title be investigated. The ruling power is not a party to the suit, nor is any Ghatwal appointed by the ruling power. It is well settled that in mortgage suits the paramount title of parties other than the mortgagor or his representative-in-interest cannot be gone into.

The right, title and interest of Udit Narayan Singh was mortgaged, and must be sold in execution of the decree to be made on the mortgage. It is only to be regretted that the time of the lower Court and this has been so long occupied in an enquiry of merely historic interest.

In view of the value of the subject-matter of the suit I deem it expedient to record briefly my findings on the several issues framed.

The first issue was not contested in this Court. It is admitted that the mortgage bond is genuine and the consideration money advanced.

On the second and sixth issues I find that the property mortgaged by the late Udit Narain Singh was a Ghatwali tenure, not held by him as a Ghatwal. Such right, title and interest as he had therein were alienable, and did not terminate with his life. The defendants Nos. 1 and 2 would either of them be estopped as his respresentative-in-interest from pleading that such right, title and interest as he held were inalienable.

On the third issue I find that the decision in Suit No. 363 of 1909 is not *res judicata*. The suit in question was one to enforce a puisne mortgage upon the same property. The present plaintiffs were defendants to the suit as prior mortgagees. The present defendants pleaded successfully that the property mortgaged was inalienable; but on the case coming to the High Court in appeal the Court of Wards, who were then in charge

(5) 21 Ind. Cas. 481; 18 C. L. J. 277 at p. 307; 18 C. W. N. 297.

(6) 42 Ind. Cas. 399; 2 P. L. J. 725; 3 P. L. W. 149.

of the estate, obtained a withdrawal of the appeal by promising to pay the mortgage money. There was no issue contested as between the present plaintiff and the present defendants with regard to the alienability of the property. The case was not one in which the decision would be *res judicata* as between co defendants.

In the finally published Record of Rights the late Raja Udit Narayan Singh was recorded as Mukarrari Istamrardar in respect of the mortgaged property in such documents as are before us. These documents relate only to the liability of the tenants to pay rent to him. The Khewats have not been filed and even if they had been filed, I should hold on the fourth issue that they would be evidence only of his title as proprietor and would not be conclusive with regard to a question of military duty attached to the proprietary rights.

On the 5th issue my finding would be the same as on the 4th issue.

On the seventh issue the question whether the Raja had any right to make dispositions of his property is covered by my discussion of the facts of the case. The right, title and interest of the late Udit Narayan Singh not being derived from the ruling power by appointment, he was at liberty to dispose of such right, title and interest as he possessed.

The learned Subordinate Judge has not discussed the eighth issue and it was not touched in the arguments. I confess that I can see no meaning in it at all. The bond in suit is binding against whichever of the defendants is the representative in-interest of the late Raja. That question is still *sub judice* in another appeal now before us.

It is conceded by the appellants that the ninth issue does not really arise. The sole question is, whether under section 6 of Regulation III of 1872 the respondent is entitled to a decree for more than half the mortgage-debt. The learned Subordinate Judge, while recognising the force of section 6, has made a decree for eight lakhs of rupees with interest from the date of the filing of the suit. This is in clear contravention of section 6. Under Order XXXIV of the Civil Procedure Code the decree of the Court must set forth the amount due on the latest date of payment. I hold that this is the decree which is contemplated by section 6 of Regulation III of 1872 and that it should be decreed that the amount due on the day of payment be eight lakhs of rupees.

Section 6 is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit. Therefore, on four lakhs of rupees and costs, interest will run at 6 per cent. per annum. Costs both in the lower Court and in this Court will be calculated on the total amount decreed. The appellants having failed on all the important issues involved will bear their own costs in both Courts. This decision covers both issue No. 10 and issue No. 11.

This decision disposes of Appeal No. 89. Mr. Naresh Chandra Sinha argued that the decree could not bear interest at all, but in course of the arguments conceded that that part of the decree relating to interest on the original principal could not be assailed. His position with regard to the compromise filed was that his inability to pay the instalments promised was due to the fact that the estate was in the hands of the Receiver, and that in view of the dispute regarding title to the estate he was unable to obtain from the Receiver the sums necessary to pay the first instalment. It is immaterial by what causes the compromise became infructuous. The learned Subordinate Judge was correct in saying that it has become infructuous and cannot be acted upon. The parties will, therefore, be relegated to their former positions and the considerations which cover the decision of the appeal of the Kumar cover also the position of the Rani. The decree which I propose will be of effect as against the representative-in interest of the late Raja Udit Narayan Singh, whether that representative in-interest be the Kumar or the Rani.

Appeals dismissed.

HUSSAIN BAKHSH *v.* PALA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3195 OF 1917.

July 18, 1918.

Present:— Sir Henry Rattigan, KT., Chief Judge.

HUSSAIN BAKHSH—DEFENDANT—APPELLANT

versus

PALA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch, I, Art. 144—*Adverse possession—Independent trespassers, whether can tack on their periods of possession.*

Plaintiffs as collaterals of one *B.* sued to recover possession of certain land held by the latter as an occupancy tenant. It appeared that after *B.*'s death in 1903 his mother remained in possession till 1905, when she was ejected by the defendant under due process of law. It was contended that the plaintiffs' suit was time-barred as it was open to the defendant to "tack on" to his period of adverse possession the period during which *B.*'s mother was in adverse possession:

Held, that it was not open to the defendant to tack on the period during which *B.*'s mother was in adverse possession, as both were independent trespassers and he could not assert that he claimed through or under her.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 24th August 1917, reversing that of the Munsif, 1st class, Gurdaspur, dated the 18th May 1917, dismissing plaintiffs' claim.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—Plaintiffs, as collaterals of Bhagwan Singh, seek to recover possession of certain land held by the latter as an occupancy tenant. It appears that Bhagwan Singh died in 1903 and that after his death his mother, *Musammat* Ishri, entered into possession and remained in occupation of the land until 1905 when she was ejected under due process of law by Hussain Bakhsh, defendant.

Defendant's answer to the suit is that the claim is time-barred; but the District Judge has held that the plea has not been established and that the suit is within time. Defendant appeals to this Court and on his behalf Mr. Tek Chand has strenuously contended that the decision of the District Judge is erroneous. He claims that the suit is barred under either Article 142 or Article 140 or Article 144 of the Limitation Act. As regards Article 142, the present case cannot clearly fall thereunder, inasmuch as plaintiffs do not claim to have been in possession of the land or to have been dispossessed or to have discontinued possession. Article 140 is equally inapplicable inasmuch as plaintiffs, who are reversioners in the sense in which that term is understood in the Punjab Customary Law, are not reversioners in the sense in which that term is used in the Article [see *Roda* v. *Harnam* (1)]. Finally, as regards Article 144, Mr. Tek Chand admits that Hussain Bakhsh himself has not been in adverse possession for 12 years, but he claims that it is open to Hussain Bukhsh to "tack on" to his period of adverse possession the period during which *Musammat* Ishri, whom defendant ejected, was in adverse possession, and the learned Pleader contends that *Musammat* Ishri was in fact, during the time she was in possession, holding under the defendant, who is the landlord of the land. The latter contention is opposed to the facts of the case and to the allegations of defendant himself in the suit in which he succeeded in obtaining a decree of ejectment against *Musammat* Ishri, whom he then described as a trespasser in possession without any lawful right. *Musammat* Ishri and defendant must be regarded, therefore, as two entirely independent trespassers; and defendant cannot possibly assert that he claims through or under *Musammat* Ishri.

In these circumstances, the authorities in this country are overwhelming to the effect that it is not open to the defendant to tack on the period during which *Musammat* Ishri was in adverse possession [see Starling's Limitation Act, page 354; Rustomji's Limitation Act, Second Edition, pages 508-509; *Ditu* v. *Devi Dial* (2), *Guroo Churn Dutt* v. *Krishna Moni Gupta* (3), *Ram Lakhan Rai* v. *Gajadhar Rai* (4) and *Baldeo Singh* v. *Mohan Singh* (5)]. In my opinion the suit has been rightly held to be within time and I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) 18 P. R. 1895.
(2) 189 P. R. 1889.
(3) 2 C. W. N. 315.
(4) 8 Ind. Cas. 1095; 33 A. 224; 7 A. L. J. 1184.
(5) 22 Ind. Cas. 855; 119 P. L. R. 1914; 72 P. W. R. 1914.

RAJANI KANTA PAL *v.* KEDAR NATH BISWAS.

CALCUTTA HIGH COURT.
RULE *Nisi* No. 351 OF 1918.
July 19, 1918.
Present :—Mr. Justice Teunon and Mr. Justice Cuming.
RAJANI KANTA PAL—PETITIONER
versus
KEDAR NATH BISWAS AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Error of law, whether ground for interference—Remedies, other, open to petitioner, effect of.

The petitioner purchased a holding in execution of a money-decree obtained against the tenant by a third party. The landlord refused to recognise the petitioner as a tenant on the ground that the holding was non-transferable. Thereafter the landlord brought a suit for rent against the old tenant and obtained a decree *ex parte* in execution of which he sought to have the property sold, whereupon the petitioner preferred an objection contending that the landlord's decree was merely a money-decree inasmuch as it was obtained against the old tenant who had no interest in the tenancy. The Court, holding that the objection of the petitioner was preferred under the provisions of Order XXI, rule 58, Civil Procedure Code, overruled it as being barred under section 170 of the Bengal Tenancy Act. The petitioner moved the High Court in revision under section 115, Civil Procedure Code:

Held, that as the petitioner had other remedies by suit or otherwise and that as the error of the executing Court, if any, was at most an error of law, the intervention of the High Court under section 115, Civil Procedure Code, was not called for. [p. 191, col. 2; p. 192, col. 1.]

Rule against the order of the Sub-Judge, Nadia.

FACTS.—Robertson and Co. obtained a permanent lease of an under-tenure under the decree-holders sometime ago. Petitioner purchased the under-tenure on 13th November 1913 in execution of a money-decree before the arrears sued for now accrued due. This purchase was brought to the notice of the decree-holder-landlords in due course. But in 1917 decree-holders landlords obtained a decree for rent against Robertson and Co., ignoring the purchase of the petitioner, and brought the property to sale in execution of the decree. Petitioner put in an objection that the latter decree was not a rent-decree but a money-decree and as such was governed by the claim sections of the Civil Procedure Code, and moved the High Court against the order of the lower Court overruling the objection.

Babu *Barnashibasi Mukherjee*, for the Petitioner.—The points to be decided are :—

(1) Whether the decree obtained by the landlord was a rent-decree or not?

(2) If it was a rent-decree, whether the claim was barred by section 170 of the Bengal Tenancy Act as the lower Court says?

[TEUNON, J.—You have your remedy by a suit].

If the property is sold then there will be difficulties. The lower Court had no right to decide the question without deciding whether it is a rent-decree or not. Therefore I submit the two points for your Lordship's consideration:

(1) The decree in execution of which the property was sold was a money-decree against Messrs. Robertson and Co., who were not properly represented.

(2) The tenancy being a permanent under-tenure is transferable under the law and I having purchased it with the knowledge of the landlord, my right cannot be challenged.

My application was under section 47 of the Civil Procedure Code.

[TEUNON, J.—If you are in possession then your application was under Order XXI, rule 58.]

Babu *Khanindra Lal Moitra*, for the Opposite Party.—The original petition was under section 47 of the Civil Procedure Code. The learned Judge dealt it as one under Order XXI, rule 58. In order to prove whether the decree is a rent-decree or not, it is to be decided whether the original suit for rent was brought by the original sole landlord against the recorded tenant.

[TEUNON, J.—Your case is that this is a non-transferable occupancy holding, but they say that it is a transferable under-tenure and permanent and the petitioner's case is that it was transferred to him with your knowledge. If this is proved to be so, what is the value of your decree?]

If that is held, he should put in the decretal amount in Court and take receipt from Court under section 170, clause (3), Bengal Tenancy Act In support of the proposition that when the plaintiff is the landlord at the date of the suit the application for execution of the decree is to be made under the Bengal Tenancy Act, *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1) was referred to.

(1) 10 C. W. N. 547; 3 C. L. J. 470; 33 C. 566 (F. B.).

RAJANI KANTA PAL *v.* KEDAR NATH BISWAS.

[TEUNON, J.—This case is not in point. In *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1) there was no question that the proper tenant was sued at that date.]

By withholding the rent from me he cannot force me to recognise him as the transferee. He could have deposited the rent under section 170, clause (3), of the Bengal Tenancy Act or under section 61 and then could have challenged whether the tenancy was transferable or not.

[TEUNON, J.—But if the decree is proved to be fraudulent?]

Then he will have to bring a fresh suit and get an injunction. So long as the decree stands, it must be presumed to be good. But instead of depositing the money as aforesaid, he puts in a petition under Order XXI, rule 58, of the Civil Procedure Code. I submit your Lordships will not interfere in this case under section 115 of the Civil Procedure Code; the petitioner has other remedies.

Babu *Baranashibasi Mukherjee*, in reply.—Under section 11 of the Bengal Tenancy Act the interest in a permanent tenure will be transferable in the same way as any other property. Therefore, the allegation of my client that the interest of Messrs. Robertson and Co. was a transferable one, is all right. The landlord knew that I stepped into the shoes of Messrs. Robertson and Co. Then again why should my client deposit rent in Court under section 61 or section 170 of the Bengal Tenancy Act? Why should he take the risk of a suit without the determination of the question as to whether the decree was a rent-decree and as such whether it was capable of being executed under Chapter XIV of the Bengal Tenancy Act? I have no objection to paying rent. Let the landlord recognise me as a tenant and take rent from me.

As regards clause (3) of section 170 of the Bengal Tenancy Act that section has no application in this case.

[TEUNON, J.—But what about section 172?]

I am not the judgment-debtor nor his representative, nor have I a voidable interest. I bought long before the date of the decree.

JUDGMENT.—In this case it appears that in execution of a money decree obtained by a third party as against the tenant of a certain holding or tenure, that tenure or holding was sold to the present petitioner on the 13th November 1913. The landlord has refused to recognise the purchaser as a tenant, on the ground that the holding is in fact a non-transferable occupancy holding. The petitioner-purchaser's contention is that this is a permanent under-tenure and, therefore, transferable. In the year 1917 to recover rents that had accrued due after the sale to the present petitioner in November 1913 the landlord brought a suit against his old tenant and obtained a decree *ex parte*. In execution of that decree he now seeks to have the property sold. The present petitioner preferred an objection to the executing Court contending that though the decree was in form a rent-decree, yet by reason of the fact that it had been brought against a person who had no present interest in the tenancy it was merely a money decree. This application he purported to make under the provisions of section 47 of the Code of Civil Procedure. There appears to be no controversy that the decree-holder is in fact the landlord and there also appears to be no controversy that the rent for the period in suit was in fact due, the landlord having apparently refused to receive rent from the petitioner and the petitioner having taken no action under section 61 of the Bengal Tenancy Act or otherwise in order to secure that payment should be duly made. In this state of facts the learned Subordinate Judge held that the application made by the petitioner before us, though it purported to be one under section 47 of the Code, was in fact one made under the provisions or falling under the provisions of Order XXI, rule 58. Having regard, therefore, to the provisions of section 170, Bengal Tenancy Act, he held that the claim could not be entertained and he, therefore, dismissed the application.

We are asked to revise his order under the provisions of section 115, Civil Procedure Code. Now it is apparent that the petitioner before us has other remedies by suit or otherwise, and it is also fairly clear that if on the facts we have set out the

learned Subordinate Judge committed any error in holding that Order XXI, rule 58, Civil Procedure Code, did not apply, he at most committed an error of law which is not sufficient to call for our intervention under the provisions of section 115, Civil Procedure Code. We, therefore, discharge this Rule with costs, two gold *mohurs*.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1199 OF 1917.

April 19, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

KILARU KOTAYYA—DEFENDANT No. 2—APPELLANT

versus

POLAVARAPU DURGAYYA AND OTHERS —PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Hindu Law—Joint family—Alienation—Necessity, absence of—Decree against father—Decree held not binding on sons, effect of—Consideration, whether charge on sons' share—Pious obligation—Res judicata *—Civil Procedure Code (Act V of 1908), s. 11.*

Where a sale by a Hindu father is held to be not binding on the share of the sons, the purchaser is not entitled to any charge on the latter's share for any portion of the consideration for the sale. [p. 193 col. 1.]

In such a case the purchaser cannot treat the consideration which he seeks to get refunded as a debt of the father which it is the pious duty of the sons to repay. [p. 193, col. 2.]

Spencer, J's judgment in *Subbaiya Mudaliar* v. *Thulasi Mudaliar*, 22 Ind. Cas. 44; (1914) M. W. N. 16; 14 M. L. T. 537; 1 L. W. 65, not approved.

Sadasiva Aiyar, J.'s view in *Subbaiya Mudaliar* v. *Thulasi Mudaliar*, 22 Ind. Cas 44; (1914) M. W. N. 16; 14 M. L. T. 537; I L. W. 65 and *Virabhadra Gowdu* v. *Guruvenkata Charlu*, 22 M. 312; 8 Ind. Dec. (N. S.) 222, followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.) and *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu*, 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 354; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55, explained and distinguished.

A decree against the father will not operate as *res judicata* in a suit by the sons to set aside the sale in respect of their shares in the property. [p. 193, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suits Nos. 22 and 25 of 1916, preferred against that of the Court of the Additional District Munsif, Bezwada, in Original Suit No. 689 of 1913.

FACT appear from the judgment.

Mr. *T. Prakasam*, for the Appellant.—The purchaser is entitled to a refund of the sale consideration when the sale is set aside, and though the sale has been held to be not binding on the sons, the latter are bound to refund a proportionate portion of the sale price. The obligation of the father to return the price is in the nature of a debt, and the sons being under a pious duty to pay their father's debts under Hindu Law, the consideration is chargeable on their share in the property.

Reference was made to the judgment of Spencer, J., in *Subbaiya Mudaliar* v. *Thulasi Mudaliar* (1).

Again, the decree against the father is *res judicata* against the sons and the sons cannot sue to set the sale aside.

Mr. *T. R. Venkatrama Aiyar*, for the Respondents.—There is no pious obligation where the sale by the father was found to be not for purposes binding on the family. The consideration cannot be treated as a debt. The pious obligation attaches only to debts contracted by the father, and not to the consequences flowing from the father's illegal acts. The consideration which the father is bound to return cannot be charged on the sons' share. *Vide* judgments of Sadasiva Aiyar, J., in *Subbaiya Mudaliar* v. *Thulasi Mudaliar* (1) and *Virabhadra Gowdu* v. *Guruvenkata Charlu* (2).

The pious obligation does not arise until after the father's lifetime: *Sahu Ram Chandra* v. *Bhup Singh* (3).

The decision in the suit against the father cannot operate as *res judicata*, as the father could not plead absence of necessity himself and get the sale set aside.

JUDGMENT.

ABDUR RAHIM, J.—The 2nd defendant purchased certain property from the 1st

(1) 22 Ind. Cas. 44; (1914) M. W. N. 16; 14 M. L. T. 537; 1 L. W. 65.

(2) 22 M. 312; 8 Ind. Dec. (N. S.) 222.

(3) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R 498; 26 C. L. J. 1; 33 M. L J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

defendant, the father of the plaintiffs, the father and sons belonging to a joint Hindu family. The 1st defendant had instituted a suit previously by which he sought to set aside the alienation on the ground of fraud, undue influence and want of consideration. This Court held that the alienation could not be set aside but though the consideration of Rs. 800 had not been originally paid by the purchaser, yet inasmuch as he undertook to pay that amount the previous suit was dismissed. The plaintiffs were not parties to the suit and no question of necessity was considered or decided by this Court. In fact that was not a question seriously pressed at the trial in that suit. The present suit has been brought by the sons in order to set aside that very sale and the plaintiffs have obtained a decree to that effect.

It has not been proved that the sale was made for purposes binding the family. The question that is now raised before us by Mr. Prakasam appearing on behalf of the purchaser is that the plaintiffs should not be allowed to have a decree, so far as their 2/3rd share is concerned, without being directed to pay a like proportion of the amount which has been paid as consideration for the sale, that is to say, he asks us to treat the consideration for the sale, which he sought to get refunded to him, as a debt of the 1st defendant which it is a pious obligation of the plaintiffs to repay. He drew our attention, in support of this contention, to a passage in the judgment of Spencer, J., in the case of *Subbayia Mudaliar* v. *Thulasi Mudaliar* (1). But no authorities are cited therein in support of such a proposition. On the other hand, it is clear from the judgment of Sadasiva Aiyar, J., in the same case that, in his opinion, a purchaser in similar circumstances was not entitled to any charge for the consideration or any portion of it, that is, in a case where the sale was held to be not binding on the share of the son. In so holding he followed a ruling of a Division Bench of this Court in *Virabhadra Gowdu* v. *Guruvenkata Charlu* (2) and the view of the law laid down by Sadasiva Aiyar, J., in *Sabbaiya Mudaliar* v. *Thulasi Mudaliar* (1). The consideration of Rs. 800 was paid for the sale of the property and no question of debt could arise until at least the sale is set aside. Whether it could even then be said to be a debt which the son would be under an obligation to pay within the meaning of Hindu Law may be open to question. In any case 2nd defendant is not entitled to any charge on the son's share for any portion of the consideration of a sale which was not for purposes binding on the family. The learned Vakil for the respondent has drawn our attention to a passage in a recent ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3), where it is stated that the question of pious obligation of a son to pay his father's debt does not arise until after the father's lifetime. This passage was considered by a decision of a Bench of this Court in *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (4), and there it is stated that their Lordships of the Privy Council could not by this statement have intended to modify the law, as laid down in a long series of decisions, as regards the right of a creditor to enforce a debt borrowed by the father both against the father and the son. It is not necessary, however, to discuss this point any further in this case, as I think that the ruling in *Virabhadra Gowdu* v. *Guruvenkata Charlu* (2) is decisive of the question raised by the appellant. Whether the 2nd defendant will be entitled to sue the father and the sons for the consideration which has failed in a separate suit afterwards, is not a question on which we need express any opinion at present.

The second point urged by Mr. Prakasam is that the decree in the previous suit, to which I have already alluded, operates as *res judicata*. I think it is rightly pointed out by Mr. Venkatarama Aiyar that the father could not, as plaintiff in that suit, get the sale set aside on the ground that there was no necessity for his own act. I think that is a sufficient answer to this argument.

In the result the appeal fails and must be dismissed with costs.

NAPIER, J.—I agree.

M.C.P.

Appeal dismissed.

(4) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

BISHUNATH SINGH *v.* BALDEO SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 7 OF 1916.

June 28, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

BISHUNATH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BALDEO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 92, 115, applicability of—Oral evidence to show nature of transaction contained in deed, admissibility of—Pre-emption, suit for—Estoppel, doctrine of, applicability of.

Section 92 of the Indian Evidence Act is confined to proceedings between the parties to the deed or their representatives-in-interest and has no application to claims by or against third persons. [p. 194, col. 2.]

Parties to a transaction which is not really an out and out sale are not estopped in a suit for pre-emption brought by a third party from adducing oral evidence to show the real nature of the transaction, even when the document evidencing the transfer stands in the form of a sale-deed. [p. 195, col. 1.]

Section 115 of the Evidence Act contemplates some act or conduct affecting the party pleading it and having the effect of inducing him to change his position for the worse. [p. 195, col. 1.]

Unless a transaction is really one which gives rise in law to a right of pre-emption, no such right can be obtained by means of an estoppel. [p. 195, col. 2.]

There is no estoppel where all that is proved is that the transaction in dispute was in form a sale and that the plaintiff treated it as a sale for the purpose of bringing a suit for pre-emption which he would not otherwise have been entitled to bring. [p. 195, col. 2.]

Appeal against the decree of the Subordinate Judge, Hardoi, dated the 23rd September 1915.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

The Hon'ble Mirza *Samiullah Beg*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre emption in respect of a sale-deed, dated the 5th January 1914, executed by Ram Singh, now represented by the third defendant Partab Singh, in favour of his brother-in-law, the 1st defendant Baldeo Singh. The property consisted of the entire south *mahal* (*mahal dakhin*) of Mauza Rajauli in the Sandila Tahsil of the Hardoi district and the price was Rs. 8,775. The substantial defence in the suit was that the transaction was not an out and out sale, but of the nature of a mortgage by conditional sale, the parties agreeing that Baldeo Singh would reconvey the property after three years on being repaid the amount advanced by him and that in the meantime Ram Singh would pay interest. There is no question here of a transaction disguised in order to avoid pre-emption. Baldeo Singh holds an important position in the Kotah State. Ram Singh was already heavily in debt and showed a disposition to plunge still more heavily. He wanted money urgently to file a suit for the redemption of a very onerous mortgage executed by him in respect of another village Sunda. Baldeo Singh, who had already lent him money on mortgage on this very property, agreed to advance the sum required, on condition that Ram Singh would execute a sale deed so as to make it impossible for Ram Singh to incur any further debts on the security of the same property. No one would be likely to advance money to Ram Singh on the security of the property so long as the name of Baldeo Singh stood recorded as owner in the proprietary register.

The plaintiff appellant Bishunath Singh on the one hand disputes the facts and on the other urges a plea of estoppel against the defendants. This plea he bases on two grounds. In the lower Court section 92 of the Evidence Act seems to have been relied on, but in this Court it had to be admitted that section 92 has no application. That section is expressly confined, as its own language clearly shows and as was emphatically held by the Privy Council in a recent case from Burma [*Maung Kyin* v. *Ma Shwe La* (1)], to proceedings between the parties to the deed or their representatives-in interest, and has no application to claims by or against third parties. The appellant, therefore, shifts his ground and urges that as Baldeo Singh could plead section 92 in answer to a suit for redemption by Partab Singh, therefore he should not be allowed to prove against the plaintiff anything which he could not have proved against Partab Singh. Otherwise, it is said, he would get all the advantages of the position of vendee without the corresponding liability to

(1) 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).

pre-emption. This is the first argument. The second is that by reason of the fact that the deed was registered as a sale-deed the plaintiff has been induced to embark on an expensive litigation and, therefore, the defendants are estopped by section 115 of the Evidence Act from denying that the transaction was a sale.

Neither of these pleas has any force. If the parties are permitted, as by law they clearly are permitted, to give evidence of the real nature of the transaction, they cannot be prevented from doing so because one of the defendants might possibly at some future time take advantage of the situation to commit a fraud on the other. The probability in this case is extremely remote as Baldeo Singh and Partab Singh are father and son, Ram Singh having died leaving a Will in favour of his sister's son.

As regards the second argument it is sufficient to say that section 115 contemplates some act or conduct affecting the party pleading it and having the effect of inducing him to change his position for the worse. Here there was no representation made directly or indirectly to the plaintiff with a view to influence his conduct. In the lower Court he set up a representation but it was amply proved that his statement was false. He, therefore, falls back on a sort of general estoppel based solely on the fact that the transaction was in form a sale and available to any person who might be entitled to any right on the assumption that a sale had already taken place. This is carrying the doctrine of estoppel to impossible lengths. If the appellant's doctrine were accepted, it would be equivalent to extending section 92 of the Evidence Act to all suits in which a third party was plaintiff. Such a plaintiff could always plead that he had been induced to embark on an expensive litigation owing to the form in which the transaction was clothed. In *Nawab Begam* v. *Hamid Ali* (2) a Bench of this Court held that the mere fact that what was really a gift was couched in the form of a sale would not in itself estop the parties from proving the real nature of the transaction in a pre-emption suit; assuming that the form of this document amounted to a representation, as to which there was possibly room for doubt, there must be proof that the plaintiff believed the representation and acted on that belief. In *Raj Bahadur* v. *Jagrup Pande* (3) the 1st learned A. J. C., who delivered the leading judgment, expressed the opinion that unless the transaction was really one which gave rise in law to a right of pre-emption no such right could be obtained by means of an estoppel. We are clearly of opinion that there is no estoppel where all that is proved is that the transaction in dispute was in form a sale and that the plaintiff treated it as a sale for the purpose of bringing a suit for pre emption which he would not otherwise have been entitled to bring.

On the evidence it is abundantly clear that the facts are as stated above and as the they have been found by the learned Subordinate Judge. The evidence has been so fully discussed in his judgment that, agreeing as we do with the view which he has taken of it, there is very little which it is necessary for us to add. The correspondence between Ram Singh and Baldeo Singh leaves no doubt as to the real nature of the transaction. On 18th September 1913 Ram Singh writes to Baldeo Singh, saying that he agrees to the proposal made by the latter to advance money on Rudauli on the execution of a sale-deed which would subsequently be returned, since he urgently requires money for the redemption of Mauza Sunda and if this proposal is not accepted he will be unable to redeem the property. Ram Singh, however, promises to execute a sale-deed of Mauza Rudauli for Rs. 9,000 and asks Baldeo Singh in return to execute what he describes as "an ordinary agreement", promising that when Ram Singh repays the money he will restore the village. The money to be recovered will be strictly spent in instituting the case, and not in extravagance as Baldeo Singh had evidently feared. This letter, Exhibit A-2, was produced by Baldeo Singh at the first hearing. In reply to this Baldeo Singh writes on 22nd September (Exhibit C-1), saying that he accepts the proposal to advance Rs. 9,000 but that as some Rs. 200 or Rs. 250 will be spent in sending his men backwards

(2) 11 O. C. 176.

(3) 42 Ind. Cas. 37; 20 O. C. 249; 4 O. L. J. 540.

and forwards in connection with the advance he will return only Rs. 8,775.

In the end, however, the sale deed also was executed for Rs. 8,775 only.

Along with this letter Baldeo Singh sent an agreement on plain paper, Exhibit C-2, saying that being in a Native State he cannot obtain a Government stamp but that if Ram Singh desires he will execute a fresh agreement on stamped paper when he comes to Ram Singh's house on leave. He asks Ram Singh to complete the sale-deed and states that he has fixed three years as the period for reconveyance, because he cannot wait indefinitely if Ram Singh should delay in instituting the Sunda case. Ram Singh should institute the case and get back his sale deed within that period. In the meanwhile he must pay 12 annas per cent. per month interest and repay the principal and any unpaid interest at the end of three years, otherwise the sale will become absolute. The accompanying agreement, Exhibit C-2, has been rejected by the learned Subordinate Judge as requiring registrtion. Whether it required registration or not, depends on whether it is treated as a document creating an actual right to the property or as merely a personal contract to execute a reconveyance under certain circumstances. The point is not very material, as the agreement can certainly be looked at for the collateral purpose of discovering what the real nature of transaction between the parties was. On October 17th of the same year Ram Singh wrote again to Baldeo Singh disclaiming any desire for a stamped agreement but protesting once more that the period of three years was insufficient. This communication was on a post card bearing the Sandila post mark of 18th October and the Kotah delivery post mark of 23rd October. A month after the execution of the sale-deed Ram Singh wrote a further letter, Exhibit A-6, promising, in reply to exhortation of Baldeo Singh to pay interest, that it should be regularly paid every three months. We have evidence that interest was paid on two occasions. Exhibit C-4 is a post card from Baldeo Singh to Ram Singh dated the 18th April 1914 acknowledging payment of Rs. 197-7-0 on this account.

The appellant has endeavoured, on altogether insufficient grounds, to throw doubts on the genuineness of this correspondence, chiefly on the ground that some of the letters were not filed on the first day of hearing. This matter has been sufficiently disposed of by the learned Subordinate Judge. Several of the communications are in the form of post cards as to the genuineness of which no doubt is possible and the whole correspondence bears internal evidence of being genuine. It has been suggested by the appellant that these letters are clearly not documents creating any right in immoveable property.

Two other circumstances which go strongly to support the respondents' case are:

(1) that Ram Singh remained throughout in possession of the property, and

(2) that the ostensible sale price bears no sort of relation to the value of the property.

As to the first point the evidence is so overwhelming that the appellant has not attempted to controvert it but has taken up the position that because mutation of names was duly effected and possession acknowledged at the time of mutation, therefore, Ram Singh's possession must be treated as being on behalf of Baldeo Singh. This argument proceeds on a misconception. If we were dealing with a dispute between Ram Singh and Baldeo Singh as to the ownership of the property, we might well say that the mutation proceedings and Ram Singh's conduct were conclusive against the latter, but when we are endeavouring to find out as against a third party the real state of affairs, the fact that Ram Singh remained throughout in possession and performed all acts of ownership is of immense importance. The previous mortgage in favour of Baldeo Singh, though in form usufructuary, was in fact treated as a simple mortgage. Ram Singh paid interest on it and he continued to give leases to tenants and filed suits in his own name just as if no mortgage was in existence. The same thing continued after the execution of the sale-deed. Ram Singh's conduct was not that of an agent in possession of property on behalf of another but of an owner in possession on his own behalf. As regards the value of the property it is amply proved that the property which Ram Singh purported to sell for Rs. 8,775 was actually worth not

less than Rs. 14,000 or Rs. 15,000. The appellant wishes us to disregard this fact on the ground that properties were frequently sold much below their real value, but in the circumstances of this case we cannot but regard it as a fact having an important bearing on the true nature of the bargain between the parties. Not only was the advance made by Baldeo Singh for less than the value of the property but, as the correspondence shows, it was made without any reference to the value of the property. Ram Singh required Rs. 9,000. Rupees 9,000 were, therefore, advanced deducting only a sum of Rs. 225 to cover the costs incurred by the lender in connection with the transaction.

The appeal fails and it is accordingly dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2839 OF 1916.

May 28, 1918.

Present :—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

Raja NARENDRA LAL KHAN—PLAINTIFF—APPELLANT

versus

MANMOTHA RANJAN PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Breach of contract—Damages, suit for—Party who has not performed his part of the contract, whether can recover damages.

A plaintiff, who has himself failed to perform his part of a contract and has given no evidence that he has suffered any damages by the defendant's breach of the contract, cannot succeed in a suit for damages for breach of contract.

Appeal against the decree of the Additional District Judge of Midnapur, dated the 28th August 1916, affirming that of the Munsif, 4th Court at that place, dated the 30th June 1915.

Babu *Siva Prosanna Bhattacharjee* and Babu *Pasupatinath Sastri* for Babu *Khirode Narain Bhuiyan*, for the Appellant.

Babus *Sarat Chander Khan* and *Suresh Chander Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the learned Additional District Judge of Midnapur, dated the 28th August 1916, affirming the decision of the Munsif of the same place. The plaintiff sued for damages for breach of a contract with reference to the sale of timber growing on certain jungle, the property of the plaintiff. The facts as found are perfectly simple, namely, that the defendants cut and removed the timber growing on certain portions of the jungle and that they had paid in advance in excess of the value of the timber so removed. Under the terms provided for by the contract, the plaintiff now wants damages from the defendants. There seem to be two answers to the plaintiff's contention. The first answer is that apparently the plaintiff himself was in default under the contract in not having agreed to have a measurement. If that was so, of course, the plaintiff cannot recover damages in respect of a contract, that he committed a breach of. The second answer is that the plaintiff, purporting to act under the terms of the contract, resumed possession of the forest and got back all the timber the price of which he now seeks to recover from the defendants. The plaintiff has given no evidence that he suffered any damages. It may be that to-day or to-morrow he will be able to re-sell the timber for an equal or a larger price than what he had sold it for to the defendants. He cannot get damages from the defendants without proving what damage he had suffered and what was the pecuniary loss that happened to him by reason of the defendants not having carried out their part of the contract. It is quite possible in this case, without coming to any conclusion as to what is the actual meaning of certain parts of the contract, to say that the plaintiff having failed to perform his part of the contract and there being no evidence that he suffered any loss at all as to the timber for which he now seeks to recover, damages cannot succeed in the present suit. The present appeal, therefore, fails and must be dismissed with costs, such costs to be paid only to the contesting defendant No. 3.

Appeal dismissed.

VISHVESHVAR VIGHNESHVAR SHASTRI *v.* MAHABALESHVAR SUBBA BHATTA.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 39 OF 1916.

March 5, 1918.

Present:— Mr. Justice Beaman and Mr. Justice Heaton.

VISHVESHVAR VIGHNESHVAR SHASTRI—DEFENDANT NO. 2—APPELLANT

versus

MAHABLESHVAR SUBBA BHATTA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 6 (b), 109, 111 (g)—Lease—Reversion, transfer of—Forfeiture for breach of condition—Transferee, whether can enforce forfeiture where breach occurred before transfer.

A transfer of the reversion of a lease carries with it the right to enforce forfeiture of the lease for breach of a condition, even where the breach has occurred prior to the transfer. [p. 200, col. 2]

Letters Patent Appeal from the decision of Mr. Justice Shah, in Second Appeal No. 1018 of 1914, against the decision of the District Judge, Kanara, in Appeal No. 131 of 1913, confirming the decree passed by the Subordinate Judge, Kumtha, in Civil Suit No. 53 of 1912.

FACTS appear from the following judgment of

SHAH, J.—The plaintiff in this case sues to recover possession of 5/6th portion of the land in suit. He claims to have purchased the landlord's rights in this land by a deed, dated the 17th of December 1911, and he relies upon the forfeiture of the tenancy resulting from the breach of a condition of the Mulgeni lease which was created by his vendors in favour of the predecessor-in-title of defendant No. 2 on the 30th of November 1896. That Mulgeni lease was not for any agricultural purpose and it was a condition of that lease that the lessee was not to alienate or permit to be alienated, by way of mortgage, sale or in any other like manner, the property leased. Defendant No. 2 claims to have purchased all the rights under this Mulgeni lease: and the contest in this litigation is principally between the plaintiff and defendant No. 2. Both the lower Courts have held that there was a breach of this condition, inasmuch as there was a sale of the Mulgeni rights in December 1908 in favour of defendant No. 2. On that footing there has been a decree in favour of the plaintiff.

The present appeal is preferred by defendant No. 2, and two points have been urged on his behalf: *first*, that the plaintiff as transferee cannot take advantage of the breach of a condition of the lease, which took place before the assignment in his favour, and, *secondly*, that the notice showing the intention to determine the lease is not sufficient in law.

As regards the first point it seems to me that under section 109 of the Transfer of Property Act the transferee, in the absence of a contract to the contrary, would possess all the rights of the lessor, and under section 111, clause (*g*), the lease would determine by forfeiture resulting from the breach of an express condition on the part of the tenant, the transferee from the landlord having shown his intention to determine the lease by a notice. In the present case there is no doubt about the condition and the breach of that condition; and there can be no doubt under the terms of the assignment in favour of the plaintiff that he was to have the same rights as his vendors for the purpose of enforcing forfeiture against defendant No. 2. It is needless to refer to certain English cases which were cited by the learned Pleader for the appellant, as under the provisions of the Transfer of Property Act it is clear that they would have no application to the present case.

In connection with this point it is urged that under section 6 of the Transfer of Property Act the mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of property affected thereby. In the present case it is quite clear that what is transferred is not a mere right of re-entry, but the whole of the landlord's interest in the land, and the transfer is not in favour of any one except the owner of the property affected thereby. It follows, therefore, that there has been a forfeiture of the Mulgeni lease in this case and that the plaintiff is entitled to enforce the forfeiture.

As regards the point of notice, it was not suggested in the trial Court, and though it was mentioned in the memorandum of appeal to the lower Appellate Court, it does not appear to have been urged as there is no reference to the point in the judgment. Besides it seems to me

that there is no substance whatever in that point. The notice was given by the plaintiff who represented the whole of the landlord's interest except that of defendant No. 7, and the notice was in respect of the whole interest. The mere fact that defendant No. 7 did not join in the notice does not appear to me to render the notice invalid or inadequate in any way.

The result, therefore, is that both the points urged in support of the appeal fail and the decree of the lower Appellate Court is affirmed with costs.

There will be only one set of costs.

Mr. *Bahadurji* (with him Mr. *V. R. Sirur*), for the Appellant.

Mr. *S. V. Palekar*, for Respondent No 1.

JUDGMENT.

BEAMAN, J.—I doubt whether the true point was present to the mind of the learned Judge below. He appears to have thought that the question could be answered from the language of sections 6, clause (*b*), 109 and 111, clause (*g*), of the Transfer of Property Act. Even were that so, I should still doubt whether the answer he has given is right. Section 6, clause (*b*), is no more than a special case of a mere right to sue. For if the mere right of re-entry on breach of condition subsequent is transferred, without the reversion, the person having it could only use it for the purpose of a suit to enforce forfeiture, without gaining any right or interest in the property so demised and forfeited. Section 109 seems to me to have no bearing on the point. Section 111, clause (*g*), need not mean any more than that the lessor must give notice of intention to enforce forfeiture, or if the breach has occurred after transfer of the reversion, the transferee must give notice. That is how I read it and if I am right, it leaves our point untouched.

Put in the simplest and fewest words it is this: Does the transfer of the reversion carry with it the right to enforce forfeiture for breach of condition prior to the transfer? The law in England was well settled and seemingly unquestioned that it did not [*Hunt* v. *Bishop* (1), *Cohen* v. *Tannar* (2)] till by the Act 1 & 2, Geo. V, c. 37, statutory validity was given to the view taken by the learned Judge below.

I am not aware of any corresponding amendment of the Transfer of Property Act, altering the law in India. Speaking generally, it is safe to say that with few exceptions the Transfer of Property Act is a codified expression of the English Law. Presumably, then, it meant to give effect to what was the settled law of England on this point up to 1911.

In the absence of statutory provision, and on general principle, I own I should find it hard to come to any other conclusion than that which was so often stated and affirmed in the English Courts.

The facts with which we have to deal are: (1) that there was a breach of condition three years before this transfer, (2) that breach of condition would undoubtedly have worked a forfeiture, (3) the lessor did not waive the breach, (4) the lessor had never given the lessee notice of his intention to enforce the forfeiture, before the transfer.

What then was transferred? The reversion primarily. No one disputes it, or contends that there was anything illegal or even questionable in such an assignment. As between the transferor and transferee of the reversion no question arises here, and we have nothing to do with it. But as between the lessor and the lessee the case is different. They had entered into a contract of leasing on conditions. That contract had been broken by the lessee. But before the penalty could be enforced the law required the lessor to give notice of his intention to enforce it. This he had not done. Admittedly till he had (or if the law permits this, till his transferee had done so), no penalty could be enforced, and the contract would be subsisting. What the lessor does is to transfer the property demised to the plaintiff setting forth the prior contract and the fact that it had been broken, so, in other words, leaving the transferee to sue on the breach and enforce the penalty. It is easy to see that this could not be done in the case of an ordinary contract.

(1) (1853) 8 Ex. 675; 22 L. J. Ex. 337; 21 L. T. (o. s.) 92; 91 R. R. 698; 155 E. R. 1523.

(2) (1900) 2 Q. B. 609; 69 L. J. Q. B. 904; 83 L. T. 64; 48 W. R. 642.

While such a contract might be assigned before breach, it certainly could not afterwards, for then what is assigned is only the right to sue for damages, and this is a mere right to sue, whether or not the transferee is to have what he can get by way of damages after suit. Similarly in this case, the fact that the transferee is to have the property demised, as soon as he can enforce the penalty by suit against the lessee for breach of condition prior to his transfer, seems to me to make no difference. All that the transferor could assign was the reversion, since he had not given notice of his intention to enforce forfeiture on breach of condition already made. But it is argued he might also transfer the right he had to give this notice and thereupon to sue on the contract and enforce the penalty. That is the very point. Could he? For what is this, thus isolated, but a mere right to sue? How can it be distinguished in any essential from the assignment of a contract already broken, under which the only surviving right is the right to sue for damages? This right, it is to be observed, is quite distinct from and must not be confounded with the right to the reversion as upon the footing of an existing lease, and for that reason it has to be examined by itself after analysis has revealed the true nature of the transfer as a whole. It is thus shown, I think, that the transfer is a transfer of the reversion implying the actual subsistence of the lease, and, therefore, that the transferee must wait for a breach of condition subsequent to the transfer before he can sue to enforce a forfeiture, or as between transferor, transferee and lessee, it is no more than the transfer by the transferor to the transferee of a right to sue the lessee and turn him out. In the latter case such a transfer is clearly prohibited by the Act, and in the former the transferee would have no cause of action on the breach prior to transfer.

But since the law of England has been altered, and the Statute of 1911 provides in terms for such a case as this, I see no reason why we should not in such matters make the administration of the law as a whole as systematic as possible. It would be difficult to say that the Transfer of Property Act, as it stands, in express words, prohibits the plaintiff from suing here, and although, as I have shown, a reference to general principles and the spirit of the Act brings out that conclusion, I do not object to accepting the statutory modification of those general principles which has taken place in England. It is only upon that ground that I could bring myself to confirm the decree of the lower Court.

Appeal dismissed with all costs.

HEATON, J. - My opinion also is that the decree made by Shah, J., should be confirmed. The only ground on which that decree is assailed is that the lessor could not transfer his right to put an end to the lease, this right being founded on a breach of a condition of the lease which happened prior to the transfer. The point is one which was taken for the first time in second appeal; it was not argued in the trial Court or in the Court of first appeal. It is one which invites and for its satisfactory elucidation, in my opinion, requires an investigation of the facts from an altogether new point of view. We cannot make such an investigation here, nor ought we to remand the case. I am, therefore, not satisfied that the transfer by the lessor to the plaintiff was illegal in so far as it comprised a transfer of a right to sue. Indeed, though my learned brother takes the contrary view I am rather disposed to think that the transfer in this case is one which is exactly covered by the words of section 109 of the Transfer of Property Act.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 284 OF 1917.

June 18, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

SHAMSHAD ALI KHAN AND ANOTHER—PLAINTIFFS - APPELLANTS

versus

MOHAMMAD ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgaged property, part of, purchased by mortgagee, subject to mortgage, effect of.

SHAMSHAD ALI KHAN *v.* MOHAMMAD ALI KHAN.

Where a mortgagee purchases a part of the mortgaged property subject to his mortgage, the question of the sale price is immaterial and the effect of the purchase is to extinguish the mortgage to an amount proportional to the extent of the property purchased. [p. 201, col. 2.]

Appeal against the decree of the District Judge, Hardoi, dated the 30th April 1916, reversing that of the Munsif, Shahabad, dated the 15th January 1917.

Mr. *M. Wasim*, for the Appellants.

Mr. *A. S. Sen*, for the Respondents.

JUDGMENT.

DANIELS, A. J. C.—Certain property was mortgaged with possession by Mohammad Ali Khan, the first defendant, to Asnad Ali Khan deceased, father of the plaintiffs-appellants, and a deed of further charge was executed in respect of the same property. A portion of this property, amounting roughly to one-half, was purchased by the plaintiffs in execution of a simple money decree. The purchase was made subject to the deed of further charge which was duly proclaimed at the sale. The plaintiffs in the present litigation seek to bring to sale the remaining half of the mortgaged property in lieu of half the interest due under the deed of further charge. They admit that by purchasing the equity of redemption in half of the property the mortgage has been split up and has been extinguished to the extent of the property which they have purchased. The first Court, finding that the value of the property purchased was slightly more than half the total value of the mortgaged property, gave the plaintiffs a decree for Rs. 48-13-9, as against Rs. 54 which they originally claimed. The appellants admit the correctness of this decree. The lower Appellate Court has dismissed the suit altogether, holding that because the deed of further charge was notified at the time of sale and the sale was made subject to it, the whole of the charge must be deemed to have been extinguished by the purchase.

The proposition of law enunciated by the Court below obviously cannot be supported and the respondents' Counsel has made no attempt to support it. If one of several properties comprised in a mortgage is sold to satisfy the money claimed, it is the invariable practice to notify the entire mortgage and this certainly does not imply any intention on the part of the mortgagee to relinquish his claim against the remaining mortgaged properties. The contention of the respondents' Counsel is that if it is found that the value of the property purchased is sufficient to cover the amount due under the charge in addition to the purchase money, it should be presumed that the charge was extinguished. He admits that there is no finding in his favour on this point and that the question has never been gone into, but he asks that we should now in second appeal remit an issue regarding it. He relies on the case of *Amir Hasan Khan* v. *Chaudhri Hadi Hasan* (1), in which the view for which he contends was accepted as one of two grounds for upholding the lower Court's judgment. He relies still more strongly on the Privy Council case of *Dulichand* v. *Ramkishen Singh* (2), which was cited evidently with some doubt as to its applicability in *Amir Hasan Khan* v. *Chaudhri Hadi Hasan* (1) (at page 344), with the remark that "For this view there *seems to be support* in the case of *Dulichand* v. *Ramkishen Singh* (2)." On the other hand a Full Bench of the Allahabad High Court has laid down in *Bisheshur Dial* v. *Ram Sarup* (3) that where a mortgagee purchases a part of the mortgaged property subject to his mortgage, the question of the sale price is immaterial and the effect of the purchase is to extinguish the mortgage to an amount proportional to the extent of the property purchased. If a mortgagee becomes possessed of the equity of redemption in one-third of the property then the mortgage is extinguished to the extent of one-third, if he becomes owner of half the mortgaged property the mortgage is extinguished to the extent of one-half and so on.

The appeal originally came before the learned Judicial Commissioner who referred it to a Bench on the ground that in his opinion the decision in *Amir Hasan Khan* v. *Chaudhri Hadi Hasan* (1) was erroneous. With this view we are in entire agreement. Where property is sold subject to a mortgage, though the sale price will doubtless be affected by the existence of the en-

(1) 4 O. C 341 at p. 344.

(2) 7 C. 648; 8 I. A. 93; 4 Sar. P. C. J. 245; 5 Ind. Jur. 493; 3 Ind. Dec. (N. S.) 966.

(3) 22 A. 284; A. W. N. (1900) 69; 9 Ind. Dec. (N. S.) 1221.

cumbrance, the mortgage money forms no part of the price. On the contrary the whole meaning of selling subject to a mortgage is that the right of the mortgagee is preserved intact. The reason why there is a complete or partial extinction of the mortgage when the mortgagee is himself the purchaser is that in such a case there is a merger of the mortgagee right and the proprietary interest to the extent of the property purchased. The integrity of the mortgage is broken up and the mortgagee can no longer claim to throw the whole burden of the mortgage on the remaining property. The law on the subject was fully considered by a Bench of six Judges in *Bisheshur Dial* v. *Ram Sarup* (3) and is thus summed up in the leading judgment of Banerji, J.:—

"Upon further consideration, I am of opinion that the rule laid down by the Bombay High Court is the true rule, and that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage."

That ruling has never, so far as we are aware or as has been pointed out to us, been dissented from by any High Court in India. It has been repeatedly followed at Allahabad and the same rule has been followed both before and since by the Bombay High Court. It has also been followed by the Calcutta High Court, *vide*, *Mutty Lal Pal* v. *Nandu Lal Neogi* (4). It has been treated as good authority in at least one case in this Court, *e. g.*, *Suraj Kishan* v. *Ajudhya Prasad Singh* (5). It only remains to see whether there is anything in the Privy Council case relied on by the respondents to conflict with a view so reasonable in itself and supported by such a wide consensus of authority. There are some observations in that case, which was decided prior to the introduction of the Transfer of Property Act, which might appear to support the respondents' argument, but the actual point to be decided was whether a purchaser who had stepped into the shoes of a prior mortgagee could recover an amount paid into Court to prevent the property being sold over again in execution of a decree based on a subsequent mortgage, a sale against which he had vainly protested before it took place. The report shows that there was no dispute before their Lordships as to the equitable right of the plaintiff to recover his money. "The arguments at the Bar," say their Lordships, "were not directed to show that there is any equity upon which the appellant could retain this money; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution proceedings." The case has been frequently cited as laying down the law as to what constitutes a voluntary payment. Neither in *Bisheshur Dial* v. *Ram Sarup* (3) nor in any of the various cases in which that ruling has been followed does it ever appear to have been suggested that the High Courts, in the view which they took, were contravening anything laid down by their Lordships of the Privy Council in that case.

We accordingly allow the appeal, and setting aside the decree of the lower Appellate Court, restore the Munsif's decree with costs in all Courts recoverable as part of the decretal amount.

KANHAIYA LAL, A. J. C.—I agree.

Appeal allowed.

(4) 12 C. W. N. 745; 8 C. L. J. 92.
(5) 27 Ind. Cas. 960; 2 O. L. J. 73.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1361 OF 1916.

July 20, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KUMUD KAMINI DASI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHUDUMANI DASI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Conveyance—Consideration money, non-payment of, effect of.

The non-payment of the consideration money expressed to be paid by a conveyance may be an

important item to take into consideration to determine whether the conveyance is or is not a real transaction, but a conveyance notwithstanding the non-payment of the consideration money may be a perfectly good transaction, except where the conveyance is drawn in such a form that the transfer is conditional upon the satisfaction of the consideration money. [p. 203, col. 2; p. 204, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 21st of March 1916, modifying that of the Munsif, 1st Court at Berhampur, dated the 27th of February 1915.

FACTS appear from arguments and the judgment.

Babu *Ram Chandra Mazumdar* (with him Babu *Phanindra Kumar Singha*), for the Appellants.—Defendants are the appellants. Plaintiff No. 2 is the wife of plaintiff No. 1 and daughter of defendant No. 1; other defendants are the sons of defendant No. 1. The *jote* in dispute was purchased by plaintiff No. 1 in *benami* for his wife, plaintiff No. 2, in 1316 B. S. Defendant No. 1 is a *korfa* tenant of the *jote*. Plaintiff No. 2 in 1319 B. S. sold the disputed *jote* to defendant No. 1 and the sale-deed was registered. The present suit, out of which this appeal arises, has been brought for *khas* possession after declaration that the *kobala* by which defendant No. 1 purchased the *jote* from plaintiff No. 2 is void and inoperative.

The first Court dismissed the plaintiff's suit on the ground that plaintiff No. 1 was present at the time when the transaction took place. On appeal the lower Appellate Court cancelled the *kobala* as void and inoperative for want of consideration. The lower Appellate Court held that "the *kobala* is void for want of consideration and is liable to cancellation on that ground, even if plaintiff No. 1 was a consenting party to its execution."

The *kobala* having been registered and possession having been delivered in accordance with it, section 25 of the Contract Act has no application. The consideration money, if not paid, is merely a charge upon the property. There are authorities to support this contention.

[FLETCHER, J.—The transaction may be a valid transaction, even if no consideration money passed at the time of the execution].

Babu *Nakuleswar Mukherjee*, for the Respondents.—The intention of the parties must be looked into. The parties here intended that the sale would be valid only upon the payment of the consideration money. The finding is that the consideration money did not pass, therefore, the sale is void and inoperative. The payment of the consideration money was made a condition precedent to the validity of the *kobala*.

Babu *Ram Chandra Mazumdar* was not called upon in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned District Judge of Murshidabad, dated the 21st March 1916, modifying the decision of the Munsif at Berhampur. The case is a small one and it is unfortunate that we have got to send the case back, as we have no other alternative because the learned District Judge has not disposed of the case in a proper manner. The suit was brought by a man and his wife, the two plaintiffs, against the man's mother-in-law for a declaration that a certain *kobala* which bore the vernacular date corresponding to some other date in April 1912 was void and inoperative on the ground that it was obtained by misrepresentation, undue influence and want of consideration, and as a consequence the plaintiff asked for *khas* possession of certain property. The plaintiff No. 2 in the year 1909 acquired certain plots of land. Of one of these plots or part of the land that was acquired the defendant No. 1, who is the mother of the plaintiff No. 2, was an under-*raiyat* and the case is that the mother obtained by the means suggested in the plaint from her daughter this *kobala* which was executed in her favour. The learned Judge in the lower Appellate Court has dealt with the case in this way. He says, "the evidence shows to me that the consideration money expressed to be paid by the conveyance executed in favour of the mother by the daughter was not, in fact, paid and, therefore, the conveyance is void." Of course that is clearly wrong. The non-payment of the consideration money may be an important item to take into consideration to determine whether the conveyance was or was not a real transaction. But a conveyance, notwithstanding the non-payment of the consideration money, may be a perfectly good transactions.

In some cases, the consideration money is not paid as it is expressed to be paid in the deed and the conveyance is a perfectly honest and good one. It has been attempted to support this view of the learned Judge on the ground that the parties intended to pass the property only upon the payment of the consideration money. Of course, there may be such a case, and there are cases where the conveyance is drawn in such a form that the conveyance is conditional and conditional only upon the satisfaction of the consideration money. But that is not the case here. In this case the conveyance is in the ordinary form adopted in Bengali instruments of sale and the words to be relied upon correspond with the ordinary words occurring in the English conveyance admitting the receipt of the consideration money. Then, it is said that the intention should be gathered from the oral evidence. Oral evidence cannot be admitted to contradict the express terms of this registered document. It is suggested that this document is not an instrument of transfer at all. I do not agree with that. The finding of the want of consideration, although an important fact in this case, was not sufficient to make the learned District Judge, without proceeding to enquire whether the transaction was a real one or not, to leave the case hanging in the air. It has not been found whether this registered document of transfer was or was not a real transaction. All that the Judge has found is that Rs. 20 was not paid. That is obviously not sufficient. The case must, therefore, go back to the lower Appellate Court for the appeal to be re-heard. The plaintiffs-respondents have some grounds of complaint on the question of estoppel which was decided against them in the primary Court. They will be entitled at the re-hearing of the appeal to press that point or any other point open to them that they think fit to press in their interest. Costs will abide the result of the hearing before the learned Judge of the lower Appellate Court.

RICHARDSON, J.—I agree.

Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 526 OF 1917.

July 25, 1918.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Coutts.

SUBA RAUT—PLAINTIFF—APPELLANT

versus

Musammat MANLA RAUTAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Partition—Step-mother, right of, to share in estate.

Under the Mitakshara Law in a partition between sons, the step-mother is entitled to a share equal to that of a son. [p. 205, col. 2.]

Appeal from a decision of the District Judge, Muzaffarpore.

Messrs. *Shivanandan Rai* and *Jalgobind Singh*, for the Appellant.

Mr. *Chandra Shekhar Banerji*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—The plaintiff is the appellant in this case. He brought a suit for partition of the family properties. The family consisted of the plaintiff, his step-brother, the defendant No. 1, and his step-mother, the defendant No. 2. At first only the defendant No. 1, the brother of the plaintiff, was made a party, and, therefore, the plaintiff claimed a half share in the family properties. Subsequently the defendant No. 2, the step-mother, was added, apparently because she also has an interest in the properties and a right to a share on partition. The defendant No. 2 did not appear in the first Court. The defendant No. 1 filed a written statement but did not appear at the date of the hearing of the suit. The Court accordingly passed an *ex parte* decree in favour of the plaintiff declaring his share to be half in the properties in suit. The defendant No. 2, the step-mother, finding that no share was allotted to her appealed to the District Judge. The District Judge, by his judgment of the 14th February 1917, allowed her equal share with the sons, that is, a one-third share in the family properties. Against this decision the plaintiff has appealed to this Court.

It is contended on his behalf that the step mother has no right to a specific share in the family properties on partition but only has a right to be maintained out of them. This contention is wholly untenable.

SUBA RAUT *v.* MANLA RAUTAIN.

The Mitakshara in Chapter 1, section 7, verse 1, relating to partition of properties clearly says that the wife shall be entitled to participation equally with the sons even when a partition takes place during the lifetime of the father. In section 8 of the same chapter there is an indication in the Mitakshara that all the wives should take equal shares, and, therefore, when a partition takes place after the death of the father among the sons, the mothers and the step-mothers would be entitled to equal shares with the sons. This is based upon verse 1 in Yajnavalkya 23—A which says "let the mother take equal shares with the sons." The word "mother" there includes step-mother. No doubt the Dayabhaga differs from the Mitakshara on this point; the mothers only take a share in the properties along with their own sons and not with the sons of different mothers, *vide* Dayabhaga, Chapter III, section 1, verses 12 and 13. Upon this text of the Dayabhaga their Lordships of the Privy Council in the case of *Hemangini Dasi* v. *Kedarnáth Kundu Chowdhry* (1) held that the mothers' share with their own sons and not with the sons of different mothers. That decision, therefore, cannot be authority for the present case which is governed by the Mitakshara Law. Under the Mitakshara Law the authorities in Calcutta and Allahabad appear to have concurred in holding that the mothers have equal shares with the sons, *vide* the case of *Sumrun Thakoor* v. *Chunder Mun Misser* (2) and *Dular Koeri* v. *Dawarkanath Misser* (3). The decision in the case of *Damoodur Misser* v. *Senabutty Misrain* (4) is exactly in point, inasmuch as it related to the Mithila School to which the parties in the present case belong. Relying upon the texts of the Mitakshara quoted above and upon Vyvada Chintamoni of Vachaspati Misser which is followed in the Mithila School, their Lordships held that "both mothers and step-mothers are equal sharers with the sons."

Viramitrodaya, which is a commentary on the Mitakshara and is accepted to be an authority in the Benares School concurrently with the Mitakshara, has laid down on page 80 (Golab Ch. Sarkar's translations) that all the wives of the father, whether sonless or having sons are entitled to equal shares with the sons, even in partition after the father's demise. Recently in the Allahabad Court in the case of *Har Narain* v. *Bishambhar Nath* (5) relying upon the above authorities it was held that in a partition between two sons the step-mother is entitled to a third share. In this case also the partition is sought between two brothers along with the step-mother. We, therefore, think that the learned District Judge was right in holding that the step-mother was entitled equally with the sons to a third share in the properties. The contention of the learned Vakil on behalf of the appellant is, therefore, overruled.

It is then contended that the learned District Judge was wrong in giving any decree in favour of the step-mother inasmuch as she did not contest the claim of the plaintiff in the first Court. In the first place, this was a question of law and certainly the fact that the step-mother did not appear or contest the claim of the plaintiff in the first Court would not prevent her from impugning the legality of the decree before the District Judge. In the second place, it appears to me that the first Court was bound to give a decree only to the extent of one-third in favour of the plaintiff upon the plaint itself. The plaint was amended and the name of defendant No. 2, the step-mother, was subsequently added. Upon the plaint, therefore, it was clear that the family consisted of two sons and the step-mother. In declaring the share of the plaintiff in the properties sought to be partitioned the Court was bound to give the plaintiff only a one-third share in the family properties, inasmuch as he could not be entitled to more than that upon the plaint itself. The plaintiff did not aver in the plaint that the defendant No. 2 had given up her share in the properties and that he was, therefore, entitled only to a half share. The defendant No. 2, the step-mother, was, therefore, not bound to contest the plaintiff's claim; she naturally

(1) 16 C. 758; 16 I. A. 115; 13 Ind. Jur. 210; 5 Sar. P. C. J. 374; 8 Ind. Dec. (N. S.) 502 (P. C.).

(2) 8 C. 17; 9 C. L. R. 415; 6 Ind. Jur. 244; 4 Ind. Dec. (N. S.) 11.

(3) 32 C. 234; 1 C. L. J. 283; 9 C. W. N. 270.

(4) 8 C. 537; 6 Ind. Jur. 584; 10 C. L. R. 401; 4 Ind. Dec. (N. S.) 346.

(5) 31 Ind. Cas. 907; 38 A. 83; 13 A. L. J. 1129.

would have thought that her interest would be protected by the Court while making a decree even *ex parte*. The result is that this appeal is dismissed with costs.

COUTTS, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 245 OF 1917.

June 21, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

LALLU RAM—PLAINTIFF—APPELLANT

versus

JOT SINGH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 181—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Final decree, application for—Limitation, commencement of.

The right to apply to have a decree for sale made absolute arises when the time fixed for payment by that decree has expired or where there has been an appeal, when that appeal is decided, the date of the appellate decree, which finally determines the rights of the parties, being taken to be the starting point of limitation within the meaning of Article 181 of the Limitation Act, if it does not extend the time originally fixed or if the time to fixed has not expired. [p. 207, col. 1.]

Appeal against the decree of the District Judge, Hardoi, dated the 10th April 1917, setting aside that of the Subordinate Judge, Hardoi, dated the 26th January 1917.

Babu *Bishambhar Nath Srivastava*, for the Appellant.

The Hon'ble Mirza *Samiullah Beg*, for the Respondent.

JUDGMENT.—In a suit filed by the plaintiff appellant for the recovery of money due on a mortgage a preliminary decree for sale was passed on the 30th July 1911, allowing the judgment-debtor time for its payment till the 8th January 1912. The plaintiff was not satisfied with that decree and filed an appeal, claiming that the interest due to him was chargeable on the mortgaged property, but was unsuccessful. An appeal filed by one of the defendants was, however, successful and the decree of the Court of first instance was varied. There was a further appeal to this Court by the plaintiff, which was dismissed on the 19th December 1913. On the plaintiff applying on the 19th December 1916 for a final decree for sale, an objection was raised that his application was barred by time. The Court of first instance disallowed that objection but the lower Appellate Court gave effect to it.

The question involved in this appeal is, whether the limitation for an application for a final decree for sale under Order XXXIV, rule 5, of the Code of Civil Procedure is to be computed from the date fixed for payment by the decree of the Court of first instance or from the date of the decree of the final Court of Appeal.

If the view taken in *Madho Ram* v. *Nihal Singh* (1), which was adopted in *Jagdish Sirgh* v. *Ram Adhin Singh* (2), be regarded as correct, the date on which the appellate decree was passed will have to be left out of account. But where a decree is confirmed or varied on appeal, the appellate decree is the only decree which is capable of execution or operative. For the purpose of ascertaining its terms, a reference has sometimes to be made to the decree of the Court of first instance or the decree appealed from; but the decree of the final Court of Appeal, where there has been such an appeal, is the decree in which the decree passed by the Court of first instance or the decree under appeal merges and which is capable of being enforced. In *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (3), where a decree was passed by a District Court for the possession of land with future mesne profits and that decree was reversed by the High Court but restored by the Privy Council, and the question arose whether the decree-holder was entitled to recover mesne profits for more than three years from the date of the decree of the Court of first instance, it was held by their Lordships of the Privy Council that the effect of their

(1) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985.
(2) 41 Ind. Cas. 858; 20 O. C. 205.
(3) 27 I. A. 209; 5 C. W. N. 52; 10 M. L. J. 290; 2 Bom. L. R. 978; 7 Sar. P. C. J. 788; 23 A. 152.

decree, by which the decree of the District Court was affirmed, was to adopt its terms and to carry on their operation with reference to its own date. In *Abdul Majid* v. *Jawahir Lal* (4) their Lordships of the Privy Council recognised that an application to make absolute a decree for sale could be made within three years from the date of the order of the High Court confirming that decree. In *Gajadhar Singh* v. *Kishen Jiwan Lal* (5) a similar view was taken and the previous decisions bearing on the point were overruled. It was pointed out in that case that Order XXXIV, rule 5, of the Code of Civil Procedure did not contemplate more than one decree absolute for sale. Under OrderXXXIV, rule 10, of the Code any costs, incurred after the passing of such a decree, can be taken into account in finally adjusting the amount to be paid to the mortgagee. But the result of the appeal may, however, be to vary, that is, to increase or decrease the amount due to the mortgagee materially; and in that case the final decree for sale may have to be varied or altered to bring it into conformity with the final appellate decree or a fresh decree may have to be prepared in its place. Where the propriety of a decree is challenged on appeal either by the mortgagee or by the judgment-debtor, it is open to the mortgagee to wait till the result of the appeal is known, for it is the decree of the final Court of Appeal, where there has been such an appeal, which declares the rights which each party holds. The right to apply to have a decree made absolute for sale arises when the time fixed for payment by that decree has expired or where there has been an appeal, when that appeal is decided, the date of the appellate decree, which finally determines the rights of the parties, being taken to be the starting point of limitation within the meaning of Article 181 of the Indian Limitation Act (IX of 1908), if it does not extend the time originally fixed or if time so fixed has not expired. The application made by the plaintiff-appellant to have the decree made absolute is, therefore, clearly within time.

We allow the appeal accordingly and setting aside the decree passed by the lower Appellate Court, restore that of the Court of first instance with costs here and hitherto. The defendant-respondent will bear his own costs throughout.

Appeal allowed.

(4) 23 Ind. Cas. 649; 18 C. W. N. 963; 27 M. L. J. 17; 16 Bom. L. R. 395; 19 C. L. J. 626; 12 A. L. J. 624; 16 M. L T. 44; (1914) M. W. N. 485; 1 L. W. 483 (P. C.); 36 A. 350.

(5) 42 Ind. Cas. 93; 15 A. L. J. 734; 39 A. 641.

PRIVY COUNCIL.

APPEALS FROM THE ALLAHABAD HIGH COURT.

March 15, 1918.

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

Lala KANHAI LAL—APPELLANT

versus

Lala BRIJ LAL AND OTHERS—RESPONDENTS.

Hindu Law—Reversioner—Compromise prior to reversion falling in—Widow induced to alter her position to her own detriment—Reversioner, whether can go behind compromise when reversion opens—Estoppel.

R, the widow of the last surviving brother of a joint Hindu family which originally consisted of three brothers, brought a suit for the recovery of the whole family properties against *P.* and *K.*, the widows of the two predeceased brothers, who both alleged that the brothers died separate, and one *L.*, who claimed the whole estate as the adopted son of *P.* and her husband, agreeing with *R.*'s contention that her husband died undivided. The adoption set up by *L.* was questioned by *R.* and *K.* and the division set up by *P.* and *K.* was questioned by *R.* and *L.* A compromise was entered into, whereby *R.* consented to take a fourth of the estate absolutely for herself and a fourth absolutely for her only daughter who was then alive, *P.* and *K.* each got a fourth absolutely for themselves and *L.*'s adoption was recognised but he was to take *P.*'s one-fourth. Subsequently *L.* got himself registered as the proprietor of *P.*'s one-fourth share with her consent. On *R*'s death, which had been preceded by that of her daughter, *L.* brought two suits against those who claimed under *R.* and her daughter and against *K.* and those who claimed under her claiming the properties respectively in their possession:

Held, (1) that *L.* had by his part in the compromise induced *R.* to change her position to her own detriment and to *L.*'s substantial benefit and that *L.* was, therefore, estopped from claiming as a reversioner; [p. 211, col. 2; p. 212, col. 1.]

(2) that for the same reason, the suit against *K.* and those claiming under her must also fail. [p. 212, col. 1.]

Appeals from one judgment and three decrees, dated the 15th June 1915, of the

KANHAI LAL *v.* BRIJ LAL.

High Court at Allahabad (Tudball and Rafique, JJ.) partly affirming and partly reversing the judgments and decrees, dated the 30th April 1913 and 31st August 1914, of the Subordinate Judge, Shahjahanpur.

Messrs. *L. DeGruyther*, *K. C.*, and *B. Dube*, for the Appellant.

Sir *Erle Richards*, *K. C.*, and Mr. *J. M. Parikh*, for the Respondents.

JUDGMENT.

SIR JOHN EDGE.—These are consolidated appeals from decrees, dated the 15th June 1915, of the High Court at Allahabad, made in appeals from decrees of the Court of the Subordinate Judge of Shahjahanpur. There were two suits, in each of which Lala Kanhai Lal and his brother, Ram Sarup, were the plaintiffs. Lala Kanhai Lal is now the appellant in these consolidatad appeals. Ram Sarup's rights were established and are not now in question; he is not a party to these appeals. In one of these suits Lala Brij Lal and his daughter, *Musammat* Ram Kali, were defendants, they are now respondents to one of these appeals. In the other suit *Musammat* Kausilla and Lala Sham Lal, who claims through her, were the defendants, they are the respondents to the other of these appeals. In each suit Lala Kanhai Lal claimed as a reversioner to one Bahadur Lal, who died in 1883. Bahadur Lal was a member of a Hindu joint family descended from one Balak Ram The pedigree of the joint family, so far as it is now material, is briefly as follows:—

BALAK RAM (dead).

- Bahadur Lal = Ram Dei. Died in 1883. Died 1912.
  - *Musammat* Kirpa = Brij Lal. Died 1896. A respondent.
    - *Musammat* Ram Kali. A respondent.
- Badri Prasad = Parbati. Died childless in 1877. Died 1898.
- Ganga Ram = Kausilla. Died childless in 1874. A respondent.
- *Musammat* Ram Piyari
  - Ram Sarup. A plaintiff, but not a party to these appeals.
  - Lala Kanhai Lal. Plaintiff, appellant.

Upon the death of Ram Dei, on the 14th May 1912, Lala Kanhai Lal and his brother, Ram Sarup, were the reversioners to Bahadur Lal. The only question which their Lordships have to consider in these appeals is the question whether Lala Kanhai Lal has not been precluded from claiming as reversioner by his having been a party to a compromise which was entered into in 1892. If he is not precluded from claiming as a reversioner, he is entitled to succeed in these appeals.

At the time of his death in 1883 Bahadur Lal was by survivorship the sole owner of the family estate, and on his death his widow, *Musammat* Ram Dei, became entitled to that estate for her life, *Musammai* Parbati and *Musammat* Kausilla being entitled only to maintenance. The title of *Musammat* Ram Dei was, however, disputed by Lala Kanhai Lal, *Musammat* Parbati and *Musammat* Kausilla. Lala Kanhai Lal set up a claim to the family estate, alleging that he had been adopted by *Musammat* Parbati to her deceased husband, Badri Prasad, and was entitled to the whole estate as such adopted son. His case was that there was a custom in the family which enabled a brother to adopt his sister's son and that *Musammat* Parbati had received her husband's authority to make the adoption. It is not necessary to consider whether there was any foundation for that case. *Musammat* Parbati's case was that the brothers Bahadur Lal, Badri Prasad, and Ganga Ram had separated; that also was the case set up by *Musammat* Kausilla. Each of these widows claimed for life one-third of the family estate. *Musammat* Parbati also alleged that she had validly adopted Lala Kanhai Lal to her deceased husband, Badri Prasad.

In order to protect her own interests and

the interests of her daughter, *Musammat* Kirpa, who was then living, *Musammat* Ram Dei brought two suits in the Court of the Subordinate Judge of Shahjahanpur. The earlier of those suits was brought on the 20th January 1891 against Lala Kanhai Lal and *Musammat* Parbati, and in that suit *Musammat* Ram Dei claimed a declaration that the alleged adoption of Lala Kanhai Lal by *Musammat* Parbati was null and void. That suit was dismissed by the Subordinate Judge on the technical objection that the plaint had not been properly verified. From the decree dismissing that suit *Musammat* Ram Dei appealed to the High Court at Allahabad. The later of those two suits was brought on the 4th February 1892 against *Musammat* Parbati and *Musammat* Kausilla, and in it *Musammat* Ram Dei claimed amongst other reliefs a declaration that her late husband Bahadur Lal had been the owner and in possession of the entire property of the joint family; that after his death she, *Musammat* Ram Dei, was in possession of and entitled to that property according to Hindu Law; and that *Musammat* Parbati and *Musammat* Kausilla had no right other than that of maintenance.

Before the suit of the 4th February 1892 came on for trial, *Musammat* Ram Dei, *Musammat* Parbati, *Musammat* Kausilla, *Musammat* Kirpa and Lala Kanhai Lal had entered on the 1st August 1892 into the following agreement of compromise:—

"We, *Musammat* Ram Dei, widow of Bahadur Lal, *Musammat* Parbati, widow of Badri Prasad, *Musammat* Kausilla, widow of Ganga Ram, *Musammat* Kirpa, daughter of the said Bahadur Lal, and Kanhai Lal, the adopted son of the said *Musammat* Parbati, by caste Agarwal, residents of Muhalla Muzaffarganj, in Shahjahanpur, do declare as follows: —

"Whereas disputes relating to property and 'Imlak' have existed between *Musammats* Ram Dei, Parbati and Kausilla and, I, *Musammat* Kirpa, daughter of Ram Dei, and I, Kanhai Lal, the adopted son of Parbati, are also regarded as claimants, we, the five persons of our free will and accord and in a sound state of body and mind, declare that we have appointed Maharaj Badri Prasad, the general attorney of *Musammat* Durga Dei, as referee, and he should divide the whole of the property consisting of villages, houses and shops as specified below and his decision as regards the profits for the past years, the villages sold after the death of Bahadur Lal and the cases at present pending in the Civil and Revenue Courts, whatever it may be, will be admitted and accepted by us. There will be no objection or denial on our part. If any of us, the executants, take any objection, it will not be entertainable. The mode of partition of property agreed upon is that with the exception of the 'Thakurdwara' of *Musammat* Ram Dei, the 'Thakurdwara' of *Musammat* Parbati, the villages of Bartara, Nagra, Badhipura, the grove situate in Panwari (?) and the 10 *biswa* share of Simri, Tahsil Pawayan, which have been made a 'Waqf' of for the expenses of the 'Thakurdwara' and for charity, he should make four equal lots of all the villages, the shops, the banking 'Kothis' and the money-lending business, the decrees, bonds and account-books in such a way that each lot may, so far as possible, contain the above things as a whole. After the preparation of the lots, *Musammats* Ram Dei, Parbati, Kausilla, and Kirpa may each duly draw one of the lots. After that they should make applications for mutation of names in the revenue department and get (their) names recorded. I, *Musammat* Kirpa, and I, Kanhai Lal, will have no claim against any sharer as regards this property. Every sharer will be the owner and possessor of (her) property and will have power to make every kind of transfer as a proprietor. The said Maharaj Sahib may come to any decision he pleases as regards the partition and preparation of lots and the settlement of disputes mentioned above and enter all the particulars in detail in the arbitration award by the end of September 1892, and get it registered. All that will be admitted and accepted by us. None of us will deviate from it.

"This agreement has accordingly been executed to stand as evidence.

"Dated the 1st of August 1892.

"By the pen of Lalta Prasad, Kayasth, resident of Rang Muhalla.

„ (Sd.) Ram Dei.
„ „ Parbati.
„ „ Kausilla.
„ „ Kirpa.
„ „ Kanhai Lal."

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The arbitrator made two awards, dated respectively the 12th and the 13th January 1893. That of the 12th January 1883 was filed in the suit of the 4th February 1892, in which *Musammat* Parbati and *Musammat* Kausilla were defendants, and that suit was dismissed as withdrawn by *Musammat* Ram Dei. The appeal to the High Court, in the suit of the 20th January 1891, was not supported, and was dismissed.

Under the awards of the arbitrator one-fourth of the family property was allotted to *Musammat* Ram Dei, one-fourth to *Musammat* Kirpa, one-fourth to *Musammat* Parbati, and one-fourth to *Musammat* Kausilla, and they respectively obtained possession of the properties allotted to them. In the award of the 13th January 1893, the arbitrator stated:—

"Kanhai Lal has been adopted by *Musammat* Parbati, but he has nothing to do with the other *Musammats'* property as such adopted son. Nor has he now any claim to their property. As regards the matter between *Musammat* Parbati and Kanhai Lal, it is not necessary to explain his rights in this award. Kanhai Lal's rights in the property comprised in *Musammat* Parbati's lot are quite safe."

So far as appears by the agreement of compromise and the awards, Lala Kanhai Lal got no share in the family property, but in fact he got the one-fourth share which was allotted to *Musammat* Parbati, and he further obtained the benefit of having the validity of his adoption by *Musammat* Parbati left undecided by a Court of Law. On the 22nd August 1898, *Musammat* Parbati executed in favour of Lala Kanhai Lal a deed of relinquishment of the property which had been allotted to her under the compromise and the award of the 13th January 1893. In that deed she stated:—

"The immoveable property, such as Zemindari, houses and shops detailed as below, belonged to Lala Badri Prasad, the husband of me, the executant. I, the executant, have, with the permission of my husband, adopted to my husband and myself, Lala Kanhai Lal, son of my husband's sister, for the benefit of the soul of my husband in the next world. Kanhai Lal aforesaid has been living with me from the date of the permission to adopt. It is he, who is the absolute owner of the entire property and legal representative of the entire property left by my husband. But the name of me, the executant, has continued to be recorded in the revenue papers against the Zemindari property. I am not the owner thereof. Kanhai Lal aforesaid is the owner of the entire property of my husband. Now I, the executant, do not also want my name to stand recorded in the revenue papers. Therefore, I, of my own free will and accord, without force and coercion, relinquish my claim to the whole of Zemindari property and houses and shops, detailed as below, in favour of Kanhai Lal, adopted son of my husband and myself, and covenant in writing that Kanhai Lal aforesaid is the owner of the entire property detailed below as representative of my husband, Lala Badri Prasad. He has acquired as absolute owner all sorts of powers in respect of the property detailed below. Up to this time my name stood recorded in the papers only fictitiously. Now I do not want that my name should stand recorded in the column of proprietors. My name, which is entered against the whole of the Zemindari property, should be expunged and the name of Kanhai Lal be entered in the papers."

In accordance with that deed of relinquishment, Lala Kanhai Lal obtained mutation of names in his own favour, and he has hitherto enjoyed that share of *Musammat* Parbati as his own property, and his right to it has not been questioned in either of the present suits. The properties which Lala Kanhai Lal has claimed in these suits as a reversioner to Bahadur Lal are the properties which were allotted in January 1893 to *Musammat* Ram Dei, *Musammat* Kirpa, and *Musammat* Kausilla respectively.

The suits in which these appeals have arisen were not tried by the same Subordinate Judge. In one of these suits the Subordinate Judge held that Lala Kanhai Lal was precluded by his having been a party to the compromise from now claiming as a reversioner. In the other of these suits a different Subordinate Judge decided that Lala Kanhai Lal was as a reversioner not bound by the compromise. The decrees of the Court of the Subordinate

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Judge were appealed to the High Court, and the appeals were considered by the High Court in one judgment. The High Court decided that Lala Kanhai Lal, having been a party to the agreement of compromise of 1892, and having taken a benefit under that settlement of the dispute, was bound by it and could not go behind it. The result was that Lala Kanhai Lal's suits were dismissed. From the decrees of the High Court made in accordance with that judgment these appeals have been brought.

It has been contended on behalf of Lala Kanhai Lal that the agreement of compromise of 1892 could not deprive him of his right to claim as reversioner unless it is capable of being treated as a conveyance of his right as a reversioner, and that he did not intend in 1892 to convey or assign such right when it might accrue to him. As it now appears, Lala Kanhai Lal was not a reversioner in 1892, and did not become a reversioner until *Musammat* Ram Dei died in 1912. All the interest which he had in the property of the family in 1892 was the mere possibility of becoming an immediate reversioner in case he should be living when *Musammat* Ram Dei might die, and when Bahadur Lal's daughter, *Musammat* Kirpa, might die without a son. It was also contended on his behalf that Lala Kanhai Lal in 1892, whatever his intention may have been, was not in law competent to convey or relinquish any future possible right as a reversioner, and as an authority in support of that contention the decision of the High Court at Bombay in *Sumsuddin* v. *Abdul Husein* (1) was relied upon. That decision is not in point. There is no question here of a conveyance of, or of an agreement to convey any future right or expectancy, or of an agreement to relinquish any future right or expectancy. The question here is, whether Lala Kanhai Lal did not by his acts in 1892 debar himself from now claiming as a reversioner.

The facts in this case are simple. In 1892 the family was a Hindu joint family to which the ordinary Hindu Law applied. All the sons of Balak Ram had died. Ganga Ram had died childless in 1874, and Badri Prasad had died childless in 1877. Bahadur Lal had died sonless in 1883, leaving his widow, *Musammat* Ram Dei, surviving him. *Musammat* Ram Dei became, on the death of Bahadur Lal, entitled for life to a Hindu widow's right to the whole of the family property. Lala Kanhai Lal had then no right of any kind to any share in the family property, but he set up a claim to the whole property based on the allegation that he had been validly adopted by *Musammat* Parbati to her deceased husband, Badri Prasad. If that claim had been substantiated by proof of a valid adoption, Lala Kanhai Lal would have been entitled to the whole family property, and *Musammat* Ram Dei would have been entitled merely to maintenance. Although as a general rule of Hindu Law a man cannot adopt his sister's son, the claim was a serious one. Lala Kanhai Lal's case was that, according to an Agarwal custom (the family was of the Agarwal caste), which governed the family, a man could lawfully adopt his sister's son, and he alleged that Badri Prasad had given *Musammat* Parbati authority to make the adoption, and that he, Lala Kanhai Lal, had been validly adopted to Badri Prasad. That Lala Kanhai Lal might have found it difficult or impossible to prove that he had been validly adopted is immaterial. He made the claim; it was a serious one, and it was supported by *Musammat* Parbati and it must have influenced *Musammat* Ram Dei, who was induced, doubtless mainly by that claim, to consent to a division of the family property, in which she obtained for herself merely a one fourth share. The claims which were set up by *Musammat* Parbati and *Musammat* Kausilla, that the three sons of Balak Ram had separated, must also have influenced *Musamma* Ram Dei to agree to the compromise of 1892. Lala Kanhai Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced *Musammat* Ram Dei, against her own interests and those of her daughter, *Musammat* Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, and under that compromise he obtained a

(1) 31 B. 165; 8 Bom. L. R. 781.

substantial benefit, which he has hitherto enjoyed. In their Lordships' opinion he is bound by it, and cannot now claim as a reversioner.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors for the Appellant.—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitor for the Respondents.—Mr. *E. Dalgado.*

Appeals dismissed.

PATNA HIGH COURT.
CUTTACK CIRCUIT.
SECOND CIVIL APPEAL No. 4 OF 1917.
December 20, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

Mohanta GADADHAR RAMANUJ DAS—APPELLANT

versus

GHANA SHYAM DAS—RESPONDENT.

Hindu Law—Joint family—Decree against father—Sale of ancestral property—Sons, whether can object.

A Hindu son is bound by a sale of his share in joint ancestral property held in execution of a decree obtained against his father, even where it is not shown that the debt was incurred by the father for legal necessity. The only exception is where the debt was an immoral one. [p. 213, col. 2.]

In a suit for accounts the defendant obtained an *ex parte* decree against the plaintiffs' father who was his agent and in execution of that decree brought to sale the joint property of the plaintiffs and their father and purchased it himself:

Held, that the sale was binding on the plaintiffs, inasmuch as the liability of their father was an ordinary civil liability and there was nothing to show that it was immoral. [p. 214, col. 1.]

Appeal from a decision of the District Judge, Cuttack, dated the 12th December 1916, modifying that of the Munsif, Jajpur, dated the 15th June 1916.

Messrs. *M. S. Das* and *B. N. Sinha*, for the Appellant.

Mr. *S. C. Bose*, for the Respondent.

JUDGMENT.—The facts of this case are as follows: Defendant No. 2 is the father of the plaintiffs Nos. 1, 2 and 3 and was the agent of defendant No. 1. A suit for accounts under the Orissa Tenancy Act was brought by defendant No. 1 against defendant No. 2, in which the defendant No. 2 failed to put in an appearance. The suit was decreed for a sum of Rs. 5,000. The decree-holder, defendant No. 1, thereupon took out execution for this sum against the father, and sold the property in suit and purchased it himself. The plaintiffs now come forward in the present suit with a claim that what was sold was only the right, title and interest of their father and that their share in the ancestral property which is governed by the Mitakshara Law was not affected by the sale. The learned District Judge has allowed their claim so far as the ancestral properties are concerned, and hence this second appeal by defendant No. 1.

Now the law as regards the liability of the sons of a Mitakshara father in respect of a sale held in execution of a decree for their father's debt has been summarised in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) by their Lordships of the Privy Council as follows:

"*First*. That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they shew that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, *secondly*, that the purchasers at an execution sale, being strangers to the suit, if they had no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

These two propositions were considered by Sir John Stanley in *Chandradeo Singh* v. *Mata Prasad* (2) and the learned Chief Justice observes as follows: "The first of these propositions, it will be observed, deals with cases where joint ancestral property

(1) 6 I. A. 88; 5 C. 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shomo L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 1 Ind. Cas 479; 31 A. 176; 6 A. L. J. 233.

has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases, and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

Their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3) approved of this statement of the law as correct, and emphasised the distinction between a suit for recovery by the sons of their share of the ancestral property sold in execution of a decree for their father's debt and a suit upon a mortgage executed by the father charging the joint property and in which the plaintiff endeavours to obtain a personal decree against the sons by reason of the pious obligation attaching upon them to pay their father's debts. Their Lordships held that so long as the father was living, the effort to affect the sons' share in the property on the ground of pious obligation to pay off their father's debt in respect of a personal debt of the father, and not in respect of a debt incurred in the interest of the family, must fail. But their Lordships nowhere ruled that the liability which empowers a creditor to enforce the payment of a personal debt of a father, and to sell the entire estate of the family for the realization of the said debt, did not exist and that it was absolutely necessary that the sons should be made parties to the suit or to the execution proceedings.

To like effect is the judgment of their Lordships in *Sripat Singh Dugar* v. *Prodyot Kumar* (4), where their Lordships say that in cases of this kind the substance and not merely the technicalities must be looked at and it must be ascertained what it was that the parties intended to sell and the Court did in fact sell. It is a question of mixed law and fact and there is no provision of law to support the proposition which the learned Vakil for the respondent has urged, namely, that in no case can you sell the share of the sons for a debt incurred by the father and that the sale in the present case passed only the right, title and interest of the father himself.

Now, what is the position here? Here the decree-holder defendant No. 1 brought to sale not the interest of defendant No. 2 alone but that of the sons also and this is the interest which the Court sold at the execution sale. This is clear from the fact that the present plaintiffs were claimants at the execution proceeding but were unsuccessful. There can be no doubt whatsoever that what the Court did in fact sell was not only the interest of the father but that of the sons also. Regarded from this point of view the argument that the debt was not one for legal necessity is not relevant. The question of legal necessity does not affect this case. If there was legal necessity the sons would be obviously bound; but the law is that even if there was no legal necessity the sons would be bound by a sale of their property held in execution of a decree against the father. The only exception is if the plaintiffs succeed in proving that the debt was an immoral debt. This is the only point in the case, and the authorities which have been discussed in *Chakouri Mahton* v. *Ganga Proshad* (5) disclose much divergence of opinion regarding it. Mookerjee, J., in that case observed that this divergence may possibly be reconciled if we recognise the distinction between a criminal offence and a breach of civil duty.

Was the act of defendant No. 2 in the present case in relation to his master such that it constituted a criminal offence? Admittedly no prosecution was instituted. The suit was one for accounts in

(3) 39 Ind. Cas. 280; 26 C. L. J. 1; 21 C. W. N. 698; 39 A. 437; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(4) 39 Ind. Cas. 252; 25 C. L. J. 220; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P. C.).

(5) 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228.

which he failed to deliver accounts and by reason of his failure a decree was made for a certain sum. The decree itself is consistent with the view that defendant No. 2 did not himself misappropriate any of the money and that he was made liable for sums which owing to his negligence or laches remained uncollected from the tenants. It is impossible from the facts of this case to say that the circumstances disclose a criminal misappropriation on his part or that there was any dishonesty which could constitute an immoral act within the meaning of the Hindu Law. Every civil debt does not necessarily involve a moral stigma and in the present case in my opinion the plaintiffs have failed to show that the debt was immoral in law, from liability in respect of which they are exempted. Therefore, the learned Judge's decree allowing the plaintiffs' claim in respect of the property in Schedule "*Ka*" was wrong and must be set aside. The appeal, therefore, succeeds and is decreed with costs.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 91 OF 1915.

March 20, 1918.

Present :—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Thakurain HAR NATH KUAR—PLAINTIFF—APPELLANT

versus

Thakur INDRA BAHADUR SINGH—DEFENDANT—RESPONDENT.

Oudh Estates Act (I of 1869), s. 22—Widow's possession, effect of—Heirs, remote, position of—Vested interest—Expectancy of inheritance—Hindu Law—Reversioner, transfer by, validity of—Transfer of Property Act (IV of 1882), s. 6 (a)—Taluqdar's widow and Hindu widow, estates of, difference between—Equity—Void agreement, whether can be enforced—Limitation Act (IX of 1908), Sch. I, Art. 62—Consideration of deed, failure of—Money, recovery of, suit for.

There is nothing in the language of section 22 of the Oudh Estates Act which can be interpreted as showing that simultaneously with the devolution of the life-interest in an estate upon the widow of the last holder under clause (8) of that section there descends a vested interest, comprising the residue of the estate, upon any of those who are declared to be the more remote heirs in the scale of succession. [p. 218, col. 2.]

Where it was found that a person was entitled to the estate left by a *taluqdar* under section 22, clause 11, of the Oudh Estates Act, but for the existence of the *taluqdar's* widow who was in possession of the estate under clause 8 of that section:

Held, that during the widow's lifetime he had no vested interest, but merely an expectancy of inheritance in the estate which he could not transfer. [p. 220, col. 1; p. 221, cols. 1 & 2.]

A transfer made by a Hindu reversioner of his expectant interest in an estate prior to the year 1882 was void, not under section 6 (*a*) of the Transfer of Property Act, but under the Hindu Law. [p. 219, col. 2; p. 220, col. 1.]

Although under the scheme of inheritance propounded in section 22 of the Oudh Estates Act, the widow of a Hindu *taluqdar* has an interest which is in many respects different from the interest held by a female heir under the ordinary Hindu law, yet this fact does not make any difference in the nature of the legal position of the person who is entitled to succeed to the estate after the widow's death. [p. 220, cols. 1 & 2.]

The principles of equity cannot be invoked for the purpose of enforcing a void agreement. [p. 221, col. 1.]

A suit to recover money advanced under a void agreement is barred under Article 62, Schedule I of the Limitation Act, if it is instituted after the expiry of three years from the date of the execution of the agreement. [p. 221, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 3rd August 1915.

The Hon'ble Pandit *Moti Lal Nehru*, Messrs. *Mohammad Wasim*, *H. C. Dutt* and the Hon'ble Syed *Wazir Hasan*, for the Appellant.

Mr. *St. George Jackson*, Babu *Ram Chandra*, Pandit *Kandhaiya Lal* and Mr. *Bindeshri Prasad*, for the Respondent.

JUDGMENT.—The facts, which led up to the suit out of which this appeal has arisen, may be stated as follows:—

One Thakur Naipal Singh was the owner of two Taluqas, named Paska and Lilar, situated in the districts of Gonda and Bara Banki respectively. Both these estates were List II estates under Act I of 1869, that is to say estates which, according to the family custom, ordinarily devolved upon a single heir.

Naipal Singh died on the 28th of October 1873, leaving two widows Thakurain Iklas Kuar and Chhoti Thakurain. He left no issue. The widows succeeded to the possession of Naipal Singh's estate, which was

taken over thereafter by the Court of Wards. In the year 1878 the defendant-respondent in the present case, Thakur Indra Bahadur Singh, brought a suit in the Court of the Deputy Commissioner of Bara Banki against the Court of Wards and the two widows of Naipal Singh for the purpose of obtaining a declaration of his right to succeed to the properties left by Naipal Singh. It is said that the two widows had set up a Will purporting to have been executed by Naipal Singh on the 15th of October 1873, and that one or other of them had notified an intention to adopt a son to the deceased Naipal Singh. At the time the suit was brought Indra Bahadur Singh was the nearest male reversioner of Naipal Singh; and if the adoption, which was threatened, had been carried out his right to succeed to Naipal Singh's property, in case he survived both the widows, would have been destroyed. Exhibit No. 5 is a certified copy of the judgment which was passed by the Deputy Commissioner of Bara Banki in the suit just mentioned, on the 22nd of October 1878. The decree which followed the judgment declared that the Will purporting to have been executed by Naipal Singh on the 15th of October 1873 was void and invalid. It was further declared that Indra Bahadur Singh was the person entitled to succeed to the Paska and Lilar estates on the death of the last surrviving widow of Naipal Singh.

The two widows remained in possession. The younger widow Chhoti Thakurain is said to have died about seven years before the present suit was brought. The elder one, Thakurain Iklas Kuar, died on the 10th of May 1911.

On the 2nd of January 1880 Indra Bahadur Singh executed in favour of Thakur Rachhpal Singh, son of Raja Sher Bahadur Singh, the document which forms the basis of the present claim brought by Rachhpal Singh's widow, Thakurain Har Nath Kuar. This document is marked Exhibit I and purports to be a sale-deed of a one-half share in the two estates of Paska and Lilar. In the body of this document a reference is made to the suit which Indra Bahadur Singh had instituted in the year 1878 and which was decided in his favour by the judgment above referred to. After this we have a statement by the executant Indra Bahadur Singh that he had become indebted to Raja Sher Bahadur Singh to the extent of Rs. 20,000. Part of this money, it is stated, was borrowed to meet the costs of the litigation just referred to; the rest of it had been borrowed for the purpose of defraying other expenses and for paying debts. The deed goes on to recite that Indar Bahadur Singh was at the time not in a position to pay this sum on account of his not being able to obtain immediate possession of the estates left by Naipal Singh. It is further stated that Indra Bahadur Singh had borrowed a sum of Rs. 5,000 from Rachhpal Singh, the son of Raja Sher Bahadur Singh, and that consequently the total amount of his indebtedness was Rs. 25,000. It is then recited that by way of satisfaction of this debt the executant sells absolutely a half share in the 39 villages which made up the two estates of Paska and Lilar. Indra Bahadur Singh declared that after the death of the survivor of the two widows, or at whatever time he might obtain possession over these two estates, he would put the vendee at once in proprietary possession of the half share which had been conveyed to him. There was further an undertaking on the part of Indra Bahadur Singh to get the name of Rachhpal Singh recorded in the decree which had been passed in Indra Bahadur Singh's favour on the 27th of October 1878.

Rachhpal Singh having died and Indra Bahadur Singh having succeeded to the possession of these two estates on the death of *Musammat* Iklas Kuar in the year 1911, the present suit has been brought by the widow of Thakur Rachhpal Singh for enforcement of the agreement contained in this document of the 2nd of January 1880. The plaintiff's claim is that in accordance with this deed of sale executed on the 2nd of January 1880, she is entitled to get possession over a half share in the villages specified in List B attached to the plaint. It was admitted by the plaintiff that while the estates were still under the management of the Court of Wards, 20 out of the 39 villages had been sold for the purpose of discharing debts which were due by Naipal Singh. The suit was, therefore, confined to a half share of 19 villages, which are specified in List B. Coupled with this claim for possession there was a claim for mesne

profits and interest amounting to Rs. 41,000 odd. By way of alternative relief the plaintiff prayed that in case the Court should not consider it possible to give her a decree for possession, she should be granted a decree for Rs. 25,000, the principal sum mentioned in the deed of 1880, together with interest amounting to a lac and over three thousand rupees.

The suit was contested by the defendant on a variety of grounds, which are set out in his written statement. He denied in the 9th paragraph of his written statement that at the time of Naipal Singh's death he was indebted to any one. He also denied having borrowed a sum of Rs. 20,000 from Raja Sher Bahadur Singh. He denied further that he borrowed Rs. 5,000 from Thakur Rachhpal Singh. It was admitted that the document in suit had been executed by him, but it was claimed that the deed did not amount to a sale-deed and that it did not operate to transfer any interest to Rachhpal Singh. In paragraphs 17 to 22 of the written statement the defendant set out various allegations describing the circumstances which led to his bringing the suit against the two widows of Naipal Singh. He asserted that he had been instigated to bring this suit by Raja Sher Bahadur Singh, who had been on terms of enmity with Naipal Singh. It was stated in the 22nd paragraph of the written statement that for the purposes of this litigation Sher Bahadur Singh spent a sum of Rs. 2,000. He had, it is stated, undertaken not to make any claim for this money against the defendant, but contrary to this promise after the death of Sher Bahadur Singh, Rachhpal Singh his son insisted on re payment being made. It was further alleged in the 22nd paragraph of the written statement that Rachhpal Singh took advantage of the defendant's helplessness and compelled him to execute the deed now in suit. In the 23rd paragraph of the written statement it was alleged that the deed was executed under undue influence and without consideration. In paragraph 24 the plea was taken that the deed of the 2nd January 1880 was void in law inasmuch as it purported to transfer what was a mere right of expectancy; and in the following paragraph it was stated that as a simple agreement the document could not be enforced. Paragraph 25 raised a plea of limitation, the case for the defendant being that any suit for the refund of consideration was barred by time.

On these pleadings seven issues were raised in the Court of the Subordinate Judge. The first issue related to the pleas of undue influence and want of consideration raised by the defendant. On this, the finding of the Court was that the defendant had failed to prove that the deed was without consideration or had been obtained by means of undue influence.

The second issue related to the nature of the terms of the deed. Were they extortionate and unconscionable, and if so, with what result? The Court below found that it was not established that the terms of the agreement were either extortionate or unconscionable.

The third issue raised the question regarding the validity of the transfer which the document purports to make, having regard to the nature of the defendant's interest at the time it was executed. The Subordinate Judge was of opinion that Indra Bahadur had nothing more than a *spes successionis* or a right of expectancy and that a transfer of an interest of this kind was void in law.

The fourth issue, which related to the title of the plaintiff to recover possession of the property, was consequently decided against her; as also was the subsidiary issue relating to the claim for mesne profits.

The fifth, sixth and seventh issues related to the alternative relief which had been claimed by the plaintiff. The learned Subordinate Judge disposed of these by finding that any claim for the recovery of the purchase-money was barred by limitation. He relied upon Article 62 of the Schedule to the Limitation Act.

The eighth issue was an issue of law dealing with certain pleas put forward by the plaintiff in replication. The Subordinate Judge held that the defendant was not estopped from raising the defences contained in paragraphs 23, 24 and 25 of his written statement.

The result, therefore, was that the entire claim of the plaintiff was dismissed with costs.

The plaintiff has now come in appeal and the decision of the trial Court is attacked on a number of grounds. The principal question raised is with regard to the decision of the Subordinate Judge on the third issue. It is claimed on behalf of the appellant that the Court below was wrong in holding that the interest which Indra Bahadur Singh purported to transfer by this document of the year 1880 was merely an expectancy. Another plea taken is that, even if it be found that at the time the document was executed Indra Bahadur Singh had nothing but a mere chance of succeeding to the estates of Naipal Singh, he was nevertheless entitled to transfer this interest inasmuch as the agreement was executed prior to the enactment of the Transfer of Property Act (IV of 1882). These pleas are in reality the backbone of the appellant's case. Another ground has been taken with regard to the plaintiff's claim for a money-decree. It has been argued that the Court below was wrong in deciding the issue of limitation against the plaintiff.

The first question, therefore, for our decision is what was the legal position of the defendant Indra Bahadur Singh with respect to the estate of Thakur Naipal Singh at the time when he executed the document upon which this suit is based. We have already mentioned that the Subordinate Judge has found that Indra Bahadur Singh had nothing more than a *spes successionis*.

The argument which was put forward in the Court below on behalf of the plaintiff, and which has been repeated here, is that at the time when this agreement was entered into Indra Bahadur Singh had in reality a vested interest in the property which was left by Naipal Singh, an interest which he was competent to transfer. In support of this argument the learned Counsel for the appellant has referred us to the scheme of inheritance which is laid down in section 22 of the Oudh Estates Act (I of 1869). Admittedly the provisions of this section contain the rule of inheritance which applies to the estates which were held by Naipal Singh at the time of his death. Clause 7 of section 22 lays down the right of the widow of the deceased Taluqdar, or grantee, to succeed to the estate in default of any of the nearer heirs mentioned in the six preceding clauses. Clause 7 provides, moreover, that if there are more widows than one, the estate descends in the first instance upon the widow who was first married to the deceased Taluqdar, or grantee, but for her lifetime only. We are not concerned with clause 8 in the present case, nor with clause 9, for admittedly Thakurain Iklas Kuar was the first married wife of Naipal Singh and survived the junior widow Chhoti Thakurain. Consequently we have it that Iklas Kuar was entitled to the estate of her deceased husband for her lifetime only, and that upon her decease the estate descended to the present defendant Indra Bahadur Singh under the provisions of clause 11. It is pointed out by the learned Counsel for the appellant that the estate which the widow of a Hindu Taluqdar takes under this section is of a different nature to the estate which is enjoyed by a Hindu widow under the ordinary Hindu Law. The section expressly declares that she takes nothing more than a life-estate strictly speaking, and it is also the fact that under section 2 of the Oudh Estates Act the expression "heir" is defined to mean a person who inherits property otherwise than as a widow under the special provisions of this Act; and so we are asked to hold that when Naipal Singh died in the year 1873, there came into existence what is known in English Law as a particular estate in favour of the senior widow, and that the residue of the estate vested in Indra Bahadur Singh who took an interest in it in the nature of a vested remainder. The argument is that as a portion only of the full estate vested in the widow, the remainder must necessarily have vested in Indra Bahadur Singh who was the nearest male collateral relation of Naipal Singh at the time of the latter's death.

With regard to these arguments, which were advanced in the Court below also, we may note here the opinion expressed by the learned Subordinate Judge. He held that a vested interest or a vested remainder could

only come into existence under a deed of grant and that there was no such deed in the present case. He was of opinion that the defendant could definitely claim to be the heir of Naipal Singh only after the death of the surviving widow, and in these circumstances he held, in accordance with the principles of English Law, that Indra Bahadur Singh continued to be an heir up till the date of the death of Iklas Kuar and that consequently he had only an expectation of an inheritance and had no estate or interest in the property which was capable of transfer. Referring to the argument based upon the definition of the expression "heir" in section 2 of the Oudh Estates Act, the Subordinate Judge was of opinion that that did not really affect the situation. He held that under this definition clause it is only for certain special purposes, that is of bequest and transfer, that the widow is excluded from the category of heirs. He pointed out that the widow's title to succeed her husband's property by inheritance is declared in section 22, and certainly it seems difficult to hold that she can take the estate of her deceased husband under any other title than that of inheritance. The Subordinate Judge referred to the decision of their Lordships of the Privy Council in the case of *Bhai Narindar Bahadur Singh* v. *Achal Ram* (1) in support of the view that the collateral succession to a Taluqa, which has passed on the death of the last male owner to his widow for her lifetime, does not open until after the widow's decease, or in case a daughter succeeds to the widow, till after the death of the daughter. Fortified by this authority he held that up till the time when Iklas Kuar died Indra Bahadur Singh had nothing more than an expectancy of inheritance. We have come to the conclusion that in this matter the decision of the Court below is correct and ought to be maintained.

The question of the legal position of Indra Bahadur Singh with respect to the estate left by Naipal Singh must be determined with reference to the provisions of section 22 of the Oudh Estates Act. In the first place, we have to notice that the estates held by Naipal Singh being entered in List II the rule is that they must descend to a single heir. According to the scheme of inheritance, which is defined in section 22, there is no descent of the deceased's estate in a case like this until the widow's death. In other words, the single person out of those mentioned in clause 11 of section 22 cannot be ascertained until the time of the widow's death.

We are unable to entertain the argument that on the death of Naipal Singh the property descended so to speak piecemeal, that a life-estate descended to the widow and the residue of the estate vested at once in the defendant Indra Bahadur Singh. There is nothing in the language of section 22 which can be interpreted as showing that simultaneously with the devolution of the life-interest in the estate upon the widow, there descends a vested interest, comprising the residue of the estate, upon any of those who are declared to be the more remote heirs in the scale of succession.

Further we cannot conceive of an interest becoming vested in an unascertained person. It is clear that at the time of Naipal Singh's death Indra Bahadur Singh was not ascertained as the person who was entitled to take immediately after the death of the survivor of the two widows. According to the language of clause 11 the person entitled to the estate, in default of the heirs mentioned in the preceding clauses, is to be ascertained in accordance with the provisions of the ordinary law to which persons of the religion and tribe of the Taluqdar or grantee are subject; that is, in the present case the ordinary Hindu Law. Under that law the right of succession after the death of a Hindu female can only be determined with reference to the state of things existing at the time of the death of the female heir; and this principle has been judicially recognized by their Lordships of the Privy Council in the ruling to which the Subordinate Judge refers in his judgment [*Bhai Narindar Bahadur Singh* v. *Achal Ram* (1)]. We might also refer in this connection to another judgment of the Privy Council relating to the same estate which is reported as *Lal Achal Ram* v. *Raja Kazim*

(1) 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique & Jackson's P. C. No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.).

Husain Khan (2). It has been argued before us by the learned Advocate for the appellant that these judgments of their Lordships lay down no general rule of law relating to succession. It is stated that in the two cases before their Lordships there was no dispute regarding the rule, it being the case of both parties that succession to the collaterals could only open after the death of the female heir. We are of opinion, however, that the ruling of their Lordships is not to be interpreted in the narrow sense contended for by the appellant. It is quite clear from a reference to their Lordships' judgments in both the cases that they had before them the special rules of succession which are contained in section 22 of the Oudh Estates Act. We hold, therefore, that the Subordinate Judge was right in his view that up till the date of Iklas Kuar's death Indra Bahadur was nothing more than an heir with an expectation of succeeding to the estate. In our opinion, it is impossible to hold that at the time when Indra Bahadur Singh executed the deed upon which this suit has been brought he had vested in him any interest in the property left by Thakur Naipal Singh.

We come now to the second part of the argument put forward on behalf of the plaintiff appellant. The Subordinate Judge, having come to the conclusion that Indra Bahadur Singh had nothing more than the interest of an expectant heir at the time of the execution of the deed, held that the transfer which he purported to make was void in law by reason of the provisions of section 6, clause (*a*), of the Transfer of Property Act (IV of 1882). The criticism of the learned Counsel for the appellant upon this finding is that as the deed in suit was executed in the year 1880, the transaction could not be affected by anything contained in the Transfer of Property Act which was not enacted till the year 1882. It is strange that this plea was not advanced before the learned Subordinate Judge. We can find no trace of any argument on these lines either in the proceedings or in the judgment of the Court below. We must, however, take notice of the fact that the Transfer of Property Act does not purport to operate retrospectively; and as the learned Counsel for the appellant points out, section 2, clause (*c*), of the Act saves any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of any such right or liability, and so it is argued that the question of the right of the plaintiff to enforce the agreement in suit is not to be determined by a reference to the language of section 6 (*a*) of the Transfer of Property Act. The argument is that even if it be held that all that Indra Bahadur Singh had in the year 1880 was an expectation of succeeding to the estate of Naipal Singh in the event of his outliving the surviving widow, there was at that time no legal prohibition against the transfer of such an expectancy or against the making of an agreement for such a transfer.

On the other hand it has been argued on behalf of the respondent that although the prohibition against the transfer of the chances of an heir succeeding to an estate was first definitely laid down by the Act passed in the year 1882, nevertheless even prior to the passing of this Act the transfer of an expectancy was forbidden by the Hindu Law. A number of cases have been cited to us upon this point, the earliest of which appears to be a judgment of their Lordships of the Privy Council which is reported as *Dooli Chand* v. *Birj Bookun Lal Awasti* (3). In the concluding portion of their judgment their Lordships say (*vide* page 532 of the report):—"The point on which the lower Court in part proceeded, and which has only been treated as doubtful by the High Court, namely, whether such an interest (that is the interest of a reversionary heir under the Hindu Law) could be the subject of a sale at all, is of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favour of the plaintiffs can be passed. They are certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of

(2) 8 O. C. 155; 9 C. W. N. 477; 27 A. 271; 32 I. A. 113; 15 M. L. J. 197; 8 Sar. P. C. J. 772 (P. C.).

(3) 6 C. L. R. 528 (P. C.).

a sale highly speculative, as any such sale must be by a guardian acting or purporting to act on behalf of an infant. The decision of this Board, which has been cited by the Judge of the lower Court, is not precisely in point, but it goes far to show that the principle of English Law which allows a subsequently acquired interest to feed, as it is said, the estoppel does not apply to Hindu conveyances."

The next case which has been cited before us in this connection is the judgment of their Lordships in *Sham Sundar Lal* v. *Achhan Kunwar* (4). There it was definitely laid down that a reversionary heir under the Hindu Law has no power to sell or mortgage his interest in expectancy. At page 80* of the report it is observed:—"In 1877 neither Achhan Kunwar nor Inayat Singh, even if he had been of age, could by Hindu Law make a disposition of or bind their expectant interests." This case has been frequently followed by the Courts in India. We may refer to the following cases:—*Nund Kishore Lal* v. *Ranee Ram Tewary* (5), *Manickam Pillai* v. *Ramalinga Pillai* (6), *Hargawan Magan* v. *Baii Nath Das* (7) and *Sumsuddin* v. *Abdul Husein* (8). There is thus, in our opinion, abundance of authority for the proposition that the transfer by a reversioner of his expectant interest is not permitted by the Hindu Law.

But here again an attempt has been made to withdraw the present case from the purview of these authorities on the ground that Indra Bahadur Singh in the years 1880 was not exactly in the same position as an ordinary reversionary heir under the Hindu Law, expecting to succeed to the estate on the death of the Hindu widow in possession. Stress has again been laid upon the fact that under the scheme of inheritance propounded in section 22 of the Oudh Estates Act the widow of a Talukdar has an interest which is in many respects different from the interest held by a female heir under the ordinary Hindu Law. That no doubt is the case; but does the fact that there is such a difference between the estate of the widow under the special provisions of the Act and the estate of the widow under the ordinary Hindu Law make any difference in the nature of the legal position of the reversionary heir? We have already touched upon this matter in dealing with the first question, namely, whether after the death of Naipal Singh any interest in his property became vested at once in Indra Bahadur Singh. We are unable to see how it can be said that Indra Bahadur Singh during the lives of the two widows had any higher interest than that of the ordinary Hindu reversioner, for, as we have pointed out, it seems clear, both upon the Act and upon authority, that the succession to Naipal Singh's estate did not open until the death of Thakurain Iklas Kuar. Which, therefore, it is not correct to say that the transfer of an expectancy, which Indra Bahadur Singh purported to make in the year 1880, was void by reason of the provisions of section 6 of the Transfer of Property Act, it seems to us that upon principle it was void by reason of its being contrary to the provisions of the Hindu Law. Indra Bahadur Singh, at the time the agreement was entered into, was subject to the Hindu Law and his position, so far as we can see, was no different from that of the ordinary reversionary heir. On the authority of *Achhan Kunwar's case* (4), therefore, we hold that the transfer of the mere *spes successionis*, which Indra Bahadur Singh had, was prohibited by the Hindu Law and that consequently no interest was transferred to Raghubpal Singh under the deed in question.

The learned Counsel for the appellant has laid stress upon a certain passage to be found in the judgment of the Bombay High Court reported as *Sumsuddin* v. *Abdul Husein* (8). That was a case in which a Muhammadan lady had in the year 1895 executed a deed in favour of her father by which she purported to release her rights to the share of her father's estate, which would in ordinary course have come to her on her father's death. There the terms of

(4) 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755 (P. C.).
(5) 29 C. 355; 6 C. W. N. 395.
(6) 29 M. 120.
(7) 4 Ind. Cas. 144; 32 A. 88; 7 A. L. J. 11.
(8) 31 B. 165; 8 Bom. L. R. 781.

*Page of 21 A.—*Ed.*

section 6 (*a*) of the Transfer of Property Act were referred to, and it was held that such a release was prohibited by the Statute. The passage to which the appellant's learned Counsel has drawn our particular attention is to be found on page 172* of the report. It reads as follows :—

"Then we come to section 6 which provides that property of any kind may be transferred, except as otherwise provided by the Act, and the first exception named is the chance of an heir-apparent. But this implies that, but for the exception, the chance of an heir-apparent would be property that might be transferred under the Act."

We are asked to hold that the learned Judge who made these observations intended to convey that it is only by reason of the enactment of section 6 of the Transfer of Property Act that the transfer of the chance of an heir-apparent succeeding to the estate has been prohibited by law. Having regard to what is to be found in other passages in the judgment, we can hardly think that the learned Chief Justice intended to lay down the law in this sense, for at page 173* we have a reference to the authority which we have already quoted, namely, the case of *Sham Sundar Lal* v. *Acahan Kunwar* (4). The learned Chief Justice points to that ruling as declaring that a Hindu reversioner cannot either dispose of or bind his expectant rights. It was argued before the learned Chief Justice that the opinion expressed in the judgment just mentioned was only a *dictum*. But Sir Lawrence Jenkins pointed out that it was a *dictum* of the highest judicial authority and that in at least two later cases effect had been given to the opinion so expressed. It can hardly be said, therefore, that it was intended to lay down that the transfer of an expectancy by a Hindu reversioner only became unlawful for the first time after the enactment of the Transfer of Property Act.

To sum up this part of the case, it appears to us that the proper view to take is that Indra Bahadur Singh in the year 1880 had no right higher than that of a reversionary heir under the Hindu Law and that the transfer of an expectancy which he professed to make in favour of the plaintiff's husband was void, being contrary to the provisions of the Hindu Law.

This finding disposes of the case of the plaintiff-appellant. If it be argued, as it has been argued, that this Court, as a Court of Equity, ought to enforce the agreement entered into between the defendant and Rachhpal Singh on the 2nd of January 1880, the answer is that the principles of equity cannot be invoked for the purpose of enforcing a void agreement. Under the provisions of section 23 of the Contract Act, which was in force at the time this document was executed, every agreement of which the object or consideration is unlawful is void, and the section provides *inter alia* that the consideration of an agreement is unlawful if it is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law. In our opinion this document, viewed as an agreement to transfer *in futuro*, was a void agreement, and it is impossible for the plaintiff to argue that it should be enforced upon the principle that equity considers that done which ought to be done.

There remains the question of the other relief which the plaintiff sought, namely, relief in the shape of a money decree for one lac and twenty-eight thousand rupees. All that seems necessary to say with regard to this is that a claim for the return of the money with interest is barred by limitation for the reasons given in the judgment of the Court below. The Subordinate Judge applied Article 62 of the Limitation Act, which gives a period of 3 years, running from the date when the money is received, for a suit to recover money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. If there was a failure of consideration in the year 1880 at the time the deed was executed by which the whole agreement was rendered void, then limitation under this Article began to run at the very latest from the date upon which the deed was executed. Article 97 of the First Schedule to the Limitation Act does not help the plaintiff-appellant That Article relates to suits for money paid upon an existing consideration which afterwards fails and gives a

*Pages of 31 B.—*Ed.*

period of 3 years from the date of the failure; but here there never was any existing consideration in the eye of the law; nor can it be said that there was any failure of consideration within a period of three years before the date of the present suit. For these reasons we have come to the conclusion that this appeal must fail.

We have only to remark before concluding our judgment that the Counsel for the respondent made a feeble attempt to support the judgment of the Court below, on the ground that it was proved that the document in suit was obtained from the defendant-respondent by the exercise of undue influence. The only particulars regarding the undue influence which the defendant put forward in his written statement are to be found in paragraph 22 of that document. There all that is made to appear is that Indra Bahadur Singh was in a helpless condition at the time he executed the deed and that the plaintiff's husband took undue advantage of the circumstance. The only evidence in support of this plea, to which the learned Counsel for the respondent has thought proper to refer us, is to be found in the deposition of the defendant himself who gave evidence in the case. The learned Subordinate Judge has given convincing reasons in his judgment for disbelieving the story put forward by Indra Bahadur Singh for the purpose of explaining the circumstances in which this document came to be written. We may say, without further discussion, that we agree entirely with the estimate formed by the Court below of the value of the defendant's evidence. It is not, in our opinion, worthy of credit. We have not been referred to any evidence which would convince us that in the year 1880 Indra Bahadur Singh was in such a helpless condition that he was unable to resist the influence of the plaintiff's husband. He was at the time a man of about 38 years of age, for we find in the copy of the judgment delivered in the suit brought by him in the year 1878 that he was described there as having been 36 years of age at the time the suit was brought. Indra Bahadur Singh, according to his own statement, although he was not in affluent circumstances at this time, was nevertheless able to support himself from the income of certain *sir* lands which were in his possession. No facts have been brought to our notice from which it could reasonably be inferred that Thakur Rachhpal Singh was in any way in a position to dominate Indra Bahadur Singh's Will. As for the argument that on the face of it the terms of the agreement were harsh and unconscionable, we are not prepared to say that they can necessarily be characterized in this language. It is true that the property which Indra Bahadur Singh purported to convey was of considerable value. On the other hand he had received a substantial sum of money from Sher Bahadur Singh and his son Rachhpal Singh and his chances of coming into possession of Naipal Singh's estate were somewhat remote, considering the fact that both the widows left by Naipal Singh were young at the time of his death. As it turned out, Indra Bahadur Singh had to wait 38 years before he was able to enter upon possession of the estate left by Naipal Singh. Without discussing this question at greater length, we are content to say that we think the finding of the Court below upon the issue relating to undue influence is correct.

For the reasons given above the appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1247 OF 1916.

July 1, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdur Raoof.

Musammat GANGA—DEFENDANT—APPELLANT

versus

KANHAI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow, possession taken during lifetime of, by trespasser, whether adverse to reversioners.

Possession taken by a trespasser during the lifetime of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow. [p. 233, col. 2.]

GANGA *v.* KANHAI LAL.

Second appeal from a decree of the District Judge, Aligarh, dated the 29th May 1916.

Mr. *Panna Lal*, for the Appellant.

Mr. *Nihal Chand Vaish*, for the Respondents.

JUDGMENT.—This is a defendant's appeal. The facts of the case are not in dispute. One Tika Ram was the owner of the property in respect of which this suit has been brought. He had a wife *Musammat* Jhunia, two sons and two daughters. His two sons predeceased him and one of them left a widow *Musammat* Ganga. Tika Ram died and his wife *Musammat* Jhunia survived him. She died some 16 years before the present suit was brought. On her death two daughters *Musammat* Dhanno and *Musammat* Jethi were in law entitled to take the property. However, *Musammat* Ganga took possession and obtained mutation of names in her own favour and admittedly has been in possession ever since. Neither *Musammat* Dhanno nor *Musammat* Jethi apparently opposed her. *Musammat* Jethi died some eight years before suit leaving the three plaintiffs, her sons. *Musammat* Dhanno is still alive. On the 6th of April 1915, *Musammat* Ganga made a Will, bequeathing this property, as if it were her own, to the defendants Khachar Mal and Cheda Lal. The plaintiffs have brought the present suit. They allege collusion between *Musammat* Dhanno and *Musammat* Ganga. They pointed out that *Musammat* Dhanno had allowed *Musammat* Ganga to acquire title by prescription as against her, *Musammat* Dhanno. They claimed that they were entitled to take possession on behalf of *Musammat* Dhanno and to manage for her. They sought not only to recover possession of the property, but they also asked for a declaration which is relief A in their plaint. That runs as follows :—"On establishment of the plaintiffs' right it may be declared that the name of the defendant first party stands recorded against the property given below without any right, and that she has no adverse or proprietary right to the property aforesaid, nor has she any right to make the Will dated the 6th of April 1915." The Court of first instance dismissed the suit. The lower Appellate Court held that the plaintiffs were entitled to a declaration that they are the owners of the property in suit as from the death of *Musammat* Dhanno and that as against them, *Musammat* Ganga's possession is not and cannot become adverse or proprietary and the Will of the 6th of April 1915 made by her is void and unenforcible. An examination of the lower Appellate Court's decree will show that this was not the declaration which was actually granted in the decree. In that decree it was declared that the plaintiffs have been in possession of the property in dispute since *Musammat* Dhanno's death (a fact that nobody has asserted at any time, *Musammat* Dhanno being still alive), *secondly*, that the possession of *Musammat* Ganga neither is nor can be adverse or proprietary as against the plaintiffs, and that the Will dated the 6th of April 1915 executed by *Musammat* Ganga is void and ineffectual. This is followed by an order that *Musammat* Ganga should bear her own costs. This decree has been signed by the Judge and the Pleaders for the parties as well as by the Munsarim of the Court below. It is quite clear on the facts that the plaintiffs ought not in these circumstances to receive any declaration whatsoever. It is an absurdity to declare that the plaintiffs will be the owners of the property after the death of *Musammat* Dhanno. It is impossible to predict that they will be alive at the time of her death, and no such declaration can or ought to be granted. As regards the declaration that *Musammat* Ganga's possession is not and cannot become adverse as against the plaintiffs, there is no need for any such declaration at all. It is a question of law, which has been repeatedly decided, that possession taken by a trespasser during the lifetime of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow; but the Courts in this country do not grant declarations on points of law simply for the convenience of parties. *Thirdly*, as regards the Will executed by *Musammat* Ganga, the declaration in respect of it is a declaration which ought not to be granted. We would refer to the decision in the case of *Umrao Kunwar* v. *Badri* (1) and also to the remarks of their

(1) 29 Ind. Cas. 302; 13 A. L. J. 551; 37 A. 422.

Lordships of the Privy Council in the case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (2). We do not think it is necessary on this branch of the case to make any further observations. It is obvious that the declaration which the Court below sought to grant, ought not to be given any more than the absurd declaration which was entered in the decree. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in all Courts.

Appeal allowed.

(2) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 149; 8 Sar. P. C. J. 625; 7 O. C. 239 (P. C.).

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 108 OF 1917.

July 16, 1918.

Present:—Mr. Justice Roe and Mr Justice Coutts.

BASAWAN SINGH AND OTHERS—APPELLANTS

versus

GANGAPHAL RAI—PLAINTIFF AND JAI-NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Sale in execution of mortgage decree—Prior and subsequent mortgagees—Auction-purchaser, whether bound by statement in plaint—Sale subject to prior lien—Purchaser, whether entitled to question lien—Transfer of Property Act (IV of 1882), ss. 76, 101—Extinguishment of mortgagee rights—Accounts.

Property passing in execution of a mortgage decree is dependent upon the terms of the plaint. [p. 224, col. 2; p 225, col. 1.]

Where in a mortgage suit the plaintiff prays for the sale of the property subject to a prior lien, it is not open to the auction-purchaser in execution of the decree obtained in that suit to dispute the subsistence of the lien. [p. 225, col. 1.]

Section 76 of the Transfer of Property Act does not apply to a case where the mortgage has in fact become extinct. [p. 225, col. 1.]

Appeal from a decision of the District Judge, Shahabad.

Messrs. *Kulwant Sahai* and *Rai Guru Saran Prasad*, for the Appellants.

Mr. *Parmeshwar Dayal*, for the Respondents.

JUDGMENT.

ROE, J.—The facts relevant to the decision of this case are as follows:

In 1884 the plaintiffs, with other co-sharers who were no parties to the two cases before us, took a usufructuary mortgage of 42 *bighas* of land for a consideration of Rs. 2,372 and between that date and 1891 advanced sums amounting to Rs. 1,084 on simple mortgages on the 16 annas of the village. On the 30th July 1897 one Jakhar Mian took a second mortgage upon the 16 annas of the village and subsequently brought a suit and made the present plaintiffs parties to that suit, on the ground that they were purchasers of a part of the mortgaged property, and praying that the property might be sold subject to the plaintiffs' prior mortgage. The purchase referred to in this plaint was made on the 1st April 1898, and by that purchase the several mortgagees took each to themselves a definite share in the village on a consideration of a definite sum of money admitted by the mortgagor to be due at that date on that part of the property transferred to each of the plaintiffs. The learned Munsif was of opinion that this splitting up of the mortgage, the conversion of *bighas* into annas and the reduction of the property, 16 annas, to the property sold, approximately 6 annas resulted, in a transaction not covered by section 101 of the Transfer of Property Act and in addition relied on the oral statement made by the plaintiff himself to the effect that the lien on the mortgaged property was destroyed by the sales. The learned District Judge was of opinion that the matter could not be open to question, for the reason that by virtue of the decree made in Jakhar Mian's suit upon his mortgage it was *res judicata* that the plaintiffs' lien still subsisted upon the property. The auction-purchaser at Jakhar Mian's execution of his mortgage decree appeals against the order of the District Judge, on the ground, *firstly*, that the decision of the learned District Judge upon the question of *res judicata* was wrong and *secondly*, on the ground that the Munsif's decision upon the question of the effect of section 101 was right. It is settled law that property passing in execution of a mortgage decree is depend-

ent upon the terms of the plaint. In the plaint in the suit of Jakhar Mian and here the learned Munsif had made an error, it was clearly stated that the plaintiffs now before us were purchasers of a part of the mortgaged property. The learned Munsif says that the plaint in the former suit does not show that Jakhar Mian and others had any knowledge of the plaintiffs' purchases. The learned Munsif is wrong. Obviously the present plaintiffs would not have been described as purchasers in that suit if Jakhar Mian had not been fully aware of the fact that they were no longer mortgagees but had made a purchase of the property in extinction of the mortgages themselves; and having regard to the frame of the relief sought in the suit upon the mortgage, I am of opinion that the present defendants cannot contest the lien actually imposed upon the property in the plaint itself. The plaint having asked for the sale of the property subject to Jakhar Mian's lien, the auction-purchaser could not take it free of that lien. The only question, therefore, to decide is that of the account to be made. There is no definite ground of appeal upon the manner of making up the account in the decree by the learned District Judge. It was suggested only that credit should be given to the defendant of the profits made from the property since the entry of the plaintiffs into possession. This suggestion is based on section 76 of the Transfer of Property Act. This section is not applicable to the circumstances. The mortgage is in fact dead and from the date of the purchase the plaintiffs were no longer mortgagees. The lien surviving under section 101 survives intact. The defendants were required to redeem at the sums actually due at the time of the plaintiffs' purchase. Mr. Parmeshwar Dayal has shown us an account from which we are satisfied that this liability had been accurately estimated in the deeds of sale, and nothing has been suggested on the other side to show this account to be inaccurate. I would, therefore, dismiss this appeal with costs.

COUTTS, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1917.

March 4, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

LAL TRIBHAWAN NATH SINGH—PLAINTIFF—APPELLANT

versus

THE DEPUTY COMMISSIONER, FYZABAD, IN CHARGE OF COURT OF WARDS, AJUDHIA ESTATE, ON BEHALF OF *Musammat* JAGDAMBA DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu law—Mitakshara—Putrika-putra *son, whether recognised—Oudh Estates Act* (*I of* 1869), *s.* 22 (4)—Taluka, *succession to—Daughter's son treated as son dying intestate and issueless, estate of, succession to—Memorandum written by witness, admissibility of—Evidence Act* (*I of* 1872), *ss.* 123, 124—*Courts of Justice, whether can call for confidential State papers—Will, revocation of, proof of—Construction of document—Will, interpretation of—Adoption, power of, given by Will—Adoption, validity of—Testator, intention of—Impartibility of* taluka, *retention of—Oudh Estates Act* (*I of* 1869), *s.* 22, *adoption under—Hindu Law, rules of, whether applicable to adoption made by* taluqdar *—Price paid for adopted son, effect of—Presents to natural father, whether vitiate adoption—Ceremonies for adoption, when can be dispensed with*—Gotra, *same, of adoptive father and adopted boy, effect of.*

Per *Stuart, A. J. C.*—Although the practice of begetting a *putrika-putra* son has fallen into disuse, it is nevertheless recognised by the Mitakshara Law. [p. 230, col. 1.]

Where a person succeeding to a *taluka* under the provisions of section 22, clause 4 of the Oudh Estates Act, dies issueless and intestate, the *taluka* goes to his heirs, and not to those of his maternal grandfather. [p. 230, col. 1.]

Where a witness, on being asked if he has had an interview with a particular person and what the purport of that interview was, replies that he has had such an interview and had noted the purport of it at the time in a written memorandum, and produces that memorandum, the memorandum is admissible in evidence. [p. 243, col. 1.]

In view of the provisions of sections 123 and 124 of the Evidence Act, no Court of Justice is entitled to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature. [p. 248, col. 1.]

A Will duly executed is not to be treated as revoked, either wholly or partially, by a Will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later Will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier Will that the two cannot stand together. It is not enough to show that the Will which is not forthcoming differed from the earlier Will, if it cannot be shown in what the difference consisted. [p. 248, col. 2; p. 249, col. 1.]

LAL TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER, FYZABAD.

Where under a Will a *talukdar* gave to his second wife in supersession of his first wife a life-estate in the *taluka* and a power to adopt a son, and further stipulated that the adopted son would after her death succeed as full proprietor in the manner contemplated by section 22, clause 8, of the Oudh Estates Act, and the second wife then adopted a son:

Held, (1) that "clause 8" in the Will was merely a clerical error "for clause 5"; [p. 250, col. 2.]

(2) that the adoption was valid, inasmuch as the *talukdar* could give to his second wife the power to adopt a son irrespective of the Will and as the intentions of the *talukdar* under the Will were substantially carried out, for the estate taken by the adopted son retained the characteristics of a *taluka*. [p. 271, col. 2.]

An adoption under the provisions of section 22 of the Oudh Estates Act is merely a selection which need not be according to the conditions and the restrictions found in the personal law applicable to the person making the adoption. [p. 252, col. 1.]

Under the Hindu Law an adoption is not vitiated by the payment of a price for an adopted son [p. 255, cols. 1 & 2.]

A male Hindu under the Mitakshara Law can only change his *gotra* on adoption. [p. 235, col. 2.]

Per *Kanhaiya Lal*, *A. J. C.*—According to the Hindu Law, a son affiliated in the *putrika-putra* form is a valid substitute for a son. The ease with which a son could be obtained by adoption has had the effect in the course of time of rendering affiliation in the form of *putrika-putra* more or less uncommon, but it has by no means become obsolete and effect cannot legitimately be refused to an affiliation in the *putrika-putra* form if it is made. [p. 254, col. 2; p. 264, col. 1.]

The succession to a person, obtaining a *taluka* under the provisions of section 22, clause 4, of the Oudh Estates Act, and dying intestate, goes, in the absence of any male lineal descendant, to the line of the person who affiliated him and treated him in all respects as a son, and not to his natural line. [p. 264, col. 2.]

A Will duly executed cannot be treated as revoked, either wholly or in part, by a Will which is not forthcoming, and the contents of which cannot be definitely ascertained. It is not enough to show that the Will which is not forthcoming differs from the earlier one, if it cannot be shown in what the difference consists. [p. 269, col. 2.]

The supply of clothes or ornaments to the parents of the boy to be adopted or the payment of money therefor in anticipation of the adoption cannot invalidate the adoption or be taken to indicate that it was made from sinful or improper motives. [p. 270, col. 2.]

The performance of requisite ceremonies for adoption can be dispensed with, if the adoptive father and the adopted boy belong to the same *gotra*. [p. 271, col. 1.]

Where the junior wife of a *talukdar* validly adopted a son in pursuance of a Will made by the *talukdar*, under which the latter bestowed a life-estate upon her and gave her the power to adopt a son and further directed that the adopted son would take possession of the *taluka* only after her death, under the provisions of section 22, clause 8 of the Oudh Estates Act:

Held, that the adoption was good, as it did effectuate the intention of the *talukdar* as expressed in his Will and as the *taluka* could not lose its character of impartibility in the hands of the adopted son [p. 272, col. 2.]

(Case-law on all points discussed)

Appeal from the decree of the Additional Judge, Fyzabad, dated the 19th October 1916.

The Hon'ble Syed *Wazir Hasan* and Babu *Aditya Prasad*, for the Appellant.

Mr. *W. Wallach*, Rai *Nagendra Nath Ghoshal*, Messrs. *Lal Mohan Banerji* and *Durga Charan Banerji*, Babus *Mahadeo Singh* and *Nagendro Nath Datt*, for the Respondents.

JUDGMENT.

STUART, A. J. C.—This appeal relates to the succession to the *taluka* of Ajudhia. The nucleus of the property comprised in this *taluka* was acquired by Raja Bakhtawar Singh before the annexation of Oudh. He was the eldest of five brothers named Bakhtawar Singh, Shiva Din Singh, Darshan Singh, Incha Ram and Debi Prasad. Their father Purandar Ram was not a man of eminence, and there was no estate in the family, until this acquisition was made by Bakhtawar Singh. Raja Bakhtawar Singh died in 1855. He was succeeded by his nephew Hanuman Singh, better known as Man Singh, the youngest of the three sons of Darshan Singh, brother of Bakhtawar Singh. The names of the three sons were Ramadhin, Raghubir Dayal and Man Singh. The *taluka* was then known as the Mahdauna *taluka*. The name was subsequently changed to that of Ajudhia. The estate was held by Man Singh after annexation, and re-conferred on him in 1858 after confiscation: it was then considerably augmented. Man Singh made a Will on the 22nd April 1864, under the terms of which he devised his estate to his wife Maharani Subhao Kuar with power to nominate a successor. Man Singh was raised to the dignity of a Knight Commander of the Star of India in 1869. He died on the 11th October 1870, having attained the position of one of the most considerable land-holders of Oudh. His nearest relatives at the time of his decease were the Maharani Subhao Kuar, a daughter Brij Raj Kuar, who was married to Narsingh Narain Singh, and Pratap Narain Singh son of Brij Raj Kuar. Maharani Subhao Kuar succeeded to the estate under the terms of the Will. On 16th August 1872 she executed

a document nominating as her successor Triloki Nath, son of Raghubir Dayal brother of Man Singh. On the 21st November 1872 Pratap Narain Singh, who was then of the age of 17 years, instituted a suit through his mother, who described herself as his sister and guardian, in the Court of the Deputy Commissioner of Fyzabad. He claimed in this suit declaration of title to the *taluka*. The plaint (Exhibit 1) asserted that the execution of the Will of the 22nd April 1864 had been obtained by undue pressure exercised by Government officials, that the Will in question had been revoked by Sir Man Singh, and that Sir Man Singh had died intestate. It continued that Pratap Narain Singh had been selected in 1857 at the age of 12 as a successor by Sir Man Singh, that his *gotra* had in the same year been changed from that of his natural father to that of Sir Man Singh, that he had been treated by Sir Man Singh in all respects as his own son, and was thus entitled to succeed to the estate under the provisions of clause 4, section 22, Act I of 1869. It appears from certified copies of certain proceedings in the Court of the Deputy Commissioner (Exhibits A-15 and A-16) and from the judgment itself (Exhibit A-12) that in the course of hearing a plea, which had not been asserted in the plaint to the effect that Pratap Narain Singh was an adopted son of Sir Man Singh, was first asserted and then abandoned. Reliance was placed in support of the plaintiff's case on the evidence of a Mr. Carnegy, who deposed to an oral revocation of the Will by Sir Man Singh. Mr. King, the Deputy Commissioner, dismissed the suit on the 28th July 1873, finding that the Will was a valid document and that Mr. Carnegy's evidence taken with the other evidence was not sufficient to establish that revocation had taken place. He found that Pratap Narain Singh had been treated in all respects as a son by Sir Man Singh. An appeal was filed to the Court of Mr. Capper, Commissioner of Fyzabad. Mr. Capper found on the 24th December 1873 (judgment Exhibit A-13) that the Will was a valid document which had not been revoked, and that Pratap Narain Singh had not been treated in all respects as a son within the meaning of clause 4, section 22, Act I of 1869. Pratap Narain Singh appealed to their Lordships of the Privy Council. They decided in 1877 [*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1)] that Mr. Carnegy was a reliable witness to the fact that Sir Man Singh revoked orally the Will of 1864, that such a Will of a Hindu could be revoked by parol, and that the testamentary disposition had thus no effect. They held, that Pratap Narain Singh had been treated in all respects as a son by Sir Man Singh and was entitled to succeed under the provisions of clause 4, section 22, Act I of 1869. They declared Pratap Narain Singh to be entitled to the *taluka* of Ajudhia, but not to the personal or non-*talukdari* property of Sir Man Singh. Pratap Narain Singh obtained possession of the estate from the Court of Wards, who were in charge of it, on the strength of the declaratory decree in his favour. In 1878 Triloki Nath petitioned their Lordships of the Privy Council to re-hear the appeal. They dismissed his petition [*Pertab Narain Singh* v. *Subhao Kooer* (2)] but permitted him, if he so desired, to open by suit in India the question whether he had been properly represented in the previous litigation in the Indian Courts. Triloki Nath then instituted fresh proceedings on 3rd June 1879 in the Court of the Additional Judge, Fyzabad, against Pratap Narain Singh, to have declared his right to the *taluka* in virtue of his having been appointed under a power of appointment given by the Will of 1864. The Court of first instance held that Triloki Nath had not been made a party to the former suit or represented in it, and that he was not bound by the proceedings of 1877 in regard to the question of revocation of the Will of 1864. The trial Judge found, however, that that Will had been revoked. Triloki Nath appealed to the Judicial Commissioner. The Judicial Commissioner held that the Maharaja's estate was not so completely represented by the widow in the former suit that Triloki Nath was bound by the decisions against her. He was of opinion that

(1) 3 C. 626 at pp. 636, 637; 1 C. L. R. 113; 4 I. A. 228; 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; Rafique & Jackson's P. C. No. 46; 1 Ind Jur. 679; 1 Ind. Dec. (N. S.) 983 (P. C.).

(2) 4 C. 184; 5 I. A. 171; 3 Suth. P. C. J. 553; 3 Sar. P. C. J. 840; 2 Ind. Jur. 504; 1 Shome L. R. 256; 2 Ind. Dec. (N. S.) 117 (P C.).

the Maharani divested her estate by the execution of the instrument appointing Triloki Nath in 1872. He found that Triloki Nath took as successor of the Maharaja, not of the widow, and that his interests vested on the 16th August 1872. He found further that the Will of the Maharaja had not been revoked. Pratap Narain Singh appealed to their Lordships of the Privy Council, who decided in July 1884 [*Pertab Narain Singh* v. *Trilokinath Singh* (3)] that their previous order was binding on Triloki Nath. They decreed the appeal and dismissed the suit. Before their Lordships had decided the appeal in Triloki Nath's previous suit, Triloki Nath had filed another suit on the 15th August 1882 in the Court of the District Judge of Fyzabad for possession of the estate. The District Judge decreed the suit on 25th September 1882. An appeal was filed to the Judicial Commissioner on the 8th October 1882. The latter deferred decision till receipt of the decision of their Lordships of the Privy Council in the previous case. On receipt of that decision he allowed the appeal and dismissed the suit on the 26th November 1884. An appeal was filed to their Lordships of the Privy Council, which was dismissed [*Triloki Nath Singh* v. *Pertab Narain Singh* (4)]. In their decision their Lordships interpreted their previous order of 1877 in certain particulars. At page 814 they say with regard to their previous order, "Their Lordships, therefore, merely declared Pratab Narain Singh's title to the *taluks* and whatever descended under Act I of 1869. As to other property which was not included in that Act, Pratab Narain would not have been the heir to the Maharaja during the lifetime of the widow. She would have taken the widow's estate in all property except that which was governed by Act I of 1869."

Raja Pratap Narain Singh remained in possession of the *taluka* till his death. Like his predecessor, he attained a high position in Oudh. He was first created a Maharaja, and subsequently raised to the dignity of a Knight Commander of the Indian Empire. He died on the 9th November 1906. He had married Maharani Suraj Kumari in 1868, and is stated by the defendants in these proceedings to have married Maharani Jagdamba Devi in 1888. The latter was aged between 10 and 11 on the date of her marriage. He had no issue by either wife. He executed a Will on the 17th July 1891, which was registered on the 20th July 1891. After his death he was succeeded by the junior Maharani, Jagdamba Devi. The estate was taken under the management of the Court of Wards. On the 12th February 1909 Maharani Jagdamba Devi adopted as successor under the terms of the Will of 1891 Dukh Haran Nath Singh son of Adika Nath, a descendant of Incha Ram who was a younger brother of Darshan Singh.

On the 11th February 1915 Tribhawan Nath Singh son of Kashi Nath Singh, son of Ramadhin the eldest brother of Sir Man Singh, instituted a suit in the Court of the Subordinate Judge, Bara Banki, against Maharani Jagdamba Devi, Dukh Haran Nath Singh, the Deputy Commissioner of Fyzabad as in charge of the estate under the Court of Wards, and Maharani Suraj Kumari. It was alleged in the plaint that the Will of 17th July 1891 had been executed by Sir Pratap Narain Singh under undue influence exercised upon him by Maharani Jagdamba Devi, that it had been revoked, and that Maharani Jagdamba Devi was not the legally wedded wife of Sir Pratap Narain Singh. It was further alleged that that lady had been guilty of acts of unchastity both during the lifetime of Sir Pratap Narain Singh and after his death and that she was, therefore, incapable of taking benefit or exercising a power of adoption under the terms of the Will. It was further alleged that in no circumstances was the adoption of Dukh Haran Nath Singh valid, as (1) it had been made under undue influence, as (2) Maharani Jagdamba Devi, having not been legally married to Sir Pratap Narain Singh and also having been unchaste both during the lifetime and after the death of Sir Pratap Narain Singh, had

(3) 11 C. 186; 11 I. A. 197; 8 Ind. Jur 697; 4 Sar. P. C. J. 567; Rafique & Jackson's P. C. No. 86; 5 Ind. Dec. (N. S.) 888 (P. C.).

(4) 15 C. 803; 15 I. A. 113; 12 Ind. Jur. 332; 5 Sar. P. C. J. 219; Rafique & Jackson's P. C. No. 104; 7 Ind. Dec. (N. S.) 1122 (P. C.).

not the power to adopt under the provisions of the Mitakshara, as (3) Dukh Haran Nath Singh had been purchased from his natural father, as (4) Dukh Haran Nath Singh's natural mother was of the *gotra* of Narsingh Narain Singh, as (5) Adika Nath was an outcaste, and as (6) the ceremony of adoption had not been properly performed. It was further alleged that the senior Maharani had been guilty of acts of unchastity during the Maharaja's lifetime. The conclusion drawn was that, Sir Pratab Narain Singh having died intestate, the senior Maharani being excluded from inheritance by her unchastity, and the junior Maharani having no title as she was not the legally wedded wife of the Maharaja, and even if she were the legally wedded wife, being excluded from inheritance by her unchastity, the plaintiff as son of Kashi Nath Singh, son of Ramadhin, in absence of all heirs under clauses 1 to 10, was entitled to succeed as heir under clause 11 to all the immoveable and moveable properties of the estate and mesne profits, and in the alternative to a declaration that the Will and adoption were void as against him.

The defence was a denial of practically every allegation in the plaint. It was set up that Maharani Jagdamba Devi was the legally married wife of Sir Pratap Narain Singh, that neither the senior Maharani nor she had ever been unchaste, that the Will of the 17th July 1891 had been duly and validly executed by Sir Pratap Narain Singh unaffected by undue influence, that it had never been revoked and that it had remained in force at the time of his death. It was further set up that it conferred a legal power of adoption on Maharani Jagdamba Devi, which she had legally exercised by making a valid adoption of Dukh Haran Nath Singh. It was further set up that the claim for moveable property was barred by limitation. The defendants asserted in addition that the plaintiff would not have title, even if Sir Pratap Narain Singh had died intestate, as the succession would have then passed to the family of Narsingh Narain Singh In replication, the plaintiff asserted that the defendants were estopped from setting up the last plea.

The suit was transferred for hearing to Mr Jagat Narayan, Additional Judge, District Fyzabad. It was decided by him on the 19th October 1916. He found in favour of the Will and the adoption and against the plaintiff's title. He found the allegations against the moral character of the two ladies to be baseless calumnies. He found in favour of the plea that the claim for moveable property was barred by limitation. He, therefore, dismissed the suit The present appeal is filed against his decree. Practically every point taken in the trial Court is re-asserted by the plaintiff in his grounds of appeal.

The appellant objected to the defendants' disputing his title to succeed on a plea that they were estopped from so doing. His case on this point was as follows: He alleged that, directly after the death of Sir Man Singh, Ramadhin had instructed a Pleader to file a suit for possession of the estate, that Narsingh Narain Singh then brought Pratap Narain Singh to Ramadhin, that Pratap Narain Singh fell at the the feet of Ramadhin and protested that he was the *putrika-putra* son of Man Singh, and that Ramadhin recognizing the sacred nature of Pratap Narain Singh's relationship thereupon abstained from instituting proceedings. P. W. No. 101 Sheo Charan Lal was the only witness who deposed to the truth of this story. The learned trial Judge has discussed the value of this plea and the veracity of this witness at pp. 202 to 207 of the judgment.

Sir Man Singh died in 1870. He was succeeded by his widow. Pratap Narain Singh did not institute a suit till the end of 1872, and, when he instituted it, he did not assert a title as *putrika-putra*. The witness Sheo Charan Lal is, as the learned trial Judge found, an unreliable witness. If it were worth the trouble, the reasons for rejecting this plea could be largely increased. I reject it.

The appellant had first to establish his title to succeed Sir Pratap Narain Singh if the provisions of the Will were set aside. Sir Pratap Narain Singh having succeeded Sir Man Singh as his heir under the provisions of clause 4, section 22, Act I of 1869, the rule of succession is found

in the same section. Clauses 1 to 10 clearly confer no right on the appellant who comes, if at all, under the provisions of clause 11. According to the rule of the Mitakshara Law which would govern the case in absence of special circumstances he cannot succeed. It is not alleged and cannot be suggested that Sir Pratap Narain Singh was the adopted son of Sir Man Singh, and Sir Pratap Narain Singh would ordinarily have been succeeded in event of intestacy and failure of heirs under the first ten clauses by the agnates of the family of his father Narsingh Narain Singh. The appellant, recognizing this obstacle, endeavoured to establish his title by an assertion in the plaint that the mother of Sir Pratap Narain Singh was specially appointed, under the practice of constituting in the person of a daughter's son a *putrika-putra*, to bear Sir Man Singh such a son and that thus the heirs to Sir Pratap Narain Singh under clause 11 were the agnates of Sir Man Singh's family. He subsequently raised a plea in argument, which was not taken in the plaint, that Sir Pratap Narain Singh should be succeeded in event of intestacy by the agnates of the family of Sir Man Singh under clause 11, owing to the circumstance that Sir Pratap Narain Singh had succeeded under the provisions of clause 4.

The practice of appointing a daughter, so that she can bear a son, who will be treated as her father's son, is recognized by the Mitakshara Law. The practice has so far fallen into disuse that only one instance can be found in reported cases, in which a daughter has been so appointed under the Mitakshara Law. This case will be found reported as *Kumaran* v. *Narayanan* (5). There such an appointment of a daughter in Malabar was recognized by the Courts. The disuse of the practice has been commented on in *Nursing Narain* v. *Bhuttun Loll* (6), *Thakoor Jeebnath Singh* v. *Court of Wards* (7) and *Sri Raja Venkata Narasimha Appa Row Bahadur* v. *Sri Rajah Suraneni Venkata Purushotama Jaganadha Gopala Row Bahadur* (8). It has not, however, been laid down by their Lordships of the Privy Council that a daughter cannot be so appointed and the law on the point never having been abrogated we should be bound to apply it, if it were established that the mother of Sir Pratap Narain Singh had been so appointed by Sir Man Singh.

The law is contained in a passage in the Mitakshara which is quoted in various text books—

"The son of an appointed daughter is equal to him; that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly he is equal to the legitimate son; as described by Vasishtha: 'This damsel, who has no brother, I will give unto thee, decked with ornaments: the son, who may be born of her, shall be my son.' Or that term may signify a daughter becoming by special appointment a son. Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly she is mentioned by Vasishtha as a son, but as third in rank: 'The appointed daughter is considered to be the third description of sons.'"

Commentary of Hemadri "The *putrika-putra* is of four descriptions: The first is the daughter appointed to be a son. She is so by a stipulation to that effect. The next is her son. He obtains of course the name of 'son of an appointed daughter,' without any compact. This distinction, however, occurs: he is not in place of a son, but in place of a son's son, and is a daughter's son. Accordingly he is described as a daughter's son in the text of Sankha and Likhita: 'An appointed daughter is like unto a son; as Prachetasa has declared: her offspring is termed son of an appointed daughter, he offers funeral oblations to the maternal grandfathers and to the paternal grandsires. There is no difference between a son's son and a daughter's son, in respect of benefits conferred.' The third description of son of an appointed daughter is the child born of a daughter, who was given in marriage with an express stipulation in this form; 'The child who shall be born of her, shall be mine for the purpose of

(5) 9 M. 260; 3 Ind. Dec. (N. S.) 578.
(6) W. R. (1864) Gap. 194.
(7) 23 W. R. 409; 15 B. L. R. 190; 2 I. A. 63; 3 Sar P. C. J. 490 (P. C.).

(8) 31 M. 310; 4 M. L. T. 9; 18 M. L. J. 420.

performing my obsequies.' He appertains to his maternal grandfather as an adopted son. The fourth is a child born of a daughter who was given in marriage with a stipulation in this form: 'The child, who shall be born of her, shall perform the obsequies of both.' He belongs, as a son, both to his natural grandfather and to his maternal grandfather. But, in the case where she was in thought selected for an appointed daughter, she is so without a compact, and merely by an act of the mind"—Ghose's Principles of Hindu Law, Commentaries, Volume II, first edition, pages 130 and 131.

The law presents no difficulties. The appellant seems to assert that Sir Pratap Narain Singh was of the third or fourth description of sons. That is his main contention, although he is ready to accept any view of the law that could suit his case. The last sentence of the commentary of Hemadri can obviously only be applied in case where there is distinct evidence of the act of mind of the father.

The position of the appellant with regard to this plea is as follows:—In his written statements of claim made to the Deputy Commissioners of Fyzabad and Gonda [Exhibit A-129 and Exhibit A-129 (*a*)] he did not assert that *Musammat* Brij Raj Kuar had been appointed to bear a *putrika-putra* son to her father. In his evidence he made a disingenuous attempt (which the learned trial Judge has found to be false) to explain this omission. In his plaint he asserted that *Musammat* Brij Raj Kuar had been married under the *putri karan* form and that for this reason Sir Pratap Narain Singh was born a *putrika-putra* and had, therefore, been treated as a son. In the evidence he carried the matter further. He endeavoured to prove an appointment before marriage as well as marriage in the form, and relied on further evidence of conduct from which he endeavoured to establish a presumption that such an appointment must have taken place. He has called evidence to prove an allegation that Sir Man Singh in the year 1851, after obtaining the permission of Bakhtawar Singh, decided to appoint his daughter to bear him a *putrika-putra* son, that he sought a husband who would agree to marry her in the *putri-karan* form, that Narsingh Narain Singh agreed and married her in this form, and that when she bore Sir Pratap Narain Singh, the latter was considered from his birth to be the *putrika-putra* son of Man Singh.

In 1851 Man Singh was a man of 31 years of age. He had married twice. His first wife had borne him Brij Raj Kuar in 1839 or 1840. That wife had died. His second wife had borne him a daughter in 1851. That daughter had died. Man Singh was in the prime of life. His second wife had shown her capacity to bear children. He would ordinarily have had every hope of begetting male offspring. What reason then could he have had to be the only person in Oudh known to history who employed a practice by which he set aside his daughter to bear him a male heir? The answer is supplied by P. W. No. 77 Bandhan. This witness has deposed that, after the death of his second daughter, Man Singh went to Bakhtawar Singh and stated that he had expected a son to continue his line, that no son had been born to him, that his daughter was dead and that he was helpless, that Bakhtawar Singh then consulted *pandits* who examined Man Singh's horoscope and declared that he would never beget a son, that Man Singh then sought Bakhtawar Singh's permission to marry Brij Raj Kuar by the *putri-karan* ceremony, and that Bakhtawar Singh agreed. P. W. No. 11 Ganesh, P. W. No. 72 Ram Sarup, P. W. No. 88 Bindeshari, P. W. No. 95 Brij Lal and P. W. No. 98 Mahipat Singh gave direct evidence upon the point. Ganesh declared that his father was one of the emissaries sent by Man Singh to procure a bridegroom. Ram Sarup said that he was a member of the wedding party and was told by his father that the ceremony was in the *putri-karan* form, though he did not himself witness the ceremony. Bindeshari swore that Narsingh Narain Singh agreed in his presence that his first born son should be *putrika-putra* of Man Singh. Brij Lal gave evidence similar to that of Ram Sarup. Mahipat Singh deposed that he saw the marriage celebrated in the *putri-karan* form. The learned trial Judge disbelieved all these witnesses. He has given his reasons for so doing at length, except in the case of

Ram Sarup and Mahipat Singh. We are informed by the Counsel for the respondents that the reason why the trial Judge did not discuss the evidence of Mahipat Singh was because the plaintiff's Counsel in the lower Court laid no stress upon the evidence of that witness. We have, however, been asked by the Counsel in appeal to arrive at a finding as to the value of this witness also, and I shall proceed to do so in due course.

The reasons of the learned trial Judge for disbelieving these witnesses are in some instances more weighty than in others. More important than his reasoning is the fact that he disbelieved them. The reasons may be varied or supplemented. Bandhan appears an absolute impostor. He has asserted that he was the intimate and favourite of Raja Bakhtawar Singh, one of the most influential noblemen of the King's Court. Thence, according to his own account, he has sunk to the position of a drug-sodden beggar. I disbelieve the account of his past. His story, that Man Singh abandoned all hopes of male posterity, because certain *pandits* pronounced against them after consulting his horoscope, is patently ridiculous. I am not satisfied that a man in the subordinate position held by the father of Ganesh would have been employed to seek a suitable bridegroom for the daughter of Man Singh. Ram Sarup appears an absolutely unreliable witness. His account as to how he came to give evidence is clearly untruthful. I need add nothing to the criticisms of the trial Judge on the evidence of Bindeshari and Brij Lal. I have examined the evidence of Mahipat Singh and find it equally valueless.

The learned Counsel for the appellant relies in addition on the evidence of P. W. No. 18 Someshar Dat which was rightly conceded in the lower Court to be worthless, and on the evidence of P. W. No. 53 Thakur Prasad, P. W. No. 4 Kewal Misir, P. W. No. 5 Ram Sabad, P. W. No. 146 Patandin, P. W. No. 152 Hardat, P. W. No 130 Ram Narain, P. W. No. 142 Baidia Nath Singh, P. W. No. 122 Tribhawan Nath Singh plaintiff, and P. W. No. 86 Sant Bakhsh Singh. The evidence of these nine witnesses is to the effect that they had heard from relations or others that Pratap Narain Singh was the *putrika-putra* son of Man Singh. It is unnecessary to discuss what the value of this evidence would be if those witnesses had received such information, as I am not satisfied that any one of them was ever told anything on the subject. The learned Counsel also refers to the evidence of P. W. No. 2 Rudra Nath Singh which adds nothing to the case, and lays stress on the evidence of P. W. No. 6 Hakimuddin. This witness deposed that he saw Man Singh shortly before his death, and that the latter declared in his presence that Pratap Narain Singh was his *putrika-putra*. This witness has given evidence as to other points in support of the plaintiff's case. His evidence has been rightly disbelieved by the trial Judge. The above evidence was found to be unreliable by the trial Judge. I find the whole of it to be false.

Man Singh treated Pratap Narain Singh in all respects as his own son. To use the words of their Lordships in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer* (1), he "so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor" (page 632). He brought him up in his own house. In 1867 when Pratap Narain Singh was invested with the Brahmanical thread at the ceremony of *janeo*, Man Singh "took that part in the ceremony which, in the ordinary course of things, would be assumed by the boy's natural father" (pages 633-634). It is to be noted, however, that according to the opinion of their Lordships nothing then was done which operated "either in law or in fact as a transfer of the boy from his own into the Maharaja's *gotra*" (page 634). At the time of the marriage of Pratab Narain Singh in 1868, Man Singh declared him to be his successor. There was also evidence that, when the provisions of Act I of 1869 were under consideration, Man Singh suggested and obtained the insertion of clause 4 into section 22. But in the Will which he made in 1864 and subsequently revoked, he did not nominate Pratap Narain Singh as his successor and

left the selection to the choice of his wife. There is nothing in the evidence in this case which would justify an addition to their Lordships' conclusion that "however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharaja had that intention as early as the date of Dadwa Sahib's marriage; that, with that intention, he continually treated his grandson in fact as the son of the house would be treated, and not as a mere grandson by a daughter and that, in order to effectuate his intention by operation of law, rather than by Will, he caused the clause in question to be inserted in the Statute" (page 637).

The question as to whether Pratap Narain Singh was or was not the *putrika putra* of Man Singh was not before their Lordships. But this circumstance in no way invalidates the finding The circumstance that Man Singh in 1864 had not declared Pratap Narain Singh to be his successor, that in the letters to Ramdhan father of Maharani Suraj Kumari at the time of her wedding in 1868, while declaring Pratap Narain Singh to be his heir and successor, he nowhere suggests that he was his *putrika putra*, and that he went out of his way to arrange for the insertion of a clause in section 22 to ensure the succession of Pratap Narain Singh (surely an act showing most excessive caution if the boy were his son *putrika-putra*), would go far to meet evidence that Brij Raj Kuar had been appointed to bear Man Singh a son in this form. It is to be noted that, had Pratap Narain Singh been a *putrika putra*, there would have been no force in the suggestion made by their Lordships at page 633 that Man Singh in 1861 was "reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own *gotra*," because had Pratap Narain Singh been *putrika-putra* he would have been Man Singh's heir to the knowledge of his relations and in Man Singh's *gotra*. The value of the evidence to the contrary is, however, immaterial in view of my finding that the evidence to prove Man Singh's appointment of his daughter is false.

The learned trial Judge has discussed at considerable length the evidence of conduct of Pratap Narain Singh and other members of the family to indicate his or their belief on the point. I consider this portion of the evidence barely material, as we are concerned with what Man Singh did, and not with what any one else thought. The appellant has, however, failed to advance his position here. In the proceedings which culminated in the decision in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer* (1), it was not asserted that Pratap Narain Singh was the *purtika-putra* of Man Singh. The case set up in his favour was that he had been treated in every respect as a son. Mr. King stated in his judgment (Exhibit A-12), "I must remark that the plaintiff's case underwent a not unimportant amount of modification during the trial, and it appeared to me that the exact position of the plaintiff was not entirely appreciated by his legal advisers, until a good deal of the evidence and counter-evidence had been delivered. The plaintiff at first alleged 'adoption' in the common sense of the word, *i.e.*, that he had been adopted by the Maharaja as a son. This is not distinctly stated in the notes of the plaint taken by the Court, but it was clear from the tenor of the examination of their witnesses by plaintiff's Counsel. During the trial, the plaintiff repudiated the adoption in the sense in which this word is commonly used by Hindus in reference to a son."

The respondents had asserted that Pratap Narain Singh's legal advisers had never imagined the possibility of raising the plea that he was a *putrika-putra*. The appellant controverted that argument in the following manner. A certain Mr. Harrington, who had been Superintendent of the Encumbered Estates in Fyzabad from May 1872 to the middle of August 1875, had in 1872 prepared a statement of the case relating to the Ajudhia succession for the opinion of the Advocate-General. At some date prior to the 15th October 1872 Narsingh Narain Singh handed to Mr. Harrington a statement of the case set up by him in favour of his son, Pratap Narain Singh's claims. Exhibit 19 is put forward as an English translation of the statement of claim prepared by Narsingh Narain Singh prior to the institution of the suit of 21st November

1872. The appellant endeavoured to put this and another document in evidence. The trial Judge refused to receive them in evidence. The appellant has produced Exhibit 19 in this Court but has not produced Mr. Harrington's deposition. I consider that Exhibit 19 can be received in evidence. The case so stated to Mr. Harrington is clearly contained in Exhibit 19. The form in which it is produced is the ordinary form in which papers are printed for submission to the Privy Council, and Exhibit 19 is clearly a translation of these instructions which came on the record of the 1872 case and was subsequently translated for submission to the Privy Council. The actual Exhibit 19 is evidently one of the copies taken at the time. The matter is more than thirty years old. Those instructions contain at paragraph 7 the following plea: —

"The Maharaja and the Maharani have both married the Dadwa's mother by *putri-karan* (the condition, etc., at the time of marriage to the effect that the bridegroom will have nothing to do with the first child and the other children after the first child will be his, the bridegroom's) and in such case the first child be considered as own son or daughter of the grandfather (*nana*). '*Putri-karan* of Mitakshara, page 71.'

"The Maharaja and the Maharani brought up the Dadwa from his infancy as their own son and invested him with the Brahmanical thread '*janeo*' in Baisakh 1274 Fasli. The Maharaja and the Maharani made the Dadwa's '*juggo pawit*', etc. (the ceremony in which the Brahmanical thread is given) and called him of the Girg *gotra* as himself and allowed him (Dadwa) to worship their (the Maharaja and the Maharani's) gods, and the Maharaja pronounced the *gayatri munter* over him (Dadwa) which is the duty of a father. All the other ceremonies usually bestowed by a father were also performed by the Maharaja in the capacity of a father.

"The witnesses to the above facts are Pandit Matr Dut, Pandit Ganga Dhar Shastri, and Pandit Dwarka Dut, etc., who have caused all these ceremonies to be performed: many of the Talukdars and the officials are well acquainted with all the ceremonies.

"From the time up to the present the Dadwa's *shankalap* had been made by 'Girg *gotra*'."

This is sufficient to prove that Narsingh Narain Singh stated to Mr. Harrington the plea that Pratap Narain Singh was the *putrika-putra* of Man Singh. But this fact, so far from assisting the appellant, tells against him. Taken with the remaining evidence, it establishes that the plea was suggested, and abandoned. We are now asked to find that Man Singh formed a deliberate intention to appoint his daughter Brij Raj Kuar to bear him a son, that this intention was approved by Bakhtawar Singh, that a husband was sought and obtained who agreed to a marriage on this condition, that the pair were married in the *putri-karan* form, and that Pratap Narain Singh was born to them as the *putrika-putra* of Man Singh. Witnesses who have given evidence in these proceedings were then in existence. They now depose in unmistakable terms to the allegations set forth above. If the theory of the appellant be accepted, Narsingh Narain Singh and Brij Raj Kuar were necessarily aware of the conditions of their own marriage. They were instructing Pratap Narain Singh's legal advisers. Yet the plea was abandoned, while a plea of adoption was set up, which had to be abandoned afterwards. It cannot be suggested that this plea, if set up and proved, would have been other than the best plea that would have been taken. Not only was the position of Pratap Narain Singh as a *putrika-putra* stronger than his position under a clause with regard to the interpretation of which considerable doubt prevailed in Oudh, but as a *putrika-putra* he would have obtained the whole of the non-*talukdari* property valued at Rs. 7,00,000 (Exhibit 1) which he failed to obtain under their Lordships' decree. The abstention to take, or rather the abandonment of this plea *in limine*, is an eloquent commentary on the theory that Pratap Narain Singh's parents believed him to be a *putrika putra*, and further furnishes an additional reason, if one be required, for distrust of the witnesses called on the point in this case. In support of the theory the appellant's

Counsel has urged the fact that in the plaint *Musammat* Brij Raj Kuar the mother of Pratap Narain Singh described herself as his sister. This peculiar description does not imply an assertion that Pratap Narain Singh was *putrika putra* of Man Singh. As their Lordships observed at page 631, the term was probably used to lend colour to the plea negatived in their judgment that treatment in all respects as a son by a Hindu was tantamount to an adoption in the Hindu Law.

The next piece of evidence relied on by the appellant was a portion of the statement of Pratap Narain Singh on the 5th January 1881 in the proceedings in the case instituted in 1879. The passages in question are as follows (Exhibit 34):—

"I belong to the Girg *gotra*, my father belongs to the Bharadwaj *gotra*. When I married I belonged to the Girg *gotra*. When I was married I was not the son of Babu Narsingh Narain, but I was the son of Maharaja Man Singh. Darogha Ramdhan was to the best of my belief a son of Maharaja Man Singh's mother's sister...I am the only son of my father. I was accounted as belonging to the Bharadwaj *gotra* till the time of my investiture with the Brahmanical thread.....*Q.* Are you adopted son of the Maharaja or are you his daughter's son? *A.* I do not know if I am an adopted son or only the daughter's son. That is a matter to be decided according to the Shastras. I do not know if the Maharaja really adopted me or not, the *pandits* have to decide that. I know my *gotra* was changed at the time of my investiture with the Brahmanical thread...*Q.* After ceremonies of *janeo* did you understand Bachi Saheba (the wife of your father Babu Narsingh Narain) as your mother? *A.* Even before the ceremonies of investiture I looked on her as a sister. I considered her as such since I can remember. I did not consider Babu Narsingh Narain as a father. I considered him as a stranger, although a relative, just as other relatives."

This statement, which is supported by the second paragraph in Pratap Narain Singh's original plaint of 1872 (Exhibit 1), so far from supporting the appellant's plea, is against it. If Pratap Narain Singh were a *putrika putra* of Man Singh, he would have been born in the *gotra* of Man Singh and not, as he asserts, in the *gotra* of his father.

The mass of evidence as to the *gotra* of Pratap Narain Singh carries the point no further than this—Sir Pratap Narain Singh, after his claim to the estate had been recognized, undoubtedly described himself and considered himself to belong to the Girg *gotra*, *i.e.*, the *gotra* of Man Singh, and not to the Bharadwaj *gotra* which was the *gotra* of his own father, Narsingh Narain Singh. It is not alleged that he cut himself adrift from relationship to his own father. He is admitted by the witnesses of the plaintiff to have made offerings to Narsingh Narain Singh and to have recited his Bharadwaj *gotra* (see evidence of P. W. No. 53 Thakur Prasad at o. p. 539). But ordinarily he retained the position, which he asserted in his deposition of the 5th January 1881, namely, that he had changed his *gotra* at the age of twelve when he was invested with the sacred thread. In addition he worshipped the family gods of Man Singh. He usually went into mourning when members of Man Singh's family died, and observed *ashouch* by abstaining from eating meat, acts of worship, and shaving on such occasions.

From these circumstances it cannot be deduced that Pratap Narain Singh changed his *gotra*. A male Hindu under the Mitakshara Law can only change his *gotra* on adoption, and it cannot be, and is not, alleged that Pratap Narain Singh was adopted by Man Singh. Pratap Narain Singh was born in the Bharadwaj *gotra* and, never having been adopted, remained in the Bharadwaj *gotra*, and the fact that he lived and died in the Bharadwaj *gotra* would not be affected by his honest belief and the honest belief of all the members of Man Singh's family that he had changed his *gotra*. Acting under the erroneous though honest belief that he had changed his *gotra* (he had clearly no authority to decide points of Hindu Law as will be seen from his deposition) he naturally worshipped Man Singh's family gods, observed *ashouch* on the deaths of members of Man Singh's family and performed other acts which would ordinarily be performed by members of the Girg *gotra* and not of the Bharadwaj *gotra*.

A simple explanation can be given of the desire of Pratap Narain Singh to be considered of the *gotra* of Man Singh. His father's family, though respectable, was obscure. The family of Man Singh, while of humble origin and of recent elevation, had become illustrious. Man Singh was eventually the most influential nobleman in Oudh. Pratap Narain Singh after a hard struggle, had succeeded in becoming recognized as his grandfather's successor. It was not surprising in the circumstances that he should seek to identify himself in every particular with the maternal grandfather who had treated him as a son and to whom he owed his estate, position, and fame: and, once he had reached the elevation of a premier noble in Oudh, it was unlikely that any of Man Singh's family would gainsay his claims.

Before Man Singh's death there had been peculiar differentiations in the treatment of Pratap Narain Singh. Man Singh had on the occasion of Pratap Narain Singh's first marriage performed the functions usually performed by the natural father of the boy. This point was noted by their Lordships and is deposed to by D. W. Tejmani examined on commission (o. p. 6) and D. W. *Musammat* Lekhraj Kuar examined on commission (o. p. 8). The latter lady has further deposed that at that marriage Maharani Subhao Kuar took the place of the bridegroom's mother and *Musammat* Brij Kuar took the place of the bridegroom's sister. But this leaves the matter as it was when it came before their Lordships in 1877. Their conclusion is not advanced by the fact that to make the treatment more marked the wife of Man Singh took the place of the boy's real mother, and their daughter, although the boy's real mother, took the place of his sister.

The law upon this point has been taken by me direct from the Mitakshara. It is substantially the law upon which the appellant's learned Counsel relies. Applying the law to the findings of fact at which I arrive I decide, agreeing with the learned trial Judge, that the plaintiff-appellant has completely failed to prove that Pratap Narain Singh was the *putrika-putra* son of Man Singh.

The second plea advanced on behalf of the appellant's title will not be found either in the notice of the suit or in the plaint. It was, however, advanced in the arguments before the issues were framed, as it is found in the sixth issue, and was according to the judgment strenuously argued at the trial. It is to the following effect:—

As Pratap Narain Singh succeeded under the provisions of clause 4, section 22, Act I of 1869, as a daughter's son treated in all respects as the son of Man Singh, it is argued that on the principle on which section 22 is based the estate should not pass out of possession of Man Singh's family in any circumstances. The view suggested is that such a son is in every respect a son of the daughter's father. In *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1) their Lordships considered in detail the meaning of the words "treated in all respects as his own son" as they occur in clause 4, and explained in the first instanace what they did not mean. Their judgment states that "the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindu Law...Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting in the person of a daughter's son a '*patrica-putra*,' or son of an *appointed* daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the fourth clause, but is not, therefore, essential in order to do so" (page 631). They were clear in affirming that the effect of the clause did not change the status of the person treated as a son. It would not subject "the grandson to prohibitions as to marriage which would not otherwise attach to him" (page 631). To fulfil the conditions of the section, "their Lordships are of opinion that wherever it is shown by sufficient evidence that a *talukdar* not having male issue has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence, which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the

person so treated shall be his successor, such person will be brought within the enactment in question" (page 632). Can the fact that a person treated in such a manner has succeeded to a *taluka* operate to exclude his heirs under personal law from succession to the *taluka* in event of his intestacy and the failure of heirs under clauses 1 to 10? For this proposition I can find no support in the words of the section.

Should such a person die intestate, his succession as heir of a *talu dar* is governed by the provisions of section 22. The succession would go in the first instance to one of his sons or one of their descendants under the provisions of clauses 1 to 3, then to a daughter's son treated as a son in all respects, then to an adopted son, then to a brother, then to an elder widow for life with remainder to a son adopted by such widow with permission, then to a junior widow for life with remainder to a son adopted by such widow with permission, and then to one of male lineal descendants not being *najib ul tarfain*. This concludes the first ten clauses. They present no difficulty. Then the succession opens to "such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such.....heir..... are subject."

How can it be said that the agnates of the daughter's father are persons "entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe" of the daughter's son are subject, in a case such as this where the ordinay law is the Mitakshara Law?

The peculiar statutory provision contained in clause 4—a provision which their Lordships found in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1) was inserted in the Act by Man Singh to suit the identical case of Pratap Narain Singh and which they found would never have been enacted had Pratap Narain Singh not existed—must be interpreted exactly as it stands. In no circumstances should abstruse meanings be read into it. As their Lordships observe, "the clause is perhaps not very clearly or happily expressed" and in its words cannot be found designs to arrange for a succession of persons other than the lineal descendants of the daughter's son so treated. The argument, that it is contrary to reason to suppose that the originators of the clause intended invariably to divert the property from the stock of the daughter's father, ignores the circumstance that on the same argument it would be equally contrary to reason to suppose that the originators of the clause intended to make such a diversion in favour of male descendants of such daughter's son. Yet this latter provision is exactly what the clause enacts. A Hindu who chose to treat his daughter's son in the manner described by their Lordships diverted the property from his own adopted son (if any), from his brothers and nephews, removed it from his own *gotra* and transferred it to another *gotra* and another clan as long as such daughter's son's descendants existed. Thus a Bais *taluka* would fall into Amethia hands and *vice versa*. As their Lordships point out, a departure would be made from family custom and relations would be offended [*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1)]. This is the rule to which the framers of the clause deliberately agreed, and in face of that anomalous state which might continue for ever, there is little force in the argument that the clause must be interpreted to prevent the continuance of an anomalous state which must continue for ever. Much stress has been laid in the appellant's argument on the circumstance that in the 5th clause the words are "in default of such son or descendants." The inference that the learned Counsel draws therefrom is that from the use of the word "son" it should be held that the daughter's son is equivalent in all respects to the daughter's father's son. The learned Counsel would have us read into clause 4, in view of the existence of these words in clause 5, some such words as "who shall thereby be given in all respects the position of his own son" after the words "his own son." But there is nothing to support this view. The words in clause 4 are "treated in all respects as his own son" and the meaning of those words has been settled once for all in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1), and the words "in default of such son" in clause 5 mean nothing more than "in default of such daughter's son."

It is true that in clause 6 the words "in default of such adopted son" are used instead of "in default of such son." But

variety in the use of the same terms is not unknown in section 22. To show this it is only necessary to refer to clause 7, where the case of a single widow is first considered and then the case of the widow of first marriage is contemplated. In clause 8 the distinction is omitted. In clause 9 it is re-introduced.

As was laid down in *Debi Bakhsh Singh* v. *Chandrabhan Singh* (9), a special rule of succession is laid down in the first ten clauses of section 22, and by clause 11 the parties are relegated to the situation in which they would have been found apart from the Statute. There that situation was found in the *sanad*. Here it is not so. The situation is found in the Mitakshara Law, and the appellant would have us legislate, rather than interpret, by adding words to the Statute which do not exist there, in order to correct a suggested anomaly in no way more at variance with what he considers the right rule than the anomaly which admittedly exists, and then utilize the addition, made by our legislative action, to abrogate the Mitakshara rule of succession which binds the members of Man Singh and Narsingh Narain Singh's family. I find against this plea.

I, therefore, decide that the appellant has in no circumstances title to succeed to Sir Pratap Narain Singh's estate, and might conclude my decision there as he has no right to question the validity of the Will or the adoption. I proceed, however, to the determination of other points, as my learned colleague and I do not interpret the law as to the appellant's title in exactly the same way.

The case of the appellant as presented in the lower Court with regard to the Will of 1891 was

1 that the Will was not executed,

2 that the execution of the Will was procured by undue influence,

3 that the Will was revoked,

(*a*) by execution of two deeds of the 23rd December 1895 and the 12th July 1898,

(*b*) by the Maharaja's conduct,

(*c*) by execution of another Will shortly before the Maharaja's death,

4 that Maharani Jagdamba Devi had no rights under the Will because she was not the legally married wife of Sir Pratab Narain Singh,

5 that if she were the legally married wife of Sir Pratab Narain Singh she had forfeited all her rights under the Will owing to misconduct prior to her husband's death,

6 that the terms of the Will conferred no right of devise to Dukh Haran Nath Singh.

The case of the appellant as presented in the lower Court with regard to the adoption was

1 that the adoption was invalid, having been procured owing to compulsion and undue influence,

2 that Maharani Jagdamba Devi not being a legally married wife could not make a valid adoption,

3 that Maharani Jagdamba Devi, even if a legally married wife, had by her unchastity both before and after marriage rendered herself incapable of making a valid adoption

4 that Dukh Haran Nath Singh was purchased from his natural father and that his adoption was, therefore, invalid,

5 that the adoption was invalid because Dukh Haran Nath Singh and his natural father were both out of caste at the time of the adoption,

6 that Dukh Haran Nath Singh's natural mother was of the Bharadwaj *gotra*, that she had entered the Girg *gotra* at the time of her marriage and that, therefore, the adoption was invalid whether Pratap Narain Singh belonged to the Girg *gotra* or the Bharadwaj *gotra*,

7 that the legal forms of the adoption not having been followed the adoption was invalid,

8 that on the interpretation of the terms of the Will Maharani Jagdamba Devi had no power to adopt Dukh Haran Nath Singh.

If the appellant had been able to succeed in setting aside the Will and the adoption and destroying the claims of Maharani Jagdamba Devi, he could not succeed under the provisions of clause 7, section 22

(9) 7 Ind. Cas. 724; 32 A. 599 at p. 610; 20 M. L. J. 917; 14 C. W. N. 1010; (1910) M. W. N. 693; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 13 O. C. 316; 37 I. A. 168 (P. C.).

Act I of 1869, during the lifetime of Maharani Suraj Kumari. To meet this difficulty he set up a plea that that lady had forfeited all her rights on account of her having "acted against the duties of a wife".

I take these pleas in order. The execution of the Will was not denied in the plaint but was denied before the learned trial Judge in argument. In the argument before us the execution was not denied and I do not understand the appellant to suggest now that the Will was not executed. But it is advisable to have a finding on the point. I find that the Will was validly executed. I am in accord with the decision of the learned trial Judge at o. pp. 400 to 404 of the judgment upon this point.

The appellant in his notices of claim [Exhibit A-129 and Exhibit A-129 (*a*)] despatched on the 13th October 1914 and the 17th November 1914 asserted that Maharani Jagdamba Devi had prior to July 1891 an adulterous intrigue with Adika Nath, a descendant of Incha Ram. This Adika Nath is the father of Dukh Haran Nath Singh, the boy subsequently adopted. The appellant next asserted that the Maharaja had executed a Will on the 14th July 1891, by which he gave Maharani Jagdamba Devi the power to adopt an heir from the family of Darshan Singh, that Adika Nath, discovering this fact and wishing to divert succession to one of his own descendants, exercised undue influence on the Maharaja, and that the Maharaja as a result of this influence executed the Will of 17th July, which was prepared by Adika Nath. According to this allegation Maharani Jagdamba Devi was given as a result of the aforesaid undue influence authority to adopt a boy from Adika Nath's own family and exercised that authority by adopting Dukh Haran Nath Singh.

The suggestion approached the ludicrous. In July 1891 Adika Nath was 13 or 14 years af age. Maharani Jagdamba Devi was 13 years of age. The Maharaja was 36 years of age. Dukh Haran Nath Singh (the boy subsequently adopted) was not born till 1904-1905. The story was that a boy, the son of a poor distant relative, had been carrying on a precocious intrigue with the girl-wife of the head of the family, who was one of the greatest noblemen in Oudh, that this youth, coming to hear that that nobleman had made a Will, under the provisions of which this wife might adopt a boy from one branch of the family under certain conditions, formed an idea of using undue influence to cause that nobleman to cancel that Will and make another Will, which would permit the lady to adopt a possible son of the intriguer—a son who on the story was not born till 13 years afterwards. The story continued that he worked this nobleman, who was a grown man of mature intellect, round to his purpose in three days, and during this period drafted a Will to secure his objects and compelled his dupe to sign it.

In the plaint which was filed on the 11th February 1915 a completely different story was told. It is there asserted that a Will was executed on the 14th July 1891 by the Maharaja, which gave Maharani Jagdamba Devi maintenance for life and power to adopt a successor from the Darshan Singh branch and that Maharani Jagdamba Devi (not a word is said about Adika Nath) by refusing food and threatening to commit suicide induced the Maharaja to alter his dispositions. The appellant's attempt to reconcile these inconsistencies is the subject of the finding of the learned trial Judge at o. pp. 103 to 121 of the judgment. I agree with that finding.

We have first an assertion that a Will was executed on the 14th July 1891. As the appellant contended that this Will was revoked, he introduced the allegation apparently to add colour to the plea of undue influence, the suggestion being that the Will of the 14th July would not have been revoked, unless undue influence had been used. The plea will be examined. The evidence to prove the execution of a Will on the 14th July is as follows. P. W. No. 6 Hakimuddin deposed that he drafted this Will and that it was signed in his presence by the Maharaja and two attesting witnesses. P. W. No. 17 Suraj Bakhsh supported this story. The Maharaja subsequently executed two deeds of endowment of property for religious and charitable purposes (Exhibit 2, dated the 23rd December 1895, and Exhibit 3, dated the 12th July 1898). In both these deeds he referred to his Will of the 14th July 1891. I have already discussed the evi-

dence given by Hakimuddin on the plea that Pratap Narain Singh was the *putrika putra* of Sir Man Singh. I have found his evidence unreliable on that point. It is equally unreliable on this point. Suraj Bakhsh is also an unreliable witness. I add nothing to the comments of the learned trial Judge on their evidence at o. pp. 386 to 397 of the judgment. The reference in Exhibit 2 and Exhibit 3 to a Will of the 14th July 1891 is thus the remaining evidence as to the existence of such a Will. That evidence is obviously insufficient to prove that such a Will existed, in view of the circumstance that there exists a genuine registered Will which was signed on the 17th July 1891 and registered on the 20th. If there had been a Will of the 14th July 1891 it stood revoked by the latter Will, and Pratap Narain Singh would not have referred to the terms of a revoked Will in Exhibit 2 and Exhibit 3. There is nothing in the terms of Exhibit 2 and Exhibit 3 really inconsistent with the terms of the Will of the 17th July 1891. I, therefore, concur with the finding of the learned trial Judge that the references in Exhibit 2 and Exhibit 3 were meant to be to the Will of the 17th July 1891 and that the 14th was inserted by a clerical error.

The finding is thus, that there was only one Will executed at that period, namely, the Will of the 17th July 1891. The evidence to show that its execution was obtained by exercise of undue influence is that of Hakimuddin alone. It is unnecessary to discuss whether his evidence, if believed, would establish that the execution of the Will had been obtained by undue influence, as I do not believe his evidence. I, therefore, find that the execution of the Will of the 17th July 1891 was not obtained by the exercise of undue influence.

I now come to the plea of revocation.

The Will could only be revoked under the provisions of section 57, Act X of 1865, read with section 19, Act I of 1869.

The first point urged is that the action of the Maharaja in executing the two deeds Exhibit 2 and Exhibit 3 shows that he revoked the Will. Under the terms of the Will the testator had declared that he was dedicating property yielding an annual profit of Rs. 12,000 for religious and charitable purposes, whereas by Exhibit 2 and Exhibit 3 he dedicated property of an annual profit of about Rs. 18,000 for these purposes. There is no real inconsistency in this. He intended in 1891 to dedicate property for religious and charitable purposes. Later he considered it desirable to dedicate property of a greater value. In no circumstances could his later acts amount to a revocation of his Will. An even weaker plea is raised in the plaint. The Maharaja got the sons of his old opponent Triloki Nath admitted into the Colvin Talukdars School and paid the expenses of their education. It was asserted that this act amounted to a revocation of the Will. The pleas in support of revocation up to this point are untenable to a degree.

The next plea taken was that Sir Pratap Narain Singh revoked his Will of the 17th July 1891 shortly before his death by executing a subsequent testamentary instrument which has not been produced.

The appreciation of the value of this plea will be assisted by a statement with dates (when available) of certain facts which are established by the evidence on the record.

In the year 1906 Mr. R. E. Hamblin, who is proved now to be dead, was Commissioner of the Fyzabad Division. Mr. F. J. Pert was Deputy Commissioner. Mr. Pert went on six months' leave in April of that year. Mr. L. C. Porter officiated as Deputy Commissioner during his absence. The headquarters of the Commissioner and the Deputy Commissioner are in Fyzabad, within a few miles of Ajudhia. Sir Pratap Narain Singh was in financial difficulties, and was negotiating for a Government loan. He was discussing the question with the Commissioner who proposed in the alternative the placing of the estate under Court of Wards' management—the course which was adopted after the Maharaja's death. The Commissioner saw the Maharaja from time to time on this matter, and had also to see him in connection with the bestowal of the title of Mahamahopadhya which had been recently conferred by the Government on Sir Pratap Narain Singh. The Maharaja to-

wards the end of the year found himself in failing health. His illness took a turn for the worse, and he died at the end of the year. In October the Maharaja communicated with Mr. Butler, Deputy Commissioner of Lucknow (who is now Sir Harcourt Butler), subsequently Lieutenant-Governor of Burma. Sir Harcourt Butler was an intimate friend of the Maharaja. He visited the Maharaja at Ajudhia on the 14th October 1906. The Maharaja's health was then in a precarious condition and he had made arrangements for medical attendance by a leading Bengali practitioner of the Ayurvedic School. This gentleman, Kaviraj Dwarka Nath Sen, arrived in Ajudhia on the 16th October. At some date between the 20th and 26th October the Maharaja received a visit from Sir Muhammad Ali Muhammad Khan, the Raja of Mahmudabad. On the 29th October Mr. Pert resumed charge of his duties on return from leave. Shortly afterwards the Maharaja received a visit from Thakur Harihar Bakhsh Singh, *talukdar* of Saraura. On 4th November Mr. Hamblin wrote to the Maharaja (Exhibit 79), in reply to a letter not produced, stating the information he would require before he could present proposals to Government for the improving of the financial condition of the estate. On the 6th November the Maharaja wrote to Mr. Hamblin (Exhibit A-351) asking for information as to the distinctive dress of holders of the title of Mahamahopadhyaya, as he wished to obtain it to wear at a Durbar to be held in the following January. He was evidently not dangerously ill to his knowledge when he wrote that letter On the 8th November Mr. Pert wrote to Mr. Hamblin (Exhibit A-358) that the Maharaja was seriously ill and asked what he was to do if the Maharaja died? Mr. Hamblin wrote to the Secretary of the Board of Revenue (Exhibit A-390) conveying this information of Mr. Pert and adding other remarks. On the 9th November the Maharaja died. Mr. Hamblin communicated the fact to the Secretary of the Board of Revenue by telegram (Exhibit A-395). He wrote subsequently to the Secretary of the Board of Revenue letters dated the 10th November, the 13th November, the 13th November and the 15th November (Exhibits A-391, A-392, A-393 and A-394) the contents of which will be discussed later.

To prove the plea of specific revocation the appellant called P. W. No. 136 Hakim Ismail Khan. This man is a petty medical practitioner, who asserts that he was first in the employment of the Maharaja and latterly pensioned by him. His story is that he had attended the Maharaja in a medical capacity for four or five months up to the date of his death. He deposed that some $2\frac{1}{2}$ to 3 months before his death *i. e.*, in August 1906, he found a paper lying on the Maharaja's bed. I proceed to give his evidence in his own words —o. pp. 1351 to 1393.

"I guessed it might be a Will. I began reading it attentively. The Maharaja asked me what I was reading. I told him that the paper was in very neat writing and so I started reading it. He told me to read it first myself and then to read it out to him. I did so. I read it out to him. He asked the Bengali Vaid also to listen to it. I told him, he had already made a Will and what sort of Will this was. He replied it was the cancellation of the former Will. I enquired from him the reason of the cancellation. He explained that the acts for which he had deprived the senior Rani of the estate were committed by the junior Rani also. He then signed the neatly written paper himself and requested me and the Vaid to sign the same as witnesses. We both signed it. This was $2\frac{1}{2}$ or 3 months before the death of the Maharaja approximately. It is an old affair. The Maharaja died on the 25th day of the Vaid's treatment but he had arrived at the Maharaja's some months before his death."

Later on he stated what the contents of this alleged Will were. "*Q.* Did the Maharaja say anything else after you had attested the Will? *A.* I do not recollect. I do not recollect the full contents. I remember something of it. Probably it provided for a maintenance of Rs. 600 to the senior Rani and monthly maintenance between Rs. 500 and 600 to the junior Maharani and Rs. 100 a month to the Mahabrahmin who was in the keeping of the Maharaja. I do not remember anything else. It perhaps also provided that

during his lifetime he was at liberty to adopt anybody he pleased but in case of his death a successor be appointed to him out of the senior line of Raja Darshan Singh's descendants."—o. pp. 1393 to 1394.

This witness's story is this, that in August 1906 the Raja had had a Will drafted by which he revoked all former Wills. Under the terms of this latter Will he assigned maintenance to his widows and bequeathed his estate to a successor to be appointed out of the senior line of Darshan Singh's descendants (that is to say, to the appellant or one of his sons who are the sole representatives of that senior line), that he signed this Will in the presence of Kaviraj Dwarka Nath Sen and the witness, and that the two latter signed as attesting witnesses. Passing over the minor improbabilities that such a small dependent as Hakim Ismail Khan would have the impertinence to take up a private paper of Sir Pratap Narain Singh and read it in front of him, and that the Maharaja would condone such impertinence, the first fact that gives the lie to this story is that Kaviraj Dwarka Nath Sen did not reach Ajudhia till the 16th October. The gentleman is now dead. The date of his arrival is proved beyond doubt partly by the evidence of his son D. W. No. 77, Kaviraj Jogendra Nath Sen, a respectable Ayurvedic practitioner, who has deposed to the best of his knowledge that his father left Calcutta for Ajudhia about the middle of October, and by the statement of Nirodh Chandra Ghoshal P. W. No. 56 (a witness whose main evidence is absolutely discredited, but whose admission here is important against the appellant) that he was sent to fetch the Kaviraj in October, but mainly by a letter from the Kaviraj (Exhibit A-359) requesting payment of his bill for attendance. The charge which he made was accepted and paid. The daily fee was Rs. 500. The fact that he received fees of this amount completely disposes of the suggestion made by Hakim Ismail Khan that the Kaviraj would have been content to remain in Ajudhia for two months or more before he commenced medical attendance on the Maharaja, doing and receiving nothing.

It is superfluous to consider the other reasons why Hakim Ismail Khan's evidence should be disbelieved, but it is advisable to do so as in appeal great stress has been laid on this man's evidence on behalf of the appellant. Sir Harcourt Butler was examined by commission on interrogatories. He was asked six questions—

"1. Was Your Honour acquainted with the late Maharaja Sir Pratap Narain Singh of Ajudhia?

"2. If so, on what terms were Your Honour and he?

"3. Has Your Honour ever visited him?

"4. If the answer to question 3 is in the affirmative, please state when Your Honour visited him last and kindly state fully all that passed between Your Honour and him at the last interview?

"5. On or about the date of the interview did Your Honour make a memorandum of the same?

"6. If so and if it is in Your Honour's possession, kindly produce it."

He replied to these questions together (o. p. 3352)—"I am the Lieutenant-Governor of Burma. I used to be a member of the United Provinces Civil Service. I was acquainted with the late Maharaja Sir Pratap Narain Singh of Ajudhia. We were on very friendly terms. I visited the Maharaja Saheb on 14th October 1903 for the last time. I understood he died shortly afterwards. On my return to Lucknow the same day I made a record of the interview which I produce. I wish it to be sent. It need not be returned. I found it amongst my private papers."

He put in at the same time the record Exhibit A, which is as follows:—"I visited the Maharaja of Ajudhia to-day. At the end of the interview he informed me that he had made a Will in favour of the second Maharani which was registered with Colonel Currie, and he committed the Maharani to my care. The Maharani was behind the *parda* and I asked no question as to the terms of the Will, whether it gave her power to adopt or not (I mention this as Mr. L. C. Porter, Deputy Commissioner of Fyzabad, on whom I called afterwards, asked me if I knew whether the Maharani had been given power to adopt). The Maharaja laid the Maharani's hand in mine

and I told her that I would be a true friend to her as I was to her husband. The Maharaja was in perfect possession of his faculties and we discussed some public affairs; he said he hoped to be well in December and to take up and push on the High Court question. He could walk and gave me 'pan' and scent and garlanded me before my departure."

The evidence of Sir Harcourt Butler is very valuable. In this Court the learned Counsel for the appellant confined himself to contesting that Exhibit A was inadmissible in evidence. That contention cannot be supported. The witness was asked in effect—Did you have an interview with the late Maharaja and what was the purport of that interview ? He replied that he had had such an interview, that he noted the purport of it at the time in a written memorandum and he produced the memorandum. He could have read out the contents of the memorandum to refresh his memory. This evidence is admissible.

D. W. No. 66 the Raja of Mahmudabad gave the following evidence as to his interview with the Maharaja—that the Maharaja asked other persons who were present to go away and that the witness had some conversation with him in private, when they had gone; the Maharaja told the witness that he did not hope to survive the disease he was suffering from and that he wanted to make a testamentary bequest; the Maharaja then told him that, according to the terms of a draft which he had shown to the Raja at Lucknow about a year or a year and a half before, he had made a Will in favour of Maharani Jagdamba Devi, the first proviso of which was that the Raja of Mahmudabad should always assist the Maharani in every way, the second proviso of which was that the management of the estate should be undertaken by a European manager under the supervision of the Local Government, the control of the Court of Wards being avoided if possible, and the third proviso of which was that the Maharani should not be permitted to adopt a son from the family of Triloki Nath. I have given the purport of this witness's evidence, as the Commissioner's translation of the vernacular is both ungrammatical and inaccurate.

The next witness is D. W. No. 54 Thakur Harihar Bakhsh Singh. His account of his last interview with the Maharaja contains the following statments—"He also stated that in case he died I should respect the junior Maharani as much as I respected him, and that I should help her as he had executed and registered a Will in her favour in which he had given her full powers after him." (o. p. 2807)

I shall revert later to the value of the evidence of the Raja of Mahmudabad as proving revocation, apart from the revocation alleged by Hakim Ismail Khan. At this point it is sufficient to state that Hakim Ismail Khan deposed to the execution of a document in August 1906 by which the bequest to Maharani Jagdamba Devi made in 1891 was cancelled and she was given a bare right of maintenance and that three gentelmen of high position have deposed that they were told independently by the Maharaja on dates subsequent to August 1906 that he had made a Will devising his estate to Maharani Jagdamba Devi. The manner in which Hakim Ismail Khan came to give his evidence was as follows. He said that between 10.30 and 11 A. M. on a day between the 11th and 16th February 1916 he met the appellant in Ajudhia on the road and that he asked the appellant if the Will which he had seen had been registered and acted upon. They had no previous conversation on the point, and according to the witness he put the remark out of mere curiosity. The appellant said that it was not registered but did not give any definite reply. They were both in a hurry, and they passed on. About that hour on the 11th, 12th, 14th, 15th, 16th, 17th, and 18th February the appellant was giving evidence in Fyzabad a few miles away. On the 13th February which was a Sunday, Hakim Ismail Khan on his own showing was at Partabgarh. On the 20th February which was also a Sunday he was on his own showing in Allahabad. He gave his evidence on the 21st of February The appellant, when under cross-examination on the 17th February, was asked what his case was as to the revocation of the Will, and he made no reference to the fact that he proposed to produce Hakim Ismail Khan and made no assertion as to a specific revocation.

I find Hakim Ismail Khan's evidence utterly unreliable. His statement is a shameless fabrication This was the view taken by the learned trial Judge.

The next witness on whom the appellant relies is P. W. No. 56 Nirodh Chandra Ghoshal. This witness is now in the employment of a printing press at Allahabad on a small salary. He says that he was once a wealthy man, but has now admittedly no private means. He has been on his own showing a participant in champertous litigation and has speculated on the result of civil suits. For some years he was in the confidence of Sir Pratap Narain Singh. He was employed by the Ajudhia Estate before the latter's death and assisted in administrative and secretarial work. He was in Ajudhia at the time of the Maharaja's death, and he remained there for some time afterwards in the employment of the Court of Wards. His story is that on the 26th October 1906 he made a draft of a letter for Sir Pratap Narain Singh, that he faired out the draft, and that Sir Pratap Narain Singh signed the fair copy which was then sent to Mr. Hamblin by mounted messenger. He produced what he asserted was the draft which he said he found in October 1915 amongst his private papers. The learned trial Judge refused to admit this draft in evidence, holding that it was a fabrication. It is raised in appeal that this is a genuine draft. I proceed to consider its contents. It was filed as Exhibit 76. It is a pencil draft written on the back of an old used envelope. It is as follows:—

"*26th October* 1906,

"My dear Mr. Hamblin,

"Just a line to repeat, as I told you the other day, that none of my former Wills stands, all three having been cancelled. My last Will I spoke to you about, has now been executed, and I hope to be able to meet you shortly in connection therewith. In case I am unable to stir about, I must, of course, ask you to take the trouble to come over.

"I am much as usual, though my Calcutta physician has great hopes of my ultimate recovery.

"Yours faithfully,
Maharaja.

"R. E. Hamblin, Esq.
"Commissioner,
"Fyzabad."

The object of proving this alleged letter from Sir Pratap Narain Singh was apparently to corroborate the evidence of Hakim Ismail Khan as to the execution of the alleged Will of August 1906. The letter as it stands could not operate as revocation under the provisions of section 57, Act X of 1865, and as the evidence of Hakim Ismail Khan has been rejected on its merits as absolutely false, it is really immaterial to decide whether the alleged draft is genuine or not. But as the appellant's learned Counsel has argued at great length in support of the genuineness of the draft, I shall decide the point.

The circumstances attending the alleged writing, preservation, and production of this draft are sufficient in themselves to justify the finding of the learned trial Judge that the draft has been fabricated for the purposes of this case. The witness is a man possessed of some education. He has considerable knowledge of affairs. He asserted that he was not an ordinary servant of the estate and alleged that he was in the confidence of the Maharaja. If such were the case, he was in a position to realise both before and after the Maharaja's death the consequence of the revocation of the Will of the 17th July 1891. Once the Maharaja was dead the position would have been very clear to the witness. If the cancellation stood alone, the estate passed under the provisions of clause 7, section 22, Act I of 1869, to Maharani Suraj Kumari for life. If the "last Will" to which reference is made in the draft, were a valid and enforceable testamentary disposition, the estate passed under its terms—terms of which the witness was admittedly ignorant. It was his obvious duty in his position to inform the Manager of the Court of Wards, into whose service he passed on the Maharaja's death, of the facts. On his own showing he informed no one and did nothing, and watched silently the succession of Maharani Jagdamba Devi. He has given as the reason of his inaction that grief for the death of the Maharaja drove all recollection from his memory. He supplemented this lame explanation while under re-exmination by an equally lame explanation to the following effect:—

"The Maharaja was very particular that the matter of the revocation of the Will should not leak out and the Commissioner know all about it, and so I did not see

any necessity for disclosing it to anybody. I also did not disclose it after his death, as the Will which he had executed was a waste paper not being signed by Mr. Hamblin, nor even registered." (o. p. 634.)

I next take his explanation as to how he came to discover the draft. The witness stated that his mind remained a blank as to the existence of this letter from November 1903 to September or October 1914, that is to say, for eight years. The appellant called on him in September or October 1914 and asked him whether the Maharaja had ever written to any person in authority about the revocation of his Will. A glimmer of recollection then came to the witness, and he said that there might be such a letter. He commenced looking among his papers a year afterwards in October 1915 and eventually found the draft. When the appellant called on him again in October 1915, he told him the purport of the draft but refused to give it to him. He produced it in Court on the 17th December 1915.

On the above facts I find the witness's story absolutely unworthy of belief; but more has to come. It is the appellant's case that Mr. Hamblin received the letter, as he would ordinarily have received a letter sent by messenger. On the 4th November 1906 Mr. Hamblin wrote to the Maharaja (Exhibit 79) a letter in which he referred to a previous meeting and discussed in detail the conditions precedent to Government action for the relief of the financial condition of the estate. He made no reference to a revocation of a Will nor to the execution of a new Will. On 6th November 1906 the Maharaja wrote to Mr. Hamblin the following short letter (Exhiblit A-351):—

"My dear Mr. Hamblin,

"I am told Government bestows certain special dress as well as distinctive medals on the recipients of the title of Mahamahopadhya.

"I shall be highly obliged if you will kindly make enquiries and obtain the same for me. I should like to have the dress and medals before the Durbar at Agra in January next, if possible.

"Yours sincerely,

"Pratap Narain Singh, Mahamahopadhya,

"Maharaja of Ajudhia."

Mr. Hamblin made the following endorsement on the letter:—

"Ask Government in sequence to the letter about my conferring title.

"R. E H."

"6—11—06".

There is no reference to Mr. Hamblin failing to acknowledge or reply to the letter of the 26th October. The witness alleged that Mr. Hamblin called on the Maharaja on the 6th or 7th November but that the Maharaja was too ill to receive him. On the 8th November Mr. Pert wrote to Mr. Hamblin Exhibit A-358. It is as follows:—

"My dear Hamblin,

"On my return from leave I find that the Maharaja of Ajudhia has been seriously ill and at the present moment is far from well. He is not being attended by Colonel Pratt, so I cannot say definitely what is the matter with him. In the event, however, of a fatal termination to his illness I should be much obliged if you would give me instructions as to what steps, if any, I should take; as far as I know, the Maharaja has left a Will in favour of his young Maharani. She is hardly likely to be capable of managing this large and seriously indebted estate and I think we should be prepared beforehand. I see there has been some talk of a loan of 60 lakhs to the Maharaja, but I have no correspondence left me by Porter beyond his letter of the 15th August forwarding the Maharaja's memorial.

"Yours sincerely,

"F. J. Pert.

"*8th Novermber* 1906".

Mr. Hamblin wrote on the same date Exhibit A-390 to the Secretary of the Board of Revenue. He quoted Mr. Pert's letter and continued:—

"Pert had spoken to me and I had said we should take under the Court of Wards, but later the matter seemed so big that I thought he should write so that I might get the Board's instructions. I also am told the Maharaja has made a Will in favour of the junior Maharani. The difficulty in taking over on his death would be as to whether the estate was not hopelessly involved, but if the Board agrees I could now have inquiries made as to the income and debts from Deputy Commissioner. The necessity

for this may not arise but you know the dilatoriness of men in the Maharaja's position. He has applied to the Government about the rents of his *taluqa* being unduly low, and as to a loan of 60 lakhs being advanced him by Government to pay off his debts and replace them by a loan at a lower rate of interest, he proposed this loan should be a mortgage. The Government refused the former, and as regards the latter said that Court of Wards' management is necessary, this was on the 6th September but the Maharaja has not yet applied. I have seen him and he has told me he wishes to make conditions with Government before he agrees to accept Court of Wards' management. I have said he should let me have the list of his conditions and then I would ask the Board; I have said that when he lets me have the details of his position I will have them tested D. O. by Deputy Commissioner, he does not want the fact of his Court of Wards negotiations till orders can issue. When he lets me have the conditions and his statements of accounts I will forward the former to you and ask D. C. to verify the latter so as to save time.

"His Honour has been told by me of the state of the Maharaja's health.

"Yours sincerely,

"R. E. Hamblin."

From this letter it would appear that Mr. Hamblin had not called on the Maharaja on the 6th or 7th November, though he had seen him on an earlier date as the contents of Exhibit 79 disclose. The Maharaja died next day. On the 10th November 1906 Mr. Hamblin wrote to the Secretary of the Board of Revenue (Exhibit A-391). He there said: "It will be ascertained as soon as possible who is the heir under the Will; it is at present believed the junior Maharani will succeed and that she has been given power to adopt." On the 13th November he wrote to the Secretary again in Exhibit A-392 giving an abstract of the terms of the Will of the 17th July 1891, and on the same date wrote a second letter Exhibit A-393 containing information as to the wishes of Maharani Jagdamba Devi and giving the date of the Will (he made a mistake in the date, for he gives it as the 16th July 1891). On 15th November he wrote to the Secretary of the Board of Revenue (Exhibit A-394), requesting orders as to the future management of the estate on the understanding that Maharani Jagdamba Devi was entitled to possession for life.

These letters show the late Mr. Hamblin to have been a careful and competent officer, whose desire was to have the management of the estate placed on a satisfactory basis and to carry out the wishes of the Maharaja. D. W. No. 31 Mr. Hailey, the Secretary of the Board of Revenue to whom the above letters were addressed, and D. W. No. 60 Mr. Pert have given evidence which shows Mr. Hamblin in the same light. What then was the situation if the witness Nirodh Chandra Ghoshal is believed and the appellant's suggestion be accepted that Mr. Hamblin had received the letter of the 26th October or had been previously informed by the Maharaja of his revocation of his Will? Mr. Hamblin, having reason to believe that the Maharaja had revoked all his Wills and executed a new Will, made no attempt to ascertain the facts in the Maharaja's lifetime and after the Maharaja's death refrained from disclosing his information to his superior officers with the result that the estate passed under the Will of 17th July 1891, which he had reason to believe was revoked, to Maharani Jagdamba Devi. If all Wills stood revoked by a valid testamentary disposition, Mr. Hamblin had to ascertain the terms of that deposition. According to the witness Mr. Hamblin did not do so and concealed his knowledge on the point. If the Wills stood revoked without a valid testamentary disposition, the estate passed to the senior Maharani. On this hypothesis Mr. Hamblin would have been party to a fraud. One of two conclusions must be drawn. If the witness be believed, Mr. Hamblin was guilty of most improper conduct. The other conclusion is that the witness is not telling the truth. The latter conclusion is the conclusion of the learned trial Judge. It is also my conclusion.

I shall here decide an objection of the appellant embodied in the third ground of appeal. The appellant had applied on the 19th and 27th July 1915 in two

applications, Exhibits 74 and 75, direct to the Commissioner of Fyzabad and not through the Court, asking permission to search the Commissioner's office for documents which might be favourable to his case. The Commissioner passed certain orders on those applications. On the 8th December 1915 the appellant applied to the Court for the production of 13 documents from the office of the Commissioner of Fyzabad. The learned trial Judge refused to send for one document. The appellant withdrew his application for the production of another. The Court eventually directed the production of 11 documents. The first two documents summoned were the original applications Exhibits 74 and 75, which the appellant asked should be returned to him with all the proceedings therewith. The fourth document summoned was the original of the alleged letter of the 26th October 1906. The Commissioner sent the first two documents with portions of the margin cut off. He explained that after he had received the documents he had written notes of a confidential character on the margins and that as he refused to let those notes be seen, he had cut the margins off before despatching the documents. He replied that there was no letter despatched by Maharaja Pratap Narain Singh to the Commissioner of Fyzabad declaring his intention to cancel or cancelling the Will of the 17th July 1891. The learned trial Judge was then asked by the appellant to compel the Commissioner to produce the marginal notes which were stated to be confidential. The Judge by an order of the 20th December 1915 refused to take such action. The appellant then attempted in his evidence on the 11th February 1915 to prove what he stated were the marginal endorsements by oral evidence—o. p. 1231. He was not permitted to do this. On the 16th February 1916 (o. pp. 1305 to 1309) the trial Judge was asked to revise his order of the 20th December 1915. He refused to do so.

The position of the appellant on this point is as follows:—He sent two applications to the Commissioner, not through the Court, asking permission to search the Commissioner's office at his will, to see if he could find anything to help his case. The request showed the same assurance which has distinguished the conduct of the case throughout. The Commissioner, instead of replying, as he well might have replied, by a short negative, permitted the appellant to examine three files. On the applications he made certain endorsements which he says were confidential. The appellant has deposed (o. p. 1231) that he read those endorsements. No explanation has been vouchsafed, as to how he obtained possession of them. He clearly could not have done so by legitimate means. While making an intense grievance of the matter, he has refused to file an affidavit as to the purpose for which he requires to prove the endorsements, or as to their contents In this Court, we gave him the opportunity to file such an affidavit. His learned Counsel were equally reticent. One suggested that the endorsements might contain a reference to the alleged letter of the 26th October 1906. Another suggested that they might contain a reference to an alleged file as to an inquiry into the pregnancy of Maharani Jagdamba Devi after the death of Sir Pratap Narain Singh. As the Commissioner had denied that either such a letter or such a file was in his possession these allegations, if they mean anything,—allegations that are unsupported by affidavit or any evidence—were that the Commissioner was not telling the truth. The case is very clear. Certain documents were called from a certain officer. He says that no such documents are in his possession. He is asked to produce certain private notes of his own. He refuses saying that they are confidential. His refusal settles the matter. The provisions of sections 123 and 124, Act I of 1872, are clear—"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

The words in these sections can only be interpreted to show that the officer's refusal to disclose is final. It was not the intention of the Legislature that a Court of Justice (from that of a third class Magistrate upwards, for all would be alike) should be entitled to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature. This proposition has been laid down clearly in *Nagaraja Pillai* v. *Secretary of State* (10) and *Jehangir* v. *Secretary of State* (11).

As a result I find Exhibit 76 to be a fabricated document and the evidence of Nirodh Chandra Ghoshal completely false. This was the view taken by the learned trial Judge.

The next witness on whom the appellant relied is P. W. No. 159 Babu Mohini Mohan Chatterji. In October 1906 he was Assistant Surgeon at the District Hospital, Fyzabad. He deposed that he saw Sir Pratap Narain Singh between the 20th and 27th October 1906. He was not treating him as a physician. His allegation is that he saw him as a friend. This is his deposition on the point:—"The Maharaja was suffering from dropsy and was rather anxious about his health, and asked me to state frankly what I thought about his illness as some of his doctors said one thing and some other. I asked him why he was so anxious about it and tried to comfort him. He said he had some very important business to finish. I said what. He said concerning the Will. I said every one knows that you have made a Will in favour of the junior Maharani. He hesitated and seemed as if he did not like the question. But after a short time he said that she is not worthy of it or does not deserve it. I changed the topic immediately and assured him that he would recover" (o. p. 1540). It is difficult to see why this evidence was introduced. So far from supporting Hakim Ismail Khan it contradicts him. It would show that the Will had not been revoked before the 20th October. The evidence established no revocation in law. The learned trial Judge has dismissed this witness's evidence contemptuously, but not too contemptuously (o. p. 373). I find the witness absolutely unreliable.

The last argument on behalf of the appellant on the point of revocation is that the evidence of the Raja of Mahmudabad established revocation of the Will of 17th July 1891. This gentleman's evidence on the point has already been noted. It does not establish revocation. At the best it would be secondary evidence of the contents of the alleged revoking Will, and it is not shown that secondary evidence is admissible. But taking the matter on a broader reasoning and examining the value of the witness's evidence, it is to this effect. He says that Sir Pratap Narain Singh had told him that he had made a fresh Will. Sir Pratap Narain Singh may have meant no more than that he had prepared a draft which met with his approval. It cannot be taken from this evidence that Sir Pratap Narain Singh said that he had executed a Will which he had signed in the presence of two attesting witnesses as required by law. In any circumstances such evidence would not be sufficient to establish the revocation of the former Will. According to the witness the Maharaja had stated that he had made his fresh Will in favour of Maharani Jagdamba Devi, subject to conditions slightly different from those prevailing in the Will of the 17th July 1891. Their Lordships of the Privy Council laid down in *Sahib Mirza* v. *Umda Khanam* (12): "It is well settled that a Will duly executed is not to be treated as revoked, either wholly or partially, by a Will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later Will contained either words of revocation, or disposition so inconsistent with the dispositions of the earlier Will that the two cannot stand together. It is not enough to show that the Will which is not forthcoming differed from the earlier Will, if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon the person who challenges the Will that is in existence. These propositions have been established in this country, both

(10) 26 Ind. Cas. 723; 39 M. 304.
(11) 6 Eng. L. R. 131 at p. 160.

(12) 19 C. 444; 19 I. A. 83; 6 Sar. P. C. J. 180; Rafique & Jackson's P. C. No. 126; 9 Ind. Dec. (N. s.) 740 (P. C.).

in this tribunal and in the House of Lords.....and as they are founded on reason and good sense they must be regarded as of general application." I, therefore, find that the Will of the 17th July 1891 was duly executed, was not executed under undue influence, and that it was never revoked.

It remains to consider the appellant's last plea on the point of the Will, to the effect that as it stands it is unenforceable or at the best devises nothing more than a life-estate to Maharani Jagdamba Devi and maintenance to Maharani Suraj Kumari and that the succession to the remainder devolves as in intestacy.

The Will (Exhibit A 318) is not a perfectly worded document.

Paragraph 1 revokes all previous Wills.

Paragraph 2 recites the fact that the testator has two married wives, Maharani Jagdamba Devi, being the second married wife. Here the appellant makes his first criticism. His argument is that if he succeeds in showing that Maharani Jagdamba Devi was not the legally married wife of Sir Pratap Narain Singh all bequests to her are void. As I shall subsequently show, the marriage of Maharani Jagdamba Devi is absolutely established, but the point is bad in any circumstances, for on the appellant's own case, if Maharani Jagdamba Devi were not a legally married wife of the testator, the fact was known to the testator, and the bequest was then to her in her individual capacity and not in the capacity of wife under the Mitakshara Law.

The 3rd paragraph laid down that if he had any male issue from his second wife the said issue and their descendants should inherit. The portion of the paragraph relating to subsequent succession is unenforceable.

The 4th paragraph laid down that in case there was no such issue and his second wife bore a daughter, the descendants of the second wife's daughter should succeed one after another. Here again the attempt to lay down a rule as to succession is unenforceable. These facts in no way invalidate the value of the Will, for the contingencies have not arisen.

The 5th paragraph devised, in absence of issue from his second wife or male issue from a daughter of the second wife, a life-estate to Maharani Jagdamba Devi without power of alienation. This devise, as I read it, was not conditional on her good conduct. But the point is unimportant as the accusations of unchastity against her are found by me, as I will subsequently show, to be absolutely unfounded.

The 6th paragraph refers to the contingency of a daughter being born to his second wife.

The 7th paragraph is the important paragraph. It may be rendered into English as follows:—"In event of failure of issue from my second wife and of heirs mentioned in paragraphs 3, 4, 5 and 6, and in event of my not having formally adopted a boy by registered instrument during my lifetime, my second wife is authorised to adopt a boy from my paternal or maternal family. Any such adopted son shall after her death succeed as full proprietor to my moveable and immoveable property in the manner contemplated by clause 8, section 22, Act I of 1869, but shall not be entitled to possession until after my second wife's death. She shall not have power to deliver him possession of the said property during her lifetime." The contents of the remaining paragraphs are immaterial.

Paragraph 7 is undoubtedly badly worded. The contingency of the failure of an heir under paragraph 5 is clearly not contemplated, for it is the heir under paragraph 5 who is to exercise the power of adoption. The reference to clause 8, section 22, Act I of 1869, cannot be read as it stands, for the power to adopt under clause 8, section 22, is given to the elder wife only. It is under clause 9, section 22, that the power to adopt is given to a junior wife. Further the succession of an adopted son under section 22 is intestate succession, whereas the succession of the adopted son here is by testamentary disposition.

A Court should be guided in interpreting a Will by certain well-known rules which were summarized in 1913 by their Lordships of the Privy Council in *Venkata Narasimha Appa Row* v. *Par-*

thasarathy Appa Row (13). "In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i e.*, to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure: 'The Court is entitled to put itself into the testator's armchair.' Among such surrounding 'circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life."

The contention of the appellant resolves itself into this:—He urges that the Will gives Maharani Jagdamba Devi only the power to adopt a boy who would succeed as a son adopted under clause 8, section 22, Act I of 1869, and that in event of such succession not being open to such boy the power of adoption cannot be exercised. He thus derives his conclusion that the Will confers at the best only a life-estate on the junior widow and maintenance to the senior. He argues that authority to adopt under clause 8 cannot be treated as authority to adopt under clause 9. He suggests that under section 15 of Act I of 1869 (which on the argument that he had a vested interest in 1906 is not affected by the Amending Act) succession to an adopted son succeeding under the Will would be as though he had bought the property and that the estate would cease to be impartible and would cease to bear the characteristics of a *taluka*. From this he argues that as it cannot be held to be the intention of the testator to take away the characteristics of impartibility from the estate, adoption cannot be permitted.

The introduction of the figure 8 may be more than a clerical error. It is possible, that the person responsible for the drafting (who on the face of it was not a trained conveyancer) argued that inasmuch as the claims of Maharani Suraj Kumari had been superseded by those of Maharani Jagdamba Devi, the latter would take the position of senior widow, and that the provisions of clause 8 would operate in her favour, should the testator die intestate after giving her authority to adopt. Be that as it may, the Maharaja had the power to give Maharani Jagdamba Devi authority to adopt under the provisions of clause 9 while refusing to give Maharani Suraj Kumari authority to adopt under the provisions of clause 8. That is how I interpret the words of clause 9 after consideration. They justify that conclusion, and any other interpretation would be repugnant, involving, as it would, the deprivation of a Hindu of his right to authorise his junior wife to make an adoption, while refusing such authority to his elder wife. The Maharaja had thus the power to give Maharani Jagdamba Devi such authority. He gave her that authority, but by error (clerical or other) referred to clause 8 instead of clause 9. Can that error invalidate the authority? I do not consider that it can possibly do so. To continue the remarks of their Lordships of the Privy Council in the decision previously quoted—pages 222, 223*

(13) 23 Ind. Cas. 166; 37 M. 199 at p. 221; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328, 41 I. A. 51; 19 C. L. J, 396 (P. C.).

*Pages of 37 M.—*Ed.*

—"That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from."

This conclusion disposes of the last objection. The words authorising Maharani Jagdamba Devi to adopt can be taken out of the Will. So taken out they constitute a power to adopt in event of intestacy. Authority for that proposition will be found in *Indar Kunwar* v. *Jaipal Kunwar* (14) and *Bhaiya Rabidat Singh* v *Indar Kunwar* (15), a sequel to the former case. There the senior Maharani of Sir Digbijai Singh, K. C. I. E., Maharaja of Balrampur, succeeded on his death to a life-estate under the provisions of an unregistered Will. She would have succeeded in event of intestacy under the provisions of clause 7, section 22, Act I of 1869, to a similar life-estate. She made an adoption. At I. L. R. 16 Cal. 562, their Lordships say: "In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far at any rate as regards the Talukdari property, because the adopted son was not a person who could take the Talukdari property under an unregistered Will. It is obvious that this objection assuming it to be well-founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in the manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good, the appellant has to establish the proposition that the adopted son is not within the exception contained in section 13, sub section 1, of the Act, that he is not a person who, under the provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the Talukdari estate or to an interest therein if the Maharaja 'had died intestate'. The appellant endeavoured to support that proposition by arguing that if the Maharaja had left no Will, there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh. But the word 'intestate' in sub-section 1 evidently means intestate as to his estate, that is, his estate, as that expression is defined by the Act, the Taluk or immoveable property to which alone the Act is declared to extend. This is plain on consideration of section 13 taken by itself, but it is made still plainer, if possible, by reference to section 22, which is closely connected with section 13, and which expresses what otherwise would necessarily be implied, and qualifies the word 'intestate' by the addition of the words 'as to his estate.'"

Such being the case, such an adopted son would be a person who would have succeeded according to the provisions of this Act "to the estate..... ...if the..... testator had died without having made the transfer and intestate"—section 14, Act I of 1869. The rule of succession laid down in Act I of 1869 would apply in this case and the property taken by him retains the charactristics of a *taluka*.

The appellant cannot succeed on any view of the case. If the devise to an adopted son is a good devise the adopted son succeeds under that devise. If it is a bad devise the adopted son succeeds under clause 9, section 22, Act I of 1869. Thus effect is given to the desire of Sir Pratap Narain Singh, which is disclosed by the contents of the Will read as a whole, to retain the property as a Taluka in the hands of the adopted son. The whole of the controversy has actually turned on the use of the figure 8 instead of the figure 9 in paragraph 7.

(14) 15 C. 725; 15 I. A. 127; 12 Ind. Jur. 377; 5 Sar. P. C. J. 150; Rafique & Jackson's P. C. No. 102; 7 Ind. Dec. (N. S.) 1067 (P. C.).

(15) 16 C. 556; 16 I. A. 53; 13 Ind. Jur. 98; 5 Sar. P. C. J. 505; Rafique & Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367 (P. C.).

I, therefore, decide that under the terms of the Will, Maharani Jagdamba Devi succeeded to a life-estate with full power to adopt a boy to succeed to the remainder from the paternal or maternal families of her deceased husband.

I now come to the validity of the adoption. The adoption may be viewed in two aspects, either as an adoption under the terms of the Will, or as an adoption under the provisions of clause 9, section 22, Act I of 1869. On my findings it is an adoption under the Will, but I am ready to consider its validity on either hypothesis. I go further and shall consider its validity under the provisions of the Mitakshara Law, although I am of opinion that an adoption under the provisions of clause 9 is merely a selection which need not be according to the conditions and the restrictions found in the Mitakshara Law. This appears a necessary consequence of the fact that Muhammadans and persons of other religions can equally with Hindus adopt legally under the provisions of Act I of 1869. But on my decision it is not necessary to relax any restriction. The conditions imposed by the Mitakshara and those imposed under clause 9 have all been complied with by the act of adoption made.

Dukh Haran Nath Singh son of Adika Nath, a lineal descendant of Incha Ram brother of Darshan Singh, was adopted in February 1909 by Maharani Jagdamba Devi with all the rites prescribed by the Mitakshara Law. The ceremony was formal and public, attended by a large number of people including gentlemen of the highest position. A mass of evidence has been given to prove the above facts. A deed of adoption, Exhibit A-319, was executed on the 12th February 1909 by Maharani Jagdamba Devi. This deed was signed by her in the presence of attesting witnesses and registered on the 12th February 1909.

Neither in the notices nor in the plaint was it suggested that the adoption was had, on an allegation that the deed of adoption was not "executed and attested in a manner required in case of a Will and registered", as stated in clauses 8 and 9, section 22, Act I of 1869, read with section 19 of the same Act. The notices attacked the adoption on certain grounds. The plaint attacked it on those and additional grounds. This particular ground was never mentioned. The point was not taken in argument in the lower Court and is not stated in the grounds of appeal. In this Court, however, the appellant, relying on the words "if made" in paragraph 18 of the plaint, challenged the adoption at the outset, on the ground that there was no evidence that the deed was signed by Maharani Jagdamba Devi in the presence of two attesting witnesses. It is sufficient to refer to the evidence of Indra Dawan Singh (o. p. 2141), one of the attesting witnesses. This is to the effect that Maharani Jagdamba Devi signed the deed in his presence and that afterwards he signed it. There was also other evidence of due execution. I find the evidence of execution reliable and decide that the deed was duly executed.

The second plea taken was that the adoption was invalid having been procured by undue influence. The learned trial Judge has treated this point at o. pp. 459 to 478 of his judgment. I have little to add to his remarks. It appears that Sir John Hewett, who was then Lieutenant-Governor of the Province, addressed Maharani Jagdamba Devi in a letter of the 18th July 1908 (Exhibit 276), in which he pointed out the advisability of her proceeding to make an adoption as provided for in the Will. On the 23rd July 1908 she received a deputation of seven gentlemen amongst whom were some of the leading Talukdars of Oudh. They had been sent to her by Sir John Hewett to advise her to the same effect. On the 7th August 1908 she wrote a letter to Mr. Butler (as he then was)—Exhibit 266. It is clear from this evidence, which is all the evidence upon which the appellant relies to support this plea, that, while she was advised to adopt a boy, no one attempted to compel her to do so, and that no one exercised any improper influence upon her. The choice of the boy to be adopted was left absolutely to her. She adopted the boy whom she wished to adopt. I agree entirely with the conclusion of the learned trial Judge upon the point and find that no undue influence or compulsion was exercised on Maharani Jagdamba Devi in the matter.

The next plea raised is that Maharani Jagdamba Devi was not the legally wedded

wife of Sir Pratap Narain Singh and thus could not make a valid adoption. I propose to consider this plea only on one point. Was she the legally wedded wife of Sir Pratap Narain Singh? In the notices no suggestion was made that the lady was not the legally wedded wife of the Maharaja.

In the plaint, paragraph 8, it was asserted that she was not a married wife and did not belong to the *biradari* of Sir Pratap Narain Singh. But it was not asserted that she was not a Brahmin and it was admitted that she came from Bhagalpur. The denial of marriage was apparently then based upon a suggestion that the ceremony was void, because it was performed while the Maharaja was alleged to have been in mourning. On the 18th August 1915 before settlement of issues Mr. Mitter stated on behalf of the appellant that the caste of Maharani Jagdamba Devi was not known but that she was of some low caste. The issue framed on the point is—"Was defendant No. 1 legally married to and could be and was a wife of Maharaja Sir Pratap Narain Singh?"

In June 1916 at the end of the case the plaintiff examined on commission in Muttra five witnesses, who deposed that Maharani Jagdamba Devi was a Vaishya girl called Jhanjhan, who had been kidnapped from her father's house in Muttra in 1884 or 1885 (Maharani Jagdamba Devi was then 7 or 8 years old) on behalf of Sir Pratap Narain Singh to be entertained by him as a mistress. Such evidence of these witnesses as is relevant is a mass of impudent perjuries. In this Court the appellant has placed no dependence upon the evidence of these witnesses, but he challenged the evidence produced to prove the Maharani's marriage and repeated his plea that she was not the wife of the Maharaja. The learned trial Judge has treated the question at length at o. pp. 207 to 292 of his judgment. It will serve no useful purpose for me to go over the same ground as I agree with his conclusions. It is sufficient to note my findings. They are as follows:—

The evidence to the effect that Maharani Jagdamba Devi was the legitimate daughter of Raghunath Misra, a respectable Brahman gentleman of Bhagalpur whose social standing was at least as high as that of Purandar Ram, father of Darshan Singh, and whose respectability and position were considerably higher than those of the appellant and many of the other living members of Darshan Singh's and Incha Ram's families, and that she was married by the rites of the Mitakshara to Sir Pratap Narain Singh, is reliable. The evidence to the contrary is unreliable. The point that Sir Pratap Narain Singh was under a disability at the time of his marriage owing to impurity due to the death of the widow of Raja Darshan Singh is treated by the learned trial Judge at o. pp. 477 to 480 of the judgment. It has been given up in argument before us. I find that Sir Pratap Narain Singh was under no disability at the time that he contracted his marriage.

I, therefore, find that Maharani Jagdamba Devi was the legally married wife of Sir Pratap Narain Singh and that she was *ahl-i-biradari*.

The 4th plea is that Maharani Jagdamba Devi forfeited all rights owing to her unchastity before and after the death of Sir Pratap Narain Singh. It is only necessary for my purposes to arrive at a finding on the point of unchastity.

With regard to the allegations of unchastity during her husband's lifetime, we have not only the evidence to which I have previously referred of Sir Harcourt Butler, the Raja of Mahmudabad, and Thakur Harihar Bakhsh Singh, but also the evidence of D. W. No. 78, Sir Prodyot Kumar Tagore. This evidence shows that up to the time of his death the late Maharaja Sir Pratap Narain Singh referred to Maharani Jagdamba Devi in the presence of gentlemen of absolute credibility in terms of the sincerest love and trust. In view of this evidence it is astonishing to find that Mr. Mitter persisted in the Court of the trial Judge in arguing strenuously in favour of the credibility of the witnesses who supported the following story. This story was that Maharani Jagdamba Devi, commencing at the age of 12 or 13, carried on during her husband's life with his knowledge a series of adulterous intrigues with seven different men. She is charged with adultery with Adika Nath, Lakhpat Rai, Rai Ragho

Prasad, Mahadeo, Kunj Lal, Narsingh Nath, and Gajadhar Nath. Witnesses were called who deposed that the Maharaja discovering the facts thrashed Adika Nath, Lakhpat Rai, Mahadeo, and Narsingh Nath, and killed Rai Ragho Prasad, thrashing the Maharani on every occasion. Witnesses deposed that the Maharaja was aware of his wife's adultery with the two remaining men. The witnesses who supported these allegations were the scum of the bazar, dismissed servants, or partisans of the appellant. I need not discuss their evidence. The learned trial Judge has discussed it sufficiently at o. pp. 297 to 331 of the judgment. He has not touched therein on the allegations of misconduct with Narsingh Nath and Gajadhar Nath, as I understand, Mr. Mitter withdrew the allegations against these persons during his argument. In this Court the Counsel, being better advised than Mr. Mitter, withdrew all allegations of misconduct in the Maharaja's lifetime. The witnesses who deposed in favour of these allegations are, of course, absolutely unworthy of belief.

The appellant, however, maintained the allegation that Maharani Jagdamba Devi was unchaste with a certain Jagannath Das, otherwise known as Ratnakar, after her husband's death. This man was the Maharaja's private secretary and continued to perform the same duties for the Maharani after her husband's death.

The evidence in support of this charge is that of P. W. No. 13 Ram Harakh, P. W. No. 161 Baijnath Dube, P. W. No. 159 Dr. Mohini Mohan Chatterji, P. W. No. 131 *Musammat* Brijraji, P. W. No. 141 Patandin, P. W. No. 142 Baidia Nath, P. W. No. 134 *Musammat* Bhuri, P. W. No. 24 Nagmani, P. W. No. 113 *Musammat* Mohan Dei, P. W. 144 Kamta Dat, P. W. No. 118 Gudar, P. W. No. 2 Rudra Nath, and P. W. No. 29 Amiruddin.

Ram Harakh, the first of these witnesses, is a member of the family of the Incha Ram branch. He used to be employed in a subordinate capacity in the estate but was dismissed for dishonesty. He has been criminally convicted of cheating, and has been declared insolvent. He produced two documents which he alleged he obtained clandestinely from a servant of the Maharani. These he alleges support the story that he tells, to the effect that Jagannath Das was the Maharani's lover. He says that he surprised them together. The learned trial Judge finds at o. pp. 332 to 341 of the judgment that the witness is not telling the truth. I agree with the learned trial Judge. I find that it is not proved that the documents in question (Exhibits 61 and 62) were written by Maharani Jagdamba Devi.

Baijnath Dube deposed that in 1915 (six years after the adoption) he saw the Maharani and Jagannath Das travelling from Kathgudam to Naini Tal in the same tonga. Even if this were true it would not help to prove unchastity before 1909, and the incident in itself would prove nothing. Indian ladies travel by tonga without loss of self-respect or propriety. The driver must necessarily be in the tonga also. If a male attendant sits with the driver and a *parda* be placed between the driver and the lady with another *parda* over the lady no breach of propriety arises. There is nothing, however, to show that Baijnath Dube can be trusted. The learned trial Judge finds his evidence unreliable on the point—o. pp. 363 to 365 of the judgment. I agree.

I have already noted the value of the evidence of Dr. Mohini Mohan Chatterji in connection with another incident. His evidence on the point under consideration is in my opinion absolutely false. He deposed that he attended the lady medically in the rains of 1907 and that he remained on one side of the *parda* while she remained on the other. He deposed that Jagannath Das went behind the *parda* with the Maharani and that he heard them laughing and talking in a familiar and improper manner. The witness showed his bias by a suggestion (most improper in a medical man) as to the cause of an alleged illness of Maharani Jagdamba Devi. I consider him quite unworthy of credit.

I have nothing to add to the remarks of the learned trial Judge on the evidence of *Musammat* Brijraji, Patandin, Baidia Nath, *Musammat* Bhuri, Nagmani, *Musammat* Mohan Dei, Kamta Dat, and Gudar, at o. pp. 341 to 362 of the judgment. The above witnesses are so palpably false that further comment is unnecessary. P. W. Rudra Nath is a member of the

Raghubir Dayal branch. He deposed that Maharani Jagdamba Devi had been put out of caste. This statement is disproved by a mass of other evidence and is absolutely untrue. P. W. No. 29 Amiruddin is a retired Sub Inspector. He deposed that a certain Preonath, now Police Inspector, was ordered to make an inquiry into the chastity of Maharani Jagdamba Devi. If this were true the fact would prove nothing. Inspector Preonath, D. W. No. 6, has, however, denied that he was ever ordered to make such inquiry. I believe Inspector Preonath and disbelieve Amiruddin on the point.

The appellant further laid stress on immaterial facts such as removal of certain old servants on the death of Pratap Narain Singh and their re-placement by others, which he contended showed an immoral disposition on the part of Maharani Jagdamba Devi.

This closes the evidence on the point. Only one conclusion is possible upon it, and that is the conclusion at which the learned trial Judge arrived, to the effect that the charge of unchastitly against Maharani Jagdamba Devi after her husband's death is not established. I agree with that conclusion. I consider it necessary to add some comments on the manner in which Maharani Jagdamba Devi has been treated in this case. Upon the evidence the only findings at which a Court can arrive are that Maharani Jagdamaba Devi is a Brahman lady of good family who was married to a nobleman of Oudh and lived with him honourably as his wife for some seventeen years. After his death she has conducted her life and her affairs with all regularity and decorum. It is a scandal that she should have been exposed to the wanton and unfounded charges which have been levelled against her in this case. She has been stigmatised as a kept woman and accused of shameless depravity both before and after Sir Pratap Narain Singh's death, and these charges have been based on palpably fabricated evidence.

The appellant set up the plea that Dukh Haran Nath Singh was purchased from his natural father Adika Nath. He argued that the adoption was invalid for this reason. Apart from the fact that there is no authority in Hindu Law for the proposition that an adoption is vitiated by the payment of a price for an adopted son, there is no evidence that a price was paid. The decision in *Eshan Kishore Acharjea Chowdhry* v. *Hurish Chunder Chowdhry* (16) is relied on by the appellant, as showing that the adoption of a son after payment of price is not recognized in the present day. An opinion to that effect was given by the Judges who decided that case. But the point was only incidentally before them and the opinion was based on no authority. The view of the law which I accept is stated in a comparatively recent decision of the Madras High Court in *Murugappa Chetti* v. *Nagappa Chetti* (17). It is as follows: —"The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment." Thus even if the appellant had proved that a price had been paid he would not have succeeded on the point. He has, however, completely failed to prove the allegation. It is in evidence that when the ceremony of adoption was performed, clothes and jewels were purchased by the estate for presentation not only to Adika Nath but also to other members of the family, and that the unexpended balance of the grant devoted to this purpose was subsequently presented to Adika Nath. But this evidence does not show that Adika Nath sold his son or accepted a price in consideration of giving his son in adoption. My finding is, therefore, that Dukh Haran Nath Singh was not purchased from his natural father.

The next plea was that Adika Nath was out of caste at the time of the adoption, that this fact placed Dukh Haran Nath Singh out of caste, and that the adoption was invalid. The learned trial Judge has discussed the evidence and stated his finding on this point at o. pp. 299 to 312 of the judgment. I agree with his view of the evidence and findings, and decide

(16) 21 W. R. 381; 13 B. L. R. Ap. 42.
(17) 29 M. 161; 16 M. L. J. 22.

that Adika Nath was never put out of caste.

The next plea was that the adoption could not be legal, because under the Mitakshara Law the male for whom the son was adopted (here Sir Pratap Narain Singh) must have been in a legal position to have married the natural mother of the adopted boy. On the view of the evidence which I take, Adika Nath the natural father of the adopted boy belonged to the Girg *gotra*. *Musammat* Chandra Kali, the boy's natural mother, originally belonged to the Mabris *gotra* and passed into the Girg *gotra* on her marriage, and Sir Pratap Narain Singh belonged to the Bharadwaj *gotra*. But there would have been nothing in the point, even had Sir Pratap Narain Singh and *Musammat* Chandra Kali belonged to the same *gotra* as a marriage in the same *gotra* is not illegal amongst Sakaldipi Brahmans. I decide against this plea.

The plea that the legal forms of adoption not having been followed the adoption was necessarily invalid, was abandoned in this Court. On the evidence the legal forms of adoption were clearly followed.

As I have decided on the question of the interpretation of the Will, Maharani Jagdamba Devi had legal authority under the terms of the Will to perform the adoption which she actually performed.

The suggestion that Maharani Suraj Kumari had forfeited her rights under the Will or intestate succession owing to misconduct was abandoned in this Court. The evidence to the effect that the unfortunate estrangement between this lady and her husband was due to her misconduct is discussed at o. pp. 493 to 495 of the judgment. I agree with the conclusions of the learned trial Judge on the point. Maharani Suraj Kumari was married nearly fifty years ago and is now an old lady. She and Maharani Jagdamba Devi are entitled to the fullest sympathy as the victims of unprovoked and absolutely unfounded charges.

The question of limitation can hardly arise on the previous findings. The learned Judge's decision on the point is correct.

There remains the question of costs. Separate Counsel appeared for Maharani Suraj Kumari, Maharani Jagdamba Devi and for the adopted boy, who was represented by the Deputy Commissioner of Fyzabad. The learned trial Judge allowed costs in respect of Counsel's fees to each separately. This was quite correct on principle, as each had a separate interest in the proceedings But the learned trial Judge overlooked the provisions of paragraph 272 of the Oudh Civil Digest. Under the provisions of this paragraph no fee to any legal practitioner not appearing for the Crown or Government or the Court of Wards or a local authority as a party shall be allowed on taxation between party and party or shall be included in any decree or order except in the case of an order under paragraph 66, unless in suits and other original proceedings before the commencement of the arguments.....there shall have been filed in Court a certificate signed by the legal practitioner certifying the amount of the fee or fees actually paid to him for his own exclusive use and benefit by or on behalf of his client. Neither the Counsel for Maharani Suraj Kumari nor Maharani Jagdamba Devi filed certificates until after arguments in the lower Court had commenced. These parties were appearing as independent parties. The minor was represented by the Court of Wards. The rule is in my opinion needlessly inelastic, but it must be applied as it stands. As, however, the appellant omitted to make Maharani Suraj Kumari a respondent in this suit, this technical plea against her fails on a technical ground. The order as to costs must, however, be modified by deleting the amount of Rs. 3,000 payable by the appellant in respect of the Counsel's fee of Maharani Suraj Kumari.

I wish to put on record my appreciation of the care and ability which distinguished the work of the learned trial Judge throughout these lengthy proceedings. Most of the evidence adduced by the appellant was false. Much was irrelevant. The conduct of the plaintiff's case in the lower Court was not to the credit of those responsible for it, and the patience of the learned Judge was tried to the utmost. He has in addition written an excellent and well reasoned judgment. It has been suggested in appeal that the criticisms which he has made on some of the witnesses are unnecessarily severe. This

suggestion is not established. The learned trial Judge has on the contrary been moderate in his strictures.

I now decide formally on the grounds of appeal.

1. The first ground is general. The appeal fails as a whole.

2. The second ground is partly general. No argument was directed in this Court to admission of inadmissible evidence on the side of the defendants. In so far as the argument was directed in this Court to refusal to admit evidence on the side of the plaintiff decision will be found on other grounds.

3. The learned trial Judge rightly refused to issue process for the production of the marginal notes on Exhibits 74 and 75, and to allow secondary evidence as to their contents

4. The learned trial Judge rightly decided the question of limitation.

5. The plaintiff is the nearest male agnate to the late Sir Man Singh. But the point is immaterial.

6. Sir Pratap Narain Singh was not the *putrika putra* of Sir Man Singh.

7. The practice of appointing a daughter's son to bear a son to a Hindu is permitted by the Mitakshara and is enforceable.

8. The evidence contained in the previous litigations concerning the Raj and in the admissions, statements, and conduct of Sir Pratap Narain Singh and his parents has been correctly appreciated by the learned trial Judge.

9. The evidence as to the statement of Narsingh Narain Singh before Mr. Harrington has now been admitted.

10. Sir Pratap Narain Singh remained in the Bharadwaj *gotra* all his life.

11. The terms of the Will of Sir Man Singh have been considered by the learned trial Judge.

12. The treatment of Pratap Narain Singh by Sir Man Singh does not establish that the former was a *putrika-putra* of the latter.

13. The ground is irrelevant and was not pressed in argument. The property was acquired by Bakhtawar Singh who devised it to Man Singh. There was no joint acquisition.

14. The learned trial Judge did not arrive at an incorrect decision on the inferences to be deduced from the use of the word "sister" in the plaint in question.

15. The plea is immaterial. The question has been decided by me irrespective of the evidence afforded by the defendants' documents in question.

16. The explanation given by the appellant on this point is false.

17. The evidence as to the performance of the ceremony of *putri-karan* is false. The evidence taken as a whole does not establish that any such ceremony was performed.

18. Due weight has been attached to the conduct of members of Sir Man Singh's family and other persons and to their treatment of Sir Pratap Narain Singh.

19. I have decided this point against the appellant.

20. This plea is now immaterial. My decision has proceeded on this point.

21. The defendants are not estopped from pleading that Sir Pratap Narain Singh belonged to the Bharadwaj *gotra*.

22. The evidence establishes that Maharani Jagdamba Devi was the legally married *ahl-i biradari* wife of Sir Pratap Narain Singh. The point as to invalidity owing to the alleged impurity of Pratap Narain Singh at the time of marriage was dropped in argument.

23. The *gotra* of Sir Pratap Narain Singh has been decided by the learned trial Judge and by me.

24. The appellant has not proved any act of unchastity on the part of Maharani Suraj Kumari or Maharani Jagdamba Devi. Exhibits 61 and 62 are not proved to have been written by Maharani Jagdamba Devi and are on the faces of them forgeries.

25. This plea was not argued. The evidence in question was admissible.

26. Ram Harakh and Dr. Mohini Mohan Chatterji are unreliable witnesses.

27. It is not proved that the Will of the 17th July 1891 was revoked.

28. It is not proved that a Will was executed on the 14th July 1891. It is not proved that the execution of the Will of the 17th July 1891 was obtained by undue influence.

29. The adoption of Dukh Haran Nath Singh is valid in law.

30. This plea was abandoned before this Cour

31. As it is not proved that Maharani Jagdamba Devi was unchaste, the plea is bad.

32. It is not proved that Dukh Haran Nath Singh was purchased from Adika Nath. The plea is bad in any case.

33. As neither Maharani Jagdamba Devi nor Dukh Haran Nath Singh were out of caste, the plea is bad.

34. This plea has been decided under grounds Nos 27 and 28.

35. I decide against the appellant on this point.

36. The adoption of Dukh Haran Nath Singh was not caused by undue influence exercised on Maharani Jagdamba Devi.

37. I decide against the appellant on this point.

38 and 39. The points are immaterial on my finding that the appellant had no title to sue.

40. The statement in question is proved. My decision has not proceeded on it.

41. The general conclusions of the learned trial Judge as to the falsity of the evidence and the fabrication of documents are correct.

42. This point was abandoned in argument.

43. The amount of costs must be reduced by Rs. 3,300, the amount awarded as Counsel's fee to Maharani Suraj Kumari.

I have discussed the pleas raised in grounds Nos. 3, 4, 6, 8, 10, 11, 12, 14, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 38, 39, and 43, at length in the body of my judgment.

I would, therefore, dismiss this appeal and direct that the appellant pay his own costs of the appeal and those of the respondents. I uphold the decision of the learned trial Judge on all points in issue, but direct that the order for costs be modified by reduction of Rs. 3,000, the amount awarded as Counsel's fee to Maharani Suraj Kumari.

KANHAIYA LAL, A. J. C.—The dispute in this case relates to what is known as the Ajudhia estate, belonging to the late Maharaja Sir Pratap Narain Singh. The estate was founded by Raja Bakhtawar Singh and was bequeathed by him to his nephew and adopted son Maharaja Man Singh. Maharaja Man Singh was also given certain villages by the British Government for services rendered by him during the Mutiny of 1857. In 1859 a *sanad* in the ordinary form was granted to him in respect of Mahdauna, Bahrauli, Ahiar and Tulshipur properties, and later on a primogeniture *sanad* was granted to him in respect of the Bishambharpur property, now forming part of the Ajudhia estate. His name was entered at No. 219 in List I, No. 54 in List II and No. 36 in List V, appended to Act I of 1869. Maharaja Man Singh died on the 11th October 1870, leaving a widow, Maharani Subhao Kuar, a daughter by a predeceased wife *Musammat* Brijraj Kuar, better known as Bachchi Sahiba, and a grandson by that daughter named Maharaja Pratap Narain Singh *alias* Dadua Sahib. After the death of Maharaja Man Singh, Maharani Subhao Kuar nominated Triloki Nath, a nephew of the Maharaja, as his successor to the estate after her death. Maharaja Pratap Narain Singh contested the right of Maharani Subhao Kuar and her nominee to succeed to the estate, on the ground that he was adopted by Maharaja Man Singh and was brought up and treated in all respects as a son within the meaning of section 22, clause 4, of Act I of 1869. The plea as to adoption was subsequently given up, and he eventually succeeded in establishing his title to the estate under section 22, clause 4 of Act I of 1869, and got a decree from the Privy Council on the 19th July 1877.

Maharaja Sir Pratap Narain Singh died on the 9th November 1906 without issue. He left, according to the defendants, two widows Maharani Suraj Kumari, known as the senior Maharani, and Maharani Jagdamba Devi, known as the junior Maharani. The marriage of the latter with the Maharaja is denied by the plaintiff. On the 17th July 1891 he had executed and registered a Will, by which he had disinherited the senior Maharani, giving her only a maintenance allowance of Rs. 600 per mensem, and bequeathed a life-interest in his estate to the junior Maharani, giving her also a power to adopt a boy from his paternal or maternal family. The Will further provided that the boy, so adopted by her, was to be the successor and absolute owner of the estate after her death, as

contemplated by clause 8 of section 22 of Act I of 1869. On the 12th February 1909 Raja Jagdambika Pratap Narain Singh was, it is stated, adopted by the junior Maharani.

The plaintiff asserts that the Will of the 17th July 1891 was revoked by Maharaja Sir Pratap Narain Singh in his lifetime and that in consequence of that revocation and for other reasons the said adoption, if made, was invalid. He further asserts that both the senior and junior Maharanis forefeited any rights they had in the estate by unchastity, existing from the lifetime of the Maharaja, and that on his death the estate devolved, according to the family custom of primogeniture as also according to the *sanad* and law, on his father Lal Kashi Nath Singh, who represented the senior line among the agnates of Maharaja Man Singh. Lal Kashi Nath Singh died before the institution of the suit, leaving the plaintiff his sole heir. The ground on which he seeks to divert the estate from the real or natural agnates of Maharaja Sir Pratap Narain Singh is that the Maharaja was the *putrika-putra* of Maharaja Man Singh and was brought up in all respects as his own son.

The defendants denied the allegations of unchastity made in the plaint and the right of the plaintiff to claim the estate. They controverted the suggestion that Maharaja Sir Pratap Narain Singh had revoked his Will of the 17th July 1891 or that he was the *putrika putra* of Maharaja Man Singh, and asserted that the junior Maharani was the lawfully married wife of Maharaja Sir Pratap Narain Singh and that the adoption made by her was in every respect valid in law.

The learned Additional Judge found on almost every point against the plaintiff. He held that Maharaja Sir Pratap Narain Singh was not the *putrika-putra* of Maharaja Man Singh, that the plaintiff had no right of suit, that the junior Maharani was lawfully married to the Maharaja and that the Will executed by the Maharaja in her favour was never revoked. He repelled the various contentions urged against the validity of the adoption.

The first question raised for consideration in this appeal is, whether Maharaja Sir Pratap Narain Singh was the *putrika-putra* of Maharaja Man Singh and if not, whether the plaintiff has otherwise any right to sue. According to the Hindu Law a son affiliated in the *putrika-putra* form is a valid substitute for a son. This may be done by the special appointment of a daughter to be a son, as if she were a son, or by a special arrangement by the father of the girl with her prospective husband that the son who may be born of her shall be his son. Manu says (IX, 127) that he who has no son may make his daughter an appointed daughter by saying "the son born of her shall perform my funeral rites." The son of an appointed daughter, according to him (Manu, IX, 133), takes the whole estate of his maternal grandfather, as if he were his son's son, for "between a son's son and the son of an (appointed) daughter there is no difference either with respect to worldly matters or sacred duties; inasmuch as their father and mother (respectively) sprang from the body of the same (man)." Vashishtha says (XVII, 16, 17): "It is declared in the Veda, 'A maiden who has no brothers comes back to the male ancestors (of her own family); returning, she becomes their son;' with reference to this the verse is, 'I shall give thee a brotherless damsel decked with ornaments; the son whom she may bear shall be my son.'" Baudhayana (II, 2, 3, 15) similarly says: "(The male child) born of a daughter after an agreement had been made is a *putrika putra*; otherwise he is a daughter's son." Gautama (XXVIII, 18) also declares: "A father who has no (male) issue may appoint his daughter, presenting burnt offerings to fire and the lord of creatures, and addressing (the bridegroom): 'For me be (thy male) offspring.'" He then proceeds to say (XXVIII, 19): "Some declare that a daughter becomes an appointed daughter solely by the intention (of the father)." Both Vrihaspati (XXV, 38) and Vishnu (XV, 6) seem to consider that a daughter can be appointed to bear a son to her father even otherwise than by an express declaration. Yagnyavalkya (II, 128) declares the son of a *putrika-putra* (appointed daughter) to be equal to a son, and commenting on that text, the author of the Mitakshara

observes: "The son of an appointed daughter (*putrika putra*) is equal to him; that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly he is equal to the legitimate son; as described by Vasishtha; 'This damsel, who has no brother, I will give unto thee, decked with ornaments; the son who may be born of her shall be my son.' Or that term may signify a daughter becoming by special appointment a son. Still she is only similar to a legitimate son; for she derives more from the mother than from the father.. Accordingly she is mentioned by Vasishtha as a son, but as third in rank: 'The appointed daughter is considered to be the third description of sons.' "—(Mitakshara, Chapter I, section XI, Para. 3). Hemadri enlarges on the same subject, his views as summarized by Colebrooke being: "The *putrika putra* is of four descriptions. The first is the daughter appointed to be a son. She is so by a stipulation to that effect. The next is her son. He obtains of course the name of 'son of an appointed daughter,' without any compact. This distinction, however, occurs: he is not in place of a son, but in place of a son's son, and is a daughter's son. Accordingly he is described as a daughter's son in the text of Sankha and Likhita: 'An appointed daughter is like unto a son; as Prachetasa has declared: her offspring is termed son of an appointed daughter: he offers funeral oblations to the maternal grandfathers and to the paternal grandsires. There is no difference between a son's son and a daughter's son, in respect of benefits conferred?' The third description of son of an appointed daughter is the child born of a daughter, who was given in marriage with an express stipulation in this form: 'The child, who shall be born of her, shall be mine for the purpose of performing my obsequies.' He appertains to his maternal grandfather as an adopted son. The fourth is a child born of a daughter who was given in marriage with a stipulation in this form: 'The child, who shall be born of her, shall perform the obsequies of both.' He belongs, as a son, both to his natural grandfather and to his maternal grandfather. But, in the case where she was in thought selected for an appointed daughter, she is so without a compact, and merely by an act of the mind." (Ghose's Hindu Law, Volume II, page 131.) "The appointment of a daughter," observe West and Buhler, "appears to have been conceived in two ways. According to the one, the appointed daughter herself took the place of a son, and then her son naturally succeeded her by representation. She was given for inheritance the place of a male, a place as a source of further succession, such as the Vyavahara Mayukha assigns her in the devolution of property not included amongst the special varieties of Stridhana. According to the other conception she was merely the instrument by which an heir to her father could be produced in the person of her son." (West and Buhler's Hindu Law, 3rd Edition, Volume II, page 888.)

It is not alleged or shown in this case that *Musammat* Brijraj Kuar was appointed to be a son, so that she might be treated as a son and her son treated as a son's son within the meaning of the first two descriptions. What is asserted is, that there was an express stipulation at the time of her marriage with Narsingh Narain Singh that a son born of her shall belong to her father, as if he were his own son. The evidence on this point consists of the statements of a few witnesses who profess to have been present at the time of the marriage of *Musammat* Brijraj Kuar with Narsingh Narain Singh or at the time when the marriage was negotiated by Maharaja Man Singh with Narsingh Narain Singh and his father. The learned Additional Judge has disbelieved the evidence adduced on the point and has given satisfactory reasons for discrediting it. Genesh (P. W. No. 11), the first witness on this point, describes himself as 87 years old and asserts that he and his father were in the service of Maharaja Man Singh, who deputed his father and two others to search a good bridegroom for *Musammat* Brijraj Kuar who might be willing to stay at the house of the Maharaja after his marriage and to agree that the first son born of such marriage would be the son of the Maharaja. He goes on to say that his father and the other two persons brought Narsingh Narain Singh and his father and the latter accepted the terms of the Maharaja in his presence

According to his own statement he entered the service of Maharaja Man Singh at the age of 12 or 13 years after the death of his uncle Beni Singh, which occurred 60 years ago. If that statement be accepted, his age at the time of the marriage of *Musammat* Brijraj Kuar which took place in 1851 could not be more than 7 or 8 years. He asserts that Raja Bakhtawar Singh was dead when the marriage of *Musammat* Brijraj Kuar was settled, but he is contradicted on that point by Bandhan (P. W. No. 77), another witness of the plaintiff. He was dismissed by the Court of Wards a month or two after the death of Maharaja Man Singh, and both from his position as the Jamadar of the door-keepers and his age at the time of the marriage of *Musammat* Brijraj Kuar, the story of his having been present at the time of the alleged conversation or of his having remembered it is extremely improbable.

Bindeshari (P. W. No. 88) states that he was present at the time of the marriage of *Musammat* Brijraj Kuar and that Maharaja Man Singh had made an understanding with Narsingh Narain Singh and his father that the first born son of the lady would be the son of the Maharaja. He has made misstatements, however, about various contemporary events. He says that the mother of *Musammat* Brijraj Kuar was alive at the time of her marriage, though it is an admitted fact that she had died in 1844. He asserts that his uncle, Rameshurdat, was the priest of Maharaja Man Singh and had officiated at the marriage, but he admits that Rameshurdat died 18 or 19 years ago and was 30, 35 or 40 years old at the time of his death, showing thereby that he could not have been alive in 1851.

It is admitted by the witness for the plaintiff that a daughter was born to Maharaja Man Singh in the very year in which *Musammat* Brijraj Kuar was married. His wife Maharani Subhao Kuar was then 19 years old and the age of Maharaja Man Singh was 31 years. It is hardly likely that at that age either Maharaja Man Singh or his wife could have so much despaired of having a male issue as to enter into a special arrangement with Narsingh Narain Singh and his father at the time of the marriage of *Musammat* Brijraj Kuar to take her first born son from them. The explanation given by Bandhan, P. W. No. 77, for that arrangement is that after the death of the daughter born of Maharani Subhao Kuar, Maharaja Man Singh told his uncle Bakhtawar Singh that he had expected a son to continue his line but was disappointed. He asked him as to the course he should adopt, and it is suggested that Raja Bakhtawar Singh sent for the horoscope of Maharaja Man Singh and consulted several astrologers, who declared that Maharaja Man Singh would have no son, that Maharaja Man Singh then asked his permission to celebrate the marriage of *Musammat* Brijraj Kuar and to take the son born of her as his son and that Raja Bakhtawar Singh consented to the arrangement. Bandhan is the only witness who has been produced to support this story. He is a professional beggar, addicted to *ganja* and *bhang* and other intoxicating drugs, and his statement is not entitled to any weight.

Brij Lal (P. W. No. 95) has come forward to state that he was present at the marriage of *Musammat* Brijraj Kaur, and that at the time of *panigrahan* or the gift of the daughter the *sankalp* was made in the *putrika-putra* form. He, however, admits that he was not at the place where the marriage ceremony was celebrated, and that the *bedi* or the sacred fire, before which Hindu marriages are consecrated, was inside the *parda*, while he was outside it. His statement that he was 32 or 33 years old when the marriage took place is contradicted by his subsequent assertion that he was 20 or 25 years old at the time of the marriage of Dadua Saheb, which took place in 1868. The manner in which he came forward to give evidence is also significant, for he states that about a month prior to his giving evidence, the plaintiff had met him and told him he should come when he was called, though he professes to have had no conversation with the plaintiff as to what he knew.

Mahipat Singh (P. W. No. 98) similarly states that he was present at the time of the marriage of *Musammat* Brijraj Kuar and that he learnt from the priests officiating at the ceremony that Maharaja Man Singh had made a *sankalp* at the time of the marriage that the son born of her would be his son and would come into his *got*

One of the three priests, from whom he heard, is stated to have died, but it does not appear whether the other two are dead or alive. There was no occasion for the priests to have given the above information to Mahipat Singh who was then a sepoy in the service of Maharaja Man Singh, aged 18 years. He mentions a conversation between Lachhman Pandit and Bhawani Singh, but Lachhman Pandit is not described by Brij Lal (P. W. No. 95) as one of the priests who officiated at the marriage of *Musammat* Brijraj Kuar.

The other evidence adduced in the case consists of the statements, said to have been made to the witnesses either by Maharaja Man Singh or his officials or by their relations, who are described as dead. The learned Additional Judge has discussed their evidence in detail and without repeating what he has said, it might safely be asserted that much of it is concocted and such of it as relates to the statements alleged to have been made by persons deceased is not entitled to any weight.

On behalf of the plaintiff reliance is next placed on the plaint in the previous suit (Exhibit 1) filed by Maharaja Sir Pratap Narain Singh, in which *Musammat* Brijraj Kuar, acting as the guardian of the Maharaja, had described herself as the sister of the Maharaja instead of his mother. In the instructions given by Narsingh Narain Singh to Mr. Harrington, the officer in charge of the Court of Wards (Exhibit 19), it was mentioned by the former that Maharaja Sir Pratap Narain Singh was the *putrika-putra* of Maharaja Man Singh, but that statement was made after a contest had arisen in regard to the estate of Maharaja Man Singh and, even if admitted in evidence, is not entitled to any greater weight than as a statement of an interested party. The statement made by Maharaja Sir Pratap Narain Singh in one of the previous suits on the 5th January 1881 (Exhibit 34) is open to a similar objection. In that statement he asserted that he belonged to the Girg *gotra* at the time of his marriage and that he was married as the son of Maharaja Man Singh, but he admitted that he was not in a position to know whether he was his adopted son or only his daughter's son. In the first suit brought on the 21st November 1872, the estate was claimed by Maharaja Sir Pratap Narain Singh against Maharani Subhao Kuar and her nominee, Triloki Nath Singh, who were in possession. In the second suit which was filed on the 3rd June 1879, the estate was claimed by Triloki Nath Singh under the Will of Maharaja Man Singh and was a nominee of his widow. In the third suit which was filed on the 15th August 1882 a similar title was set up. The estate has thus been under litigation since 1872, and any statements made during the pendency of those suits or in connection with them or by way of a preparation for launching them cannot, therefore, be considered to be of any value.

It is next contended on behalf of the plaintiff that even if there was no evidence to prove a marriage in the *putrika-putra* form, a presumption should be made in favour of such a marriage from the conduct of Maharaja Man Singh and that of Maharaja Sir Pratap Narain Singh and the treatment meted out by the former to the latter. There is a considerable amount of evidence showing that *Musammat* Brijraj Kuar and Maharaja Sir Pratap Narain Singh lived with Maharaja Man Singh, that Maharaja Sir Pratap Narain Singh was born in his house and was brought up by him from his infancy and that the ceremony of investing him with the sacred cord and his marriage were performed by Maharaja Man Singh, as if he had been his own son. There is also considerable evidence to show that Maharaja Sir Paratap Narain Singh treated himself as belonging to the Girg *gotra*, that is, to the *gotra* of Maharaja Man Singh, that he worshipped the family gods of the Maharaja and observed mourning and impurity on the occasion of the death of the Maharaja's paternal kinsmen and acted and behaved throughout as if he was the son of Maharaja Man Singh. Maharaja Man Singh in turn treated him as such and got clause 4 inserted in section 22 of Act I of 1879 when it was on the legislative anvil, giving to the son of a daughter "treated in all respects as a son" a statutory position much higher than that of an ordinary son of a daughter.

In *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (1) their Lordships of the Privy Council said: "So matters stood when the Maharaja, as one of the

leading members of the British Indian Association of Talukdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868. Imtiaz Ali, the Vakil concerned in the drafting and preparation of this Act on the part of the Talukdars, has sworn that clause 4 of the 22nd section originated with the Maharaja; that it was opposed by some of the Talukdars, but finally appoved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the Maharaja that his object in pressing this clause was to provide for the Dadwa Sahib." They then went on to refer to the contradictory evidence adduced on the point on behalf of the other defendants and observed: "The scale, however, is conclusively turned in favour of the testimony of Imtiaz Ali on this point by the evidence of Mr. Carnegy. Mr. Carnegy, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharaja in January 1870, and that in the course of that conversation the Maharaja did make a statement to the effect that he had had a clause inserted in Act I of 1869 to suit the identical case of the Dadwa. That statement is very material, inasmuch as it shows that the Maharaja considered that he had treated his grandson in all respects as a son. The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge, says:—'It is not saying too much, the Court believes, to say that if the plaintiff had not existed, the clause as it stands would never have been enacted.' Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion. It appears, then, to their Lordships that, however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharaja had that intention as early as the date of the Dadwa Sahib's marriage; that, with that intention, he continually treated his grandson in fact as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by Will, he caused the clause in question to be inserted in the Statute."

The question then arises whether from the state of his mind, as indicated by his conduct, and the subsequent treatment, accorded by him, an inference can be drawn that he intended that the son of *Musammat* Brijraj Kuar was to be his *putrika putra* in case no male issue was to be born to him by his wedded wife. There are indications, afforded by the Vedas, that in the earliest times a *putrika-putra* was constituted by the daughter being merely accorded the position of a son in the family, for a "brotherless female" was described as coming back to her father's family (Ghose's Hindu Law, 3rd Edition, Volume I, pages 105 and 107). Manu says: "Through that son whom (a daughter), either not appointed or appointed, may bear to (a husband) of equal (caste), his maternal grandfather (has) a son's son; he shall present the funeral cake and take the estate." (Sacred Books of the East, Volume 25, page 354.) Gautama similarly says: "Some declare that (a daughter becomes) an appointed daughter solely by the intention (of the father)." (*Ibid.*, Volume II, page 301.) So also Vishnu: "A damsel who has no brother is also (in every case considered) an appointed daughter, though she has not been given away according to the rule of an appointed daughter." (*Ibid.*, Volume VII, page 62.) Other writers, however, took up a more stringent position as to the method in which a *putrika-putra* was to be constituted. Vrihaspati gives currency to both the views prevalent in his time and says: "Gautama has declared that a daughter is appointed after performing a sacrifice to Agni and Prajapati, others have said that she is an appointed daughter (*putrika*) who was merely supposed to be one by a man having no male issue." (*Ibid.*, Volume XXXIII, page 376). The author of the Viramitrodaya observes: "That a son born of a daughter who is given in marriage without such express declaration may be the *putrika-putra* is determined in the following passage of the Mitakshara in the book of Schara:—The epithet 'having brother' has been used to prevent the apprehension of the bride's appointment; by this it appears that a daugh-

ter may be appointed, though not declared to be so." (Sarkar's Viramitrodaya, page 103.) A mental declartion has thus been accepted by many writers as one of the recognised methods of appointing a daughter and of constituting her son a *putrika putra*. The ease with which a son could be obtained by adoption has had the effect in course of time of rendering affiliation in the form of *putrika putra* more or less uncommon, but it has by no means become obsolete, for the Mitakshara gives the *putrika-putra* the second or predominant position after the legitimate son and treats him in every respect as his substitute. In fact the institution of an *illatom* son-in-law in vogue in Malabar [*Kumaran* v. *Narayanan* (5)] or *khanadamad* recognised in the Punjab are but relics of the same [Roy's Customary Law, page 508, and *Fateh Ali* v. *Muhammad Hayat* (18)], and effect cannot legitimately be refused to an affiliation in the *putrika-putra* form, if it is made (Ghose's Hindu Law, Volume I, 3rd Edition, page 736; Sastri's Hindu Law, 4th Edition, page 129; Sarvadhikari's Hindu Law, page 252, and Sarkar's Law of Adoption, 2nd Edition, pages 132 and 166 A). How far a mental declaration, not published or made known to others and not accompanied by conduct of an unequivocal character, can be enforced against the husband of the daughter after her marriage may well be doubted; but in the case of Maharaja Sir Pratap Narain Singh, no such difficulty arises, because after the death of Maharaja Man Singh, his father practically set up a claim on the strength of an affiliation in some such form. In any event, the insertion at the instance of Maharaja Man Singh of a clause in section 22 of Act I of 1869 to give statutory recognition to an affiliation by treatment is not without its significance.

Whatever the actual position of Maharaja Sir Pratap Narain Singh may have been under the Hindu Law, the statutory recognition extended by section 22, clause 4, of Act I of 1869 placed him in any case, for purposes of succession to Maharaja Man Singh and for constituting a stock of descent to his line, in the position of a son next only to a legitimate son. As the son of a daughter, his position but for clause 4 of section 22 would have been relegated to clause 11 of that section; and it would hardly be consistent to accede to him the position of a son inferior only to a legitimate son for the purpose of obtaining succession and to assign to him the position of the son of a daughter for the purpose of giving succession to the line in which he was affiliated. If the object of the affiliation was to bring him into the stock for the purpose of succession, as if he were "in every respect" a son, that object would be defeated by assigning to him the position of a son of a daughter within the meaning of clause 11 of section 22 and thus diverting the succession from the affiliator's line. The son of a daughter treated by a Talukdar or grantee or his heir or legatee in all respects as his own son is described in clause 5 of section 22 as the "son" of such Talukdar, and not as his daughter's son; and if he is to be regarded as a "son" of the Talukdar, the diversion of the succession on his death, if he died without issue, from the paternal line of such Talukdar to the paternal line of the natural father of such son could hardly have been intended. He cannot be treated as a son for the purpose of clauses 4 and 5 of section 22 and the son of a daughter for the purpose of clause 11. The succession to such a son in the absence of any lineal descendant should, therefore, go to the line of the person who affiliated him and treated him in all respects as a son, and not to his natural line. Such a son is a creature of the Statute, and the position which the Statute assigns to him will regulate the succession after him. The plaintiff represents the senior branch of the family, to which Maharaja Man Singh belonged, and as such he would be entitled to succeed to the estate left by Maharaja Sir Pratap Narain Singh, if the latter be supposed to have died intestate.

The Will executed by Maharaja Sir Pratap Narain Singh and the adoption made by his junior widow in pursuance of the Will are, however, insuperable obstacles in the plaintiff's way. The Will was executed on the 17th July 1891 and registered on the 20th July 1891. The plaintiff does not any longer dispute the genuineness of that

(18) 18 Ind. Cas. 818; 68 P. W. R. 1913; 197 P. L. R. 1913.

Will. He asserts that it was obtained by the junior Maharani by means of undue influence and that it was subsequently revoked by the Maharaja himself. The story of undue influence, said to have been exerted by the junior Maharani, is not borne out by any reliable evidence. The suggestion is that on hearing that the Maharaja intended to execute a Will by which the Maharanis were to get a fixed maintenance allowance, the junior Maharani stopped taking food until a Will was executed by the Maharaja conformable to her wishes. Hakimuddin (P. W. No. 6) states that he was in the service of the Maharaja from 1879 to 1885 or 1886, that thereafter he did other odd works for the Maharaja at different times at Barabanki, Ajudhia and Gonda, that in July 1891 the Maharaja got him to write out a Will for him and signed it, and that on the next day he found the Maharaja uneasy and learnt from him that the junior Maharani had given up food and drink since the preceding night, saying that she would not live and give up her life, if he did not leave the estate to her. Hakimuddin then goes on to say that the Maharaja asked him and two other gentlemen stated to be dead and decided in consultation with them to execute another Will to put an end to the unpleasantness. The Maharaja had previously executed a Will on the 8th August 1877 (Exhibit 19), which was duly registered, and it is unlikely that he would have executed another Will in revocation of the same without getting it registered. Hakimuddin admits that he was heavily indebted to the Maharaja, a decree for arrears of rent having been obtained against him towards the end of 1884, which was several times executed, and in satisfaction thereof his property had been sold by auction. He was declared an insolvent in 1896 or 1897. The junior Maharani had also obtained a decree for arrears of rent against him since the death of the Maharaja. A notice of ejectment was issued against him in the year 1319 Fasli. He has about 302 *bighas* of land in his cultivation. He was not a likely person whose services could have been requisitioned by the Maharaja to have a Will faired out by him or whom he would have consulted as to the measures to be adopted to appease the wrath of the junior Maharani. The Will of the 17th July 1891 makes no reference to any such prior Will, and the story of an unregistered Will having been executed on the 14th July 1891 appears to be an entire myth. Suraj Bakhsh (P. W. No. 17) supports Hakimuddin as to a Will having been read out by the latter to the Maharaja, who signed it; but he is a man who has been out of employ for some time, having been indebted to the extent of about Rs. 3,000 from 14 or 15 years and adjudicated insolvent in consequence. He professes that he was in the private service of the Maharaja in 1889, but he admits that his pay will not be found entered in the estate accounts.

There is, moreover, evidence to show that the Maharaja got a Will drafted in consultation with the late Mr. Conlan, Barrister-at-Law of Allahabad, and sent a copy of that draft to the Local Government either for information or for approval. On the 2nd October 1890 Sir John Woodburn, the then Chief Secretary to the Local Government, returned the draft, saying that the Lieutenant-Governor had read it and that the Maharaja had done well to take the advice of a practised lawyer like Mr. Conlan (Exhibit A-20). The draft which accompanied that Will has also been produced and, except in regard to disinherision of the senior Maharani and the selection of a boy for adoption either from the paternal or maternal family, is very much similar to the Will executed by the Maharaja on the 17th July 1891 to which reference has already been made (Exhibit A 318). Is it likely that having consulted Mr. Conlan and having obtained the approval of the Local Government to the draft prepared by him, the Maharaja would seek the counsel or assistance of a person of the character and position of Hakimuddin and get a Will executed only to be revoked by a Will executed and registered more or less in accordance with the draft, which had been sent to the Local Government several months earlier?

In the declaration of trust executed by the Maharaja on the 23rd December 1895 (Exhibit 2) and another executed by him on the 12th July 1898 (Exhibit 3) a reference is made to a Will of the 14th July 1891. An improper advantage has evidently been taken of the mistaken

date there referred to, to bolster up a Will of that date. In the declarations of trust aforesaid, the Maharaja stated that he had previously expressed a desire by a Will for the dedication of some property to religious purposes but the alleged Will of the 14th July 1891, a summary of which has been given by Hakimuddin (P. W. No. 6), contained, so far as the version of Hakimuddin went, no reference to any such declaration of intention; whereas the Will of the 17th July 1891, which had been faired out a day earlier and bore the 16th July 1891 as the date of its execution, and the draft sent to the Local Government prior to the 2nd October 1890, contain paragraphs, bearing out such an intention, and expressing a desire to carry it out thereafter. The reference to the Will of the 14th July 1891 in the place of that of the 17th July 1891 in the declarations of trust aforasaid was obviously due to some clerical mistake or to a mistake of memory, and it does not in any way support the theory which the plaintiff has set up.

The alleged revocation of the Will of the 17th July 1891 by a letter, said to have been written to the Commissioner of the Fyzabad Division on the 26th October 1906, is also not borne out by any reliable evidence. The first witness adduced on the point is Hakim Ismail Khan (P. W. No. 136), who claims to have been in the service of the Maharaja up to four or five years prior to his death. He asserts that about two months and a half or three months prior to the death of the Maharaja, he happened to visit him and found a paper lying neatly written, which he guessed might be his Will. He had, according to his own statement, the imprudence to start reading it attentively, and on the Maharaja enquiring what he was reading and finding that it was his Will, he was asked by the Maharaja to read it first himself and then to read it out to him. He goes on to say that he read it out to him and asked him what sort of a Will it was, as he had previously made one before. The Maharaja is said to have replied that he wrote it in cancellation of the previous Will and explained that the acts, for which he deprived the senior Maharani of the succession to his estate, had been committed by the junior Maharani also. It is said that the Maharaja then signed that paper himself and requested him and his Ayurvedic physician, Dwarka Nath Sen, to attest it as witnesses. No such Will has, however, been produced. It is not suggested that it was registered. Kaviraj Dwarka Nath Sen, before whom the said Will is stated to have been executed, is dead, and the falsity of this witness is apparent from the fact that he states that Dwarka Nath Sen was present when the alleged Will was executed $2\frac{1}{2}$ or 3 months before the death of the Maharaja, whereas from the letter of the Kaviraj to the Deputy Commissioner of Fyzabad dated the 13th January 1907 (Exhibit A-359) and another to the Special Manager of the Ajudhia Estate dated the 29th June 1907 (Exhibit A-360) demanding payment of the bill for his attendance on the Maharaja, it is apparent that he did not visit Ajudhia and start his medical treatment till the 16th October 1906, that is, till long after the date of the alleged revocation. It is unlikely that the Maharaja would have taken into confidence a person of the position of Hakim Ismail Khan by talking to him about the misconduct of either his senior or junior Maharani, and it is still less likely that had he intended to revoke his previous Will, he would have done so except by means of a registered instrument. The witness appears to have been approached by the plaintiff about 5 or 6 days before he gave his evidence. He pays no income-tax and is a man of no position, and his evidence is not entitled to any weight.

Dr. Mohini Mohan Chatterji, another witness of the plaintiff (P. W. No. 159), says that in the course of a conversation with the Maharaja, the latter told him that he had an important business to finish in connection with the Will which he had previously executed in favour of the junior Maharani, inasmuch as he said "she is not worthy of it or does not deserve it:" but apart from the improbability of the Maharaja making such statement to him, his evidence is too vague to be entitled to any weight. According to him, the Maharaja said so to him when he went to see him otherwise than for his treatment between the 20th and 27th October 1906, but Hakim Ismail Khan suggests that a Will, revoking the previous one, had already been executed

by the Maharaja about $2\frac{1}{2}$ months or 3 months before his death.

The next witness on the point is Nirodh Chandra Ghoshal (P. W. No. 56), who was in the service of the Maharaja and, after his death, of the Court of Wards till his resignation in 1913. He claims to have been doing the confidential work of the Maharaja and has produced from his custody the draft of a letter (Exhibit 76), which the Maharaja is alleged to have sent to the Commissioner of the Fyzabad Division on the 26th October 1906. The draft purports to inform Mr. Hamblin, the Commissioner, that the Maharaja had cancelled all his previous Wills, that the last Will about which he had spoken to him was not executed and that he hoped to be able to meet him shortly in connection therewith. It also contained a request that in case he was unable to stir about, Mr. Hamblin might take the trouble to come over. It is impossible, however, that any such letter could have been written by the Maharaja or sent to Mr. Hamblin, for on the 6th November 1906, a day before the death of the Maharaja, Mr. Hamblin wrote to Mr. Hailey, the Secretary to the Board of Revenue (Exhibit A-390), that the Maharaja was reported to be seriously ill and that at that moment he was far from well, that as far as he knew the Maharaja had made a Will in favour of his junior Maharani and that in the event of his illness terminating fatally, instructions might be issued as to what steps, if any, he should take. In that letter, he stated that he had seen the Maharaja in connection with the loan of 60 lakhs, which he asked for from the Government, and the conditions he wanted to make before he accepted the management of his estate by the Court of Wards; and it is unlikely that had he received any letter from the Maharaja of the kind suggested, he would not have referred to it and contented himself with saying that as far as he knew the Maharaja had made a Will in favour of his junior Maharani. On the 4th November 1906 Mr. Hamblin had written a letter to the Maharaja himself in reply to one of his, which contained no reference to any such revocation (Exhibit 79). In another letter sent by Mr. Hamblin to Mr. Hailey, a day after the death of the Maharaja (Exhibit A-391), Mr. Hamblin reiterated: "It will be ascertained as soon as possible who is the heir under the Will; it is at present believed the junior Maharani will succeed and that she has been given power to adopt." A Will of such a character would be entirely inconsistent with what Hakim Ismail Khan and Dr. Mohini Mohan Chatterji would ask us to believe. Nirodh Chandra Ghoshal states that Mr. Hamblin called on the Maharaja on the 6th or 7th November 1906, after a letter corresponding to the draft (Exhibit 76) was sent, but the Maharaja was too ill to meet Mr. Hamblin. The draft does not bear the signature of the Maharaja, and from the evidence of Nirodh Chandra Ghoshal, it would seem that the execution of the alleged last Will had not been completed, for the Maharaja had told him that he would have to sign the Will and that he could see it then.

The manner in which the draft was produced and the stage at which it was tendered also render its genuineness as a draft, dictated by the Maharaja, open to serious suspicion. On the 10th November 1906, Babu Balakram handed over the original Will of the Maharaja dated the 17th July 1891 on behalf of the junior Maharani to Mr. Pert, the Deputy Commissioner of Fyzabad (*vide* the evidence of Mr. Pert, D. W. No. 60, and Exhibit A-361). Nirodh Chandra Ghoshal continued in the service of the Court of Wards till 1913. A dispute arose on the death of the Maharaja in the mutation proceeding in consequence of an objection filed by the senior Maharani. The junior Maharani wrote to Rai Sri Ram Bahadur, the legal adviser and friend of the late Maharaja, in connection therewith. Rai Sri Ram Bahadur wrote in reply (Exhibit 81) that he was much grieved to hear that the senior Maharani had failed to respect the wishes of the late Maharaja and filed an objection in the mutation proceeding against the entry of the name of the junior Maharani in the revenue register. On the back of that letter was endorsed a draft in pencil of the reply sent by the junior Maharani to Rai Sri Ram Bahadur, thanking him for his letter and for the assurance of help and sympathy

conveyed to her in her affliction. If the Maharaja had revoked his Will of the 17th July 1891 in favour of the junior Maharani within the knowledge of Nirodh Chandra Ghoshal, as is now suggested, is it likely that Nirodh Chandra Ghoshal would have remained silent and mentioned to no one that the Maharaja had revoked his Will and sent a letter to the Commissioner to that effect?

Nirodh Chandra Ghoshal admits that he had an interview with the plaintiff in September or October 1914, before he had given evidence, and that he did not tell him at the time that the Maharaja had sent such a letter to the Commissioner. He pretends that he did not then remember it and discovered the draft among his papers at Allahabad in October 1915, when the plaintiff asked him again to look for it. He is not a man holding any property, and, according to his own admission, has been connected with a speculative claim to another estate in which his brother was financing the claimant to the extent of a $5\frac{1}{2}$ annas share on their joint behalf. His brother had financed another litigation before, and from the past conduct of the witness in not having made any mention of the revocation before and his character as a person interested in speculation, the authenticity of the alleged drafts seems to be open to serious doubt.

There is, on the other hand, a considerable amount of independent evidence to establish that the Maharaja was passionately attached to his junior Maharani and had earnestly entreated all his friends in position or authority to help her in the event of his death. Sir Harcourt Butler visited the Maharaja on the 14th October 1903, and from his evidence and the note of his interview which he made at the time (Exhibit A) it is clear that the Will in favour of the junior Maharani dated the 17th July 1891 was the last Will which the Maharaja had executed up to that date. Sir Harcourt Butler states that at the end of the interview the Maharaja informed him that he had made a Will in favour of the second Maharani which, as he said, was "registered with Colonel Currie," or more accurately speaking, attested by him, and, laying the hand of the Maharani who was inside the *parda* in his, he committed her to his care. The Raja of Mahmudabad similarly visited the Maharaja about 15 or 20 days before his death and had conversed with him in private. The Maharaja told him that he did not hope to survive the disease from which he was suffering, and his death-bed request to him was that he should help the junior Maharani, in whose favour he had already executed a Will according to the draft, which he had shown him at Lucknow, and that the Raja should try that his estate should not be put under the management of the Court of Wards in a regular way but might be put under the management of a European manager under the supervision of the Local Government in the event of his death, that he should not let the Maharani adopt a boy from the family of Lal Triloki Nath Singh and further that he should try as far as possible to save the estate from being sold in lieu of his debt. The Raja says that the draft of that Will had been shown to him at Lucknow about a year or a year and a half before the death of the Maharaja and that the Maharaja had shown him several drafts "probably after 1895", all of which were in favour of the junior Maharani. It is possible that the Raja may have had a very hazy idea of the date or period, or that what the Raja describes as a draft was really a copy of the Will, which the Maharaja had executed on the 17th July 1891. It is also possible that the Maharaja may have prepared drafts after 1895 with the object of altering that Will in certain particulars; but it is extremely unlikely that the Maharaja had executed a Will, such as Hakim Ismail Khan suggests, revoking that of the 17th July 1891 and diverting the bequest from the junior Maharani for the Raja deposes that all the drafts which were shown to him were in favour of the junior Maharani and the last conversation which the Raja had with the Maharani about 15 or 20 days before the death of the latter tended in the same direction. It is not improbable at any rate that the drafts to which the Raja refers may have been shown to him before 1891, for the Raja has no positive recollection

of the exact time when he saw them.

Thakur Harihar Bakhsh Singh (D. W. No. 54), a respectable Talukdar, holding estates in the Sitapur and Bara Banki districts and paying a revenue of Rs. 54,000 a year, also bears testimony to having seen the Maharaja for the last time 8 or 10 days before the death of the latter, while he was under the treatment of Kaviraj Dwarka Nath Sen. The Maharaja then told him that in case he died, the witness should respect the junior Maharani as much as he respected him and that he should help her because, he said, he had executed and registered a Will in her favour in which he had given her full powers after him.

Baqar Husain (D. W. No. 9), who was one of the attesting witnesses to the Will of the 17th July 1891, states that he had visited the Maharaja several times during his illness and that the Maharaja had told him that he had a mind to adopt a boy of the family and then to lead the life of a *sanyasi* and that, when reminded of the Will, he said that his Will was the same.

Maharaja Prodyot Kumar Tagore (D. W. No. 78) also states that on the occasion of a visit of the Maharaja to Calcutta the latter told his father, Maharaja Sir Jotindro Mohan Tagore, with whom he was staying, that it was not possible for his junior Maharani to visit Calcutta on account of her ill-health and that she was a very devoted wife and used to look after him and nurse him very much in spite of her bad health. He further told him that he had made a Will in which he had given the Maharani the power to adopt and also made provision for the future management of his estate. The evidence of these witnesses has not been controverted and leaves hardly any room for doubt that the Will of the 17th July 1891 is the last and subsisting Will of Maharaja and that the Maharaja intended that the junior Maharani should succeed him after his death.

In any event no Will revoking that of the 17th July 1891 is forthcoming and in its absence the Will of the 17th July 1891 must have legal effect. Section 57 of the Indian Succession Act (X of 1865), which has been extended by section 19 of Act I of 1869 to the Wills of *talukdars*, lays down that no unprivileged Will shall be revoked otherwise than by another Will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is required to be executed or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. The original Will of the 17th July 1891 was in this case not destroyed and its revocation has not been proved in the manner required by law. In *Lachman Singh* v. *Umrao Singh* (19), where a Will made by a testator was said to have been revoked in a written statement and a plaint filed by him in other cases, it was held that such a revocation could not take effect under section 57 of the Indian Succession Act. In *Haidar Ali* v. *Tasadduk Rasul Khan* (20), where a Will made by a *talukdar* was stated to have been revoked by another Will executed after Act I of 1869 came into force but not registered in accordance with section 20 of that Act, it was held by their Lordships of the Privy Council that the latter, being inoperative as to the *talukdari* estate, could not revoke the previous Will, which was not rendered inoperative by any of its provisions. In *Sahib Mirza* v. *Umda Khanam* (12), Lord Macnaghten pointed out that a Will duly executed could not be treated as revoked, either wholly or in part, by a Will which was not forthcoming, and the contents of which could not definitely be ascertained, and that it was not enough to show that the Will which was not forthcoming differed from the earlier one, if it could not be shown in what the difference consisted. This observation applies with particular force to the several drafts which the Raja of Mahmudabad says the Maharaja had shown to him. It is also noticeable that the form in which the Maharaja used to subscribe himself in his letters to Mr. Hamblin (Exhibit A 351) is different from that in which the draft produced by Nirodh Chandra Ghoshal (Exhibit 76) des-

(19) 11 O. C. 102.

(20) 18 C. 1; 17 I. A. 82; 5 Sar. P. C. J. 529; 9 Ind. Dec. (N. S.) 1 (P. C.).

cribed him. The story of the alleged revocation appears to be entirely unfounded.

In pursuance of the above Will the junior Maharani adopted Dukh Haran Nath Singh, the second son of Adika Nath Singh, on the 12th February 1909, naming him Jagdambika Pratap Narain Singh after his adoption. The adoption is proved by the evidence of several respectable witnesses, including the junior Maharani, and is also corroborated by the deed of adoption, formally executed and registered by her on that date (Exhibit A-139). The fact of the adoption has not been seriously disputed by the plaintiff either in this Court or in the Court below, and it is unnecessary to refer to that evidence in detail. Apart from the alleged revocation of the Will of the 17th July 1891 by the Maharaja, which has not been established, the plaintiff impeaches the validity of the adoption on several grounds. It was suggested that the junior Maharani was not the married wife of the late Maharaja, that she was unchaste and was not, therefore, qualified to make the adoption according to the Hindu Law, that the natural mother of the boy adopted was of the same *gotra* as the natural father of the late Maharaja, in consequence of which a marriage between the late Maharaja and the natural mother of the adopted boy could not have been legal, that Adika Nath Singh, the natural father of the adopted boy, was an outcaste, that the boy was purchased for a money consideration, and that the requisite ceremonies of adoption had not been performed.

It is not now disputed that the junior Maharani was married to the late Maharaja. There is nothing to show that that marriage was not absolutely legal. The evidence adduced to prove the alleged unchastity of the junior Maharani with Adika Nath Singh or other persons has been rightly disbelieved by the learned Additional Judge, and I agree with my learned colleague, who has discussed that evidence in detail, that the imputations made are baseless and without any foundation

The *gotra* of Adika Nath Singh was Girg and that of his wife, *Musammat* Chandra Kali, the mother of the adopted boy, before her marriage, as stated by Bishwa Nath (D. W. No. 18) and Ramdeo (D. W. No. 20) and other witnesses, was Mahris. The Maharaja belonged originally to the Bharadwaj *gotra* and had according to his own statement gone into the Girg *gotra* by reason of his affiliation by Maharaja Man Singh. In either view the *gotra* of the natural mother of the adopted boy before her marriage was different from that of the late Maharaja and the validity of the adoption cannot, therefore, be impugned on that ground. The evidence produced by the plaintiff that Ram Sahai, the father of *Musammat* Chandra Kali, belonged to Bharadwaj *gotra* is refuted by the evidence of persons belonging to the family of Ram Sahai, and cannot be trusted.

There is, moreover, evidence to show that among Sakaldipi Brahmans, that is, in the caste to which the Maharaja belonged, marriages can take place between the same *gotra*. Such marriages are generally condemned by Hindu law-givers, but where owing to the smallness of the community or other cause, they do take place outside the pale of prohibited degrees, they are apart from custom not necessarily void. The principle of *factum valet* applies to them (Mayne's Hindu Law, 8th Edition, page 103, and Shastri's Hindu Law, 4th Edition, Volume I, pages 99 and 100).

The evidence adduced to establish that Adika Nath Singh was outcasted by the Maharaja owing to his intrigue with the junior Maharani is also unsatisfactory, and the allegation that the boy was purchased by the junior Maharani for taking in adoption is not borne out by any reliable testimony. The supply of clothes or ornaments to the parents of the boy to be adopted or the payment of money therefor in anticipation of the adoption cannot invalidate the adoption or be taken to indicate that it was made from sinful or improper motives. In *Murugappa Chetti* v. *Nagappa Chetti* (17) and *Mahableshvar Fondba* v. *Durgabai* (21) adoptions were upheld, though in each case it was shown that some money had been paid or promised to the natural father of the adopted boy in consideration of his giving his son in adoption. Adika Nath Singh (D.W. No. 51) states in his evidence that he got a shawl and other clothes on the occasion of adoption, as did the other members of the family of Maharaja Man Singh and Babu Narsingh

(21) 22 B. 199; 11 Ind. Dec. (N. S.) 714.

Narain Singh. Adika Nath Singh was himself a relation of the late Maharaja, and the present of articles of that character to relations at the time of adoption, as in the case of a marriage in the family, is not uncommon.

The evidence of Ganesh Dat Shastri (D. W. No. 13), Lal Adika Nath Singh (D. W. No. 51) and the junior Maharani (D. W. No. 53) shows that the requisite ceremonies for adoption were duly performed. In fact, as pointed out by their Lordships of the Privy Council in *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (22), the performance of ceremonies can be dispensed with, if the adoptive father and the adopted boy belong to the same *gotra*, which would be the case, if the late Maharaja was the *putrika-putra* of Maharaja Man Singh.

It is also contended that the adoption was brought about by the pressure, exercised by the officials of the time and some of the *talukdars* on the junior Maharani; but the only evidence which has been pointed out in support of that contention is a letter sent by Sir John Hewett, the then Lieutenant-Governor of these provinces, to the junior Maharani on the 18th July 1906, advising her to adopt a boy in accordance with the wishes of her late husband (Exhibit 276), and the statement of the junior Maharani (D. W. No. 53) in the present case that if she had not been advised to make the adoption, she would have made it after 12 years, so that she might have been spared the disgrace of being dragged into Court by the present suit. An advice given from the best of motives does not, however, amount to the exercise of undue influence. The letter sent by the junior Maharani to Mr. (now Sir) Harcourt Butler on the 7th August 1908 (Exhibit 266), which was sent after the junior Maharani had received the letter of Sir John Hewett, and a deputation of some of the leading *talukdars*, moreover, clearly show that the Maharani had voluntarily agreed to make the adoption, realising that it was to the interests of herself and her estate that she should do so, so long as her personal comfort, that is the possession of the estate by her for her life, was not interfered with. Throughout the process of selection and the ceremonies which attended the adoption, legal advice was available to her; and however much she may now feel pestered by the suit and the imputations which have been made against her in it, the suggestion that she was induced to make the adoption by undue influence cannot for a moment be entertained.

It is next argued that the adoption made did not effectuate the intention of the testator as expressed in his Will and that the devise in his favour consequently failed: in other words, it is contended that the intention of the testator was that his estate was to remain impartible and that the adopted son was to succeed to the property on the death of the junior Maharani under section 22, clause 8 of Act I of 1869, so as to render the rule of succession laid down in section 22 applicable to its subsequent devolution. As a general rule, a devise in favour of an undesignated or unascertained person in a particular character may fail, if the person in whose favour the devise was made fails to occupy that character. A bequest in favour of an adopted son may, as pointed out by their Lordships of the Privy Council in *Fanindra Deb Raikat* v. *Rajeswar Das* (23) and *Lali* v. *Murlidhar* (24) fail, if the adoption subsequently proves to be invalid and the devisee does not fulfil the character in which the devise was made. But the adoption in the present case is not invalid. The boy adopted by the junior Maharani fulfils the character of an adopted son, though he succeeds to the property as a devisee and not under clause 8 of section 22 of Act I of 1869. By clause seven of his Will, the testator provided that the junior Maharani shall be competent to adopt a boy from his paternal or maternal family, and that, after the death of the junior Maharani,

(22) 29 Ind. Cas. 639; 39 B. 441; 17 Bom. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 19 C. W. N. 729; 13 A. L. J. 570 42 I. A. 135 (P. C.).

(23) 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.).

(24) 28 A 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.).

such adopted son shall, as contemplated by clause 8 of section 22 of Act I of 1869, be the successor and absolute owner of all the moveable and immoveable properties belonging to him. The intention of the testator was to emphasize that the son to be adopted by the junior Maharani was not to dispossess her during her life, for in addition to his referring to clause 8 of section 22, which empowered a widow making an adoption to remain in possession for her life, he went on to say that the son to be adopted shall not be entitled to possession till after the death of his junior Maharani and that the junior Maharani too shall have no power to give him possession during her lifetime. The junior Maharani was not an heir to the estate within the meaning of clause 8 of section 22, because the senior Maharani was alive at the time of the death of the testator. No power to adopt was given to the senior Maharani. The adoption was in fact made by the junior Maharani, and clause 8 of section 22 could not, therefore, apply to him. Apart from the devise, the adopted son could have succeeded to the estate only under clause 9 of section 22 on the death of both the senior and the junior Maharanis; but whether he does succeed to it under the devise or under clause 9 of section 22 or under clause 11 of section 22, the estate continues to be impartible in his hands. If the Maharaja had died intestate after authorizing the junior Maharani by a writing to adopt a son but without making any devise in her or his favour, the son so adopted would have succeeded to the estate after the death of the senior and the junior Maharanis or, in other words, to a vested remainder therein under clause 9 or clause 11; and if so, sections 13 and 14 of Act I of 1869 are wide enough to keep the estate within the Act Where property goes to a widow for her life with a vested remainder to another, the combined interest of the former and the latter constitutes the bundle of rights known as the estate within the meaning of section 2 of Act I of 1869 and the interests of the former as much as of the latter may in that sense be regarded as different portions of the same estate. In *Indar Kunwar* v. *Jaipal Kunwar* (14), where a *talukdar*, who died childless but leaving two widows, bequeathed to the senior Maharani his entire estate and gave her a power to adopt a son to him and at the same time provided maintenance for both his widows after such adoption, it was held by their Lordships of the Privy Council that as, if there had been no Will, the junior widow would have succeeded to an estate expectant on the determination of the life estate of the senior, but subject to be defeated by an adoption by the latter, there was an interest which brought her within the meaning of section 13, paragraph 1, of Act I of 1869, so as to make the maintenance bequeathed to her by the Will payable out of the entire estate though the Will was unregistered. In *Bhaiya Rabidat Singh* v. *Indar Kunwar* (15) it was held that the word "intestate" in section 13, sub-section 1 of Act I of 1869, meant intestate as to the *talukdari* estate, and that a son adopted under authority conferred in writing by a *talukdar* was not excluded from the exception contained in that section. The adoption being valid under the Hindu Law, the adopted son would in any case succeed to the vested remainder under clause 11 of section 22, and it cannot be said that the estate has been excluded from the operation of section 22 and has become partible in his hands.

In regard to the other points raised in the appeal, I have nothing to add to the judgment of my learned colleague, with whose conclusions I am in entire agreement. I, therefore, agree in dismissing the appeal with costs except in regard to the extra fee of Rs. 3,000 awarded by the Court below to the senior Maharani, which will be expunged from the decree, inasmuch as it was not certified to that Court before the commencement of arguments as required by the Rules.

Appeal dismissed.

DIVAKAR SINGH *v.* RAMAMURTHI NAIDU.

MADRAS HIGH COURT.

SECOND APPEAL No. 660 OF 1917.

March 15, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

DIVAKAR SINGH—PLAINTIFF—APPELLANT

versus

A. RAMAMURTHI NAIDU—DEFENDANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 165, 173—Search for stolen property, when can be allowed—Investigation by Police after submission of report, legality of.

Section 165 of the Criminal Procedure Code does not authorize a general search for stolen property. A search for specific stolen property is, however, allowed by the section.

Bisser Misser v. *Emperor*, 20 Ind. Cas. 229; 41 C. 261; 17 C. W. N. 1209; 14 Cr. L. J. 405, followed.

Prankhang v. *Emperor*, 17 Ind. Cas. 76; 16 C. W. N. 1078; 13 Cr. L. J. 764, distinguished.

The number of investigations into a crime that can be made by the Police is not limited by law and the Police, after submitting a report of an investigation, have power to make further investigation on receipt of further information.

Second appeal against the decree of the District Court, Guntur, in Appeal Suit No. 154 of 1916, preferred against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 18 of 1915.

FACTS appear from the judgment.

Mr. *V. Ramadoss* (with him Mr. *V. Rathnasomanathan*), for the Appellant.—The search was illegal and is not authorised by the terms of section 165, Criminal Procedure Code. *Bajrangi Gope v. Emperor* (1). The second investigation by the Police was illegal, as the result of the first investigation was embodied in a report.

Mr. *C. Narasimhachariar*, for the Respondent.—The search was for specific stolen property and was legal. *Bisser Misser* v. *Emperor* (2). The search was *bona fide* and plaintiff could not claim damages. The Police have ample powers of investigation on receipt of fresh information.

JUDGMENT.—Upon the finding that the Sub-Inspector of Guntur conducted the search there can be no question of defendant's jurisdiction over the place searched. The finding is objected to on the ground that no specific issue was raised on the point, but the plea that the defendant did not himself conduct the search, but only searched the house as the Sub-Inspector's assistant, was specifically raised in the written statement and comes within the scope of issue I. Even otherwise it is questionable whether defendant, as investigating Police Officer, was not attached to Guntur Police station by the orders of his superiors, but this point does not seem to have been considered.

The contention chiefly relied on by Mr. Ramadoss is that the search was wholly illegal inasmuch as section 165 of the Criminal Procedure Code does not give authority to search for stolen property. This is a somewhat startling proposition put in this way, and it is based on the rulings in *Bajrangi Gope* v. *Emperor* (1) and *Prankhang* v. *Emperor* (3). These two cases were considered in *Bisser Misser* v. *Emperor* (2), where it was held that they were only authority for the proposition that section 165, Criminal Procedure Code, does not authorise a general search for stolen property, as opposed to a search for specific stolen property. This latter form of search, which is the form in the case now under our consideration, was expressly held to be legal and it was remarked that its legality had never been questioned since the case decided in *Mahomed Jackariah and Co.* v. *Ahmed Mahomad* (4). We agree in their view and hold that the present search was not illegal. It has been found to have been made *bona fide* and, therefore, plaintiff is not entitled to damages.

Another contention is put forward that when a report of investigation has been sent in under section 173 of the Criminal Procedure Code the Police has no further powers of investigation, but this argument may be briefly met by the remark that the number of investigations into a crime is not limited by law and that when one has been completed another may be begun on further information received.

The second appeal is dismissed with costs.

Appeal dismissed.

M. C. P.

(1) 9 Ind. Cas. 64; 38 C. 304; 15 C. W. N. 343; 13 C. L. J. 639; 12 Cr. L. J. 8.

(2) 20 Ind. Cas. 229; 41 C. 261; 17 C. W. N. 1209; 14 Cr. L. J. 405.

(3) 17 Ind. Cas. 76; 16 C. W. N. 1078; 13 Cr. L. J. 764.

(4) 15 C. 109; 12 Ind. Jur. 259; 7 Ind Dec. (N. S.) 658.

MAHOMED ZAMIRUDDIN *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISIONS NOS. 255 to 258 OF 1918.

July 18, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

MAHOMED ZAMIRUDDIN AND OTHERS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Revision—High Court, power of, to direct Sessions Judge to re-hear appeal—Criminal trial—Procedure—Court, duty of, to pass orders on petitions.

Both under the Criminal Procedure Code and under section 107 of the Government of India Act, the High Court has power to direct a Sessions Judge to re-hear an appeal after obtaining additional evidence. [p. 275, col. 1.]

When petitions are made to the Court, it is improper merely to direct them to be filed with the record. [p. 275, col. 1.]

Criminal revision from a decision of the Sessions Judge, Patna.

Messrs. *Yunus*, *Yunus Muhammad* and Rai *Tribhuban Nath Sahay*, for the Applicants.

JUDGMENT.

MULLICK, J.—The petitioner Zamiruddin has been sentenced under section 498, Indian Penal Code, to rigorous imprisonment for one year and the petitioner Nurul Wahab to rigorous imprisonment for nine months and a fine of Rs. 200.. Nourangi and Thakur Singh have been sentenced to rigorous imprisonment for six months each under sections 498 and 114, Indian Penal Code. The woman in regard to whom these offences are alleged to have been committed is Saleha, the wife of Saiyid Hassan.

It appears that the petitioners were defended by Counsel before the Deputy Magistrate who took cognizance of the case and that inspite of a full and protracted trial, numerous petitions were made to the Court by the accused protesting *inter alia* on the ground that evidence likely to assist the defence had been improperly excluded. These complaints were repeated before the Sessions Judge in appeal but were found to have no substance. Dissatisfied with the learned Judge's order the petitioners have come to this Court in revision.

We have heard the parties at great length and have come to the conclusion that the learned Sessions Judge should have followed the procedure prescribed by section 428, Criminal Procedure Code, and have directed the trial Court to allow the accused to adduce the additional evidence which they desired him to take.

The two witnesses from Mirzapore were clearly necessary for the defence of the accused Nurul Wahab and we are not satisfied that there was any such negligence on the part of the accused in the matter of taking out process as would have warranted a refusal to procure the attendance of the witnesses. It is said that the accused made no clear and definite prayer on the 11th May for issue of fresh processes. It is difficult to understand this explanation in the face of the accused's Counsel's repeated protests on the 11th May that he was not prepared to argue the case till his defence was completed. The learned Deputy Magistrate also states in his explanation that it was the accused's duty to supply the certified copy of a document the original of which he had summoned one of the Mirzapore witnesses to produce, and likewise to deposit the diet and travelling expenses of the witnesses. The answer to these objections is that the Court never asked the accused to take these steps. On the contrary the Court issued processes twice for the attendance of these witnesses without making any such demands. In our opinion the Court having once issued process was bound to exhaust all the processes allowed by law, unless it was clearly shown that the accused was guilty of wilful obstruction and delay.

We are also of opinion that the learned Sessions Judge should have directed the trial Court to recall Abdul Karim for further cross-examination in regard to the validity of the marriage. We are not satisfied that the questions which the accused's Counsel desired to put were irrelevant.

We also think that the request to recall *Musammat* Sabuzni should have been granted. The learned Magistrate has unfortunately kept no record of the questions which he disallowed on the ground of irrelevance.

In this connection we have to observe that it is to be regretted that the learned

Deputy Magistrate, who appears to have otherwise tried the case with great care and patience, should have omitted to record orders on the numerous petitions filed by the accused, and that he should have allowed the impression to be created that the imputations as to his conduct of the trial remained unchallenged. It has been repeatedly held that when petitions are made to the Court, it is improper merely to direct them to be filed with the record.

The result is that the order of the learned Sessions Judge dismissing the appeal is set set aside and the appeal restored. We direct that the appeal be re-heard after due attention to the observations herein made. Upon receiving the additional evidence certified by the trial Court the learned Judge will dispose of the appeal according to law.

The learned Counsel for the petitioners contends that this Court, in exercise of its revisional jurisdiction, has no authority to make this order and he relies upon the case of *Gajanand Thakur* v. *Emperor* (1). That case does not deal with the powers of this Court as a Court of revision and is certainly no authority for the contention that in the present case we cannot interfere except to direct a re-trial. In our opinion both under the Criminal Procedure Code and under section 107 of the Government of India Act of 1915, this Court has full jurisdiction and power to direct the learned Sessions Judge to re-hear the appeal after obtaining the additional evidence. It would be utterly unreasonable to accede to the demand that because two defence witnesses have not been examined and because the cross examination of two prosecution witnesses was not sufficiently full, the whole case should be re-tried *de novo*.

As the Sessions Judge of Patna has already formed an opinion on the evidence we transfer the appeal to the file of the Sessions Judge of Shahabad and direct that the petitioners be released on bail to the satisfaction of the District Magistrate of Patna to appear before the Sessions Judge of Shahabad when called upon to do so.

Let the record be sent through the Sessions Judge of Patna to the District Magistrate of Patna and then by the last named officer to the Sessions Judge of Shahabad, who will pass the necessary orders under section 428, Criminal Procedure Code.

THORNHILL, J.—I agree.

Order set aside.

(1) 35 Ind. Cas. 503; 1 P. L. J. 99; 17 Cr. L. J. 332; 3 P. L. W. 175.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 204 OF 1918.

June 28, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

TAPRINESSA—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 201, 203, 211, offences under—Accomplice, whether can be convicted under ss. 201, 203—False information to Police implicating innocent man—Offence—Intention.

A person who gives false information to the Police, accusing another of an offence of murder in order to screen the real offender, commits offences not only under sections 201 and 203, Indian Penal Code, but also under section 211. [p 276, col 2; p. 277, col. 1.]

The husband of the accused having been murdered at night, she gave information to the Police falsely implicating a certain person:

Held, that although there were circumstances of grave suspicion against the accused woman, as being an accomplice, yet as it would be impossible on the record as it stood to hold that she was the murderer or one of the murderers, she could be convicted under sections 201 and 203, Indian Penal Code. [p. 277, col. 1.]

Empress v. *Behala Bibi*, 6 C. 789; 8 C. L. R. 207; 3 Ind. Dec. (N. S.) 511 and *Torap Ali* v. *Queen-Empress*, 22 C. 638; 11 Ind. Dec. (N. S.) 425, doubted and distinguished.

FACTS appear from the judgment.

Babu *Hemendranath Basu*, for the Appellant.—On the facts found by the Sessions Judge and on the conclusions arrived at by him, it would appear that the Judge held the accused to be an accomplice in the murder of the deceased. An accomplice could not be convicted under section 201 of the Penal Code. If she was an accomplice, as held by the Sessions Judge, the statement she had made to the Police was only to exculpate herself by implicating another. Refers to *Empress* v. *Behala Bibi* (1) and *Torap Ali* v. *Queen-Empress* (2).

(1) 6 C. 789; 8 C. L. R. 207; 3 Ind. Dec. (N. S.) 511.
(2) 22 C. 638; 11 Ind. Dec. (N. S.) 425.

TAPRINESSA *v.* EMPEROR.

The statement must have been made not in answers to questions but must have been volunteered. Refers to *Queen* v. *Joynarain Patro* (3). So the only statement on which any conviction could be based was the first information, which was only voluntary.

[TEUNON, J.—The learned Judge does not convict her under section 211, but under section 201 of the Penal Code as he says she gave false evidence only to screen herself and not to inculpate any other man. But if she cannot screen herself without inculpating another, then section 201 applies.]

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown, was not called upon.

JUDGMENT.—The appellant before us one Taprinessa has been convicted under sections 201 and 203 of the Indian Penal Code and sentenced under the first named section to three years' rigorous imprisonment and under the second to two years' rigorous imprisonment, the two sentences to run concurrently. It appears that on the night of the 13th July 1917 the husband of this woman named Sanghi was murdered, it would seem, shortly after midnight. The medical evidence shows that the cause of death was a blow with some cutting weapon, such as a *dao* or knife, on the right side of the neck cutting the anterior and internal jugular veins and also cutting into the third cervical vertebra and resulting, in the opinion of the medical officer, in instantaneous death. On the following morning the appellant accompanied the village Chowkidar, one Idhai, to the local Thanah and there with a number of details gave an account of the murder. She charged one Afiruddin, her next door neighbour, as one of the murderers.

The substantial question in the case before the learned Sessions Judge and in this appeal before us is whether that charge and the account given were false and were known by the appellant to be false. Afiruddin has been examined as a witness in this case and he has denied the commission of this murder or being any party thereto. His denial is corroborated by the absence, as the Judge finds, of any motive on his part to commit this murder and by all his subsequent conduct. We have no doubt, therefore, that in so far as she charged this man with murder, that charge was not true.

The further question is, whether she knew that it was a false charge that she was making. The circumstances on which the Judge relies as showing that the woman was in fact an accomplice in the murder, though not sufficient to enable him or us to come to such a finding, are yet sufficient to show that in naming Afiruddin as one of the murderers she knew that she was stating what was not true. These circumstances, shortly stated, are these: The fact that to the neighbours whom she saw in the morning following the occurrence she named no one; that she named Afiruddin for the first time on her way with the Chowkidar to the Thana; that on the next following day she made to the investigating Sub-Inspector an entirely different statement implicating three others and that on the 26th July she submitted from jail a petition in which she combines her two stories. That the charge was intentionally false is also clear by the delay that the woman made in giving the alarm or in arousing her neighbours, by the fact that at an earlier stage of the night she sought to call out one of her neighbours on a false pretext, by the fact that on the clothes she was wearing there were no stains of blood and by the absence of any signs of use of force or violence in the house in which she and her husband went to bed for the night. All these circumstances go to show that she knows far more about this murder than she was prepared to admit either at the time when she gave the first information or now. The reasonable inference from all this is that she in fact knew who the murderers were and that from some motive best known to her, possibly because of her quarrels some days before with Afiruddin's wife, she chose intentionally to implicate him.

There can be no doubt, therefore, that the conviction under section 201 has been properly arrived at, and indeed we are unable to understand the process of reasoning by which the Judge was led to acquit the woman of the charge under section 211, Indian Penal Code. We can only suppose that he has overlooked the distinction

(3) 20 W. R. Cr. 66.

between motive and intention. Not content with screening the real offenders the woman proceeded further falsely to implicate an innocent person. It cannot be supposed that a person who falsely brings such a grave charge against another does not know that the inevitable result will be injury to that person, and on general principles it should have been held that she intended that injury.

Lastly it has been argued in law that as the circumstances point to this woman being an accomplice in the murder she could not in law be convicted of the offence charged under sections 201 and 203, and in support of this contention reliance is placed upon the cases reported as *Empress* v. *Behala Bibi* (1) and *Torap Ali* v. *Queen-Empress* (2). We have, however, pointed out that though there are circumstances of grave suspicion against this woman, it would be impossible on the record as it stands to hold that she was the murderer or one of the murderers. That being so, even assuming that the cases reported as *Empress* v. *Behala Bibi* (1) and *Torap Ali* v. *Queen-Empress* (2) are properly decided on their own facts, still the present case may be distinguished and in this connection we may refer to the case of *Sumanta Dhupi* v. *Emperor* (4). As we have said in the present case the conviction, in our opinion, is legal and proper.

For these reasons we dismiss this appeal.

Before concludiug we desire to say that we do not agree with the Sessions Judge in his criticisms on the action of the Magistrate before whom the woman Taprinessa was produced on the 17th July. Though it might have been more happily worded, the caution given by the Magistrate to the woman was in substance sound and proper.

Appeal dismissed.

(4) 32 Ind. Cas. 132; 23 C. L. J. 333; 17 Cr. L. J. 4; 20 C. W. N. 166.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 773 AND 774 OF 1917.

CRIMINAL REVISION PETITIONS NOS. 620 AND 621 OF 1917.

July 2, 1918.

Present:—Mr. Justice Kumarasami Sastri.

KRIPASINDHU NAIKO—PETITIONER IN CR. R. CASE NO. 773 OF 1917

HARIKRISHNA NAIKO—PETITIONER IN CR. R. C. NO. 774 of 1917

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 117, 528, 530—Bad livelihood proceedings—Notice, issue of, by Magistrate to person not within jurisdiction, legality of—Proceedings drawn up on reference by District Magistrate, effect of, on want of jurisdiction—Joint trial of two persons, legality of—Misjoinder—Undivided members of Hindu family, liability of, for misconduct of particular members—Evidence, nature of—Rumour and hearsay, admissibility of—'Repute', meaning of—Notice to accused, form and contents of—Landlord keeping tenants of bad character, liability of—Forest offences—Statements in office files, admissibility of.

The issue of notice under section 110 of the Criminal Procedure Code is not a formal matter and the section limits the power to issue the notice to the Magistrate in whose jurisdiction the accused is. [p. 278, col. 2.]

The issue of a notice under section 110, Criminal Procedure Code, is a judicial act to be exercised after due consideration of the materials placed before the Magistrate, and not merely an executive order to be passed as a matter of course on a complaint by the Police. The issue of a notice by a Magistrate without jurisdiction cannot be justified on the ground that it was drawn up under orders from the District Magistrate. [p. 278, col. 2; p. 279, col. 1.]

A defect in the issue of the notice is not a mere irregularity, but the question is one of jurisdiction and falls under section 530 of the Criminal Procedure Code. [p. 279, col. 2.]

Ohiduddin Choudhury v. *Emperor*, 44 Ind. Cas. 122; 19 Cr. L. J. 266, dissented from.

It is not legal to try two persons jointly charged under section 110 (*f*) of the Criminal Procedure Code. [p. 280, col. 1.]

The test to be applied in cases where a plea of misjoinder is raised is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint. [p. 279, col. 2.]

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member, and, where they are living separately, there is not even the presumption that one member knew and assented to the misdeeds of the other. [p. 279, col. 1.]

Evidence of general repute does not mean hearsay evidence. [p. 280, col. 1.]

The belief of a class of persons, that a particular individual has done particular acts or has characteristics of a certain kind because there are rumours

to that effect in a particular place, is not admissible as evidence of repute where no facts are mentioned to indicate that there were sufficient reasons for the impression [p. 280, col. 2.]

A notice under section 110, Criminal Procedure Code, must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details to enable the accused to know what fact he is to meet, but it is not necessary to give a list of witnesses. [p. 280, col. 2.]

Where, however, the defect has not been objected to in the trial Court, the High Court ought not to quash the proceedings in revision in the absence of any proof that the accused was prejudiced by the defect [p. 281, col. 1.]

The facts that a landlord has tenants of bad character under him and lends them money when they are in difficulty or mediates between his tenants who are accused of theft and their victims, are not grounds for requiring security from the landlord under section 110. [p. 285, col. 2.]

Inferences drawn by forest officials as to persons who committed forest offences are not evidence of repute. The Court should test the sources of the information that led the officials to infer that the accused had anything to do with the offences. [p. 285, col. 2.]

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment in Criminal Appeals Nos. 16 and 17 of 1917 on the file of the Court of the District Magistrate of Ganjam, both preferred against the judgment in Miscellaneous Case No. 7 of 1917 on the file of the Court of the Divisional Magistrate of Chatrapur.

Messrs. *K. V. L. Narasimham*, *P. Narayanamurthi* and *K. Srinivasa Iyengar*, for the Accused.

Mr. *C. Narasimmachari*, for the Public Prosecutor for the Government.

JUDGMENT.—These petitions are filed against the order of the Sub-Divisional Magistrate of Chatrapur which was confirmed on appeal, directing the petitioners to furnish security for good behaviour under section 110 of the Criminal Procedure Code. The petitioners are brothers. One of them is the Karji of Panchabuhuti and the other is the Sirdar of Gondhadhars. The notice issued to them by the Divisional Magistrate sets out that the charge-sheet submitted by the Sub Inspector of Police made it appear to the Magistrate that they were habitually protecting thieves, habitually committing or attempting to commit or abetting the commitment of offences involving a breach of the peace, and were so dangerous and desperate as to render their being at large without security hazardous to the community. The Sub-Divisional Magistrate directed them to execute a bond for Rs. 500 with two sureties of Rs. 100 each for the period of one year. Various legal objections to the validity of the order are raised and I shall deal with them before going into the evidence.

The first objection raised is that the Sub-Divisional Magistrate had no jurisdiction to issue notice or try the case, as the accused persons did not reside within his jurisdiction. It appears from the record that the Police sent the charge-sheet to the District Magistrate, who did not issue any notice under the Criminal Procedure Code but sent the charge sheet on for disposal first to the Special Agent and then to the Sub-Divisional Magistrate of Chatrapur. It is contended that the Magistrate issuing the notice under section 110 of the Criminal Procedure Code should be the Magistrate within whose jurisdiction, the persons against whom the notice is issued reside and that as the accused admittedly reside outside his jurisdiction, the proceedings taken by him are invalid. As it is clear from the records, and not disputed by the Public Prosecutor, that the accused are residing within the jurisdiction of the Deputy Magistrate of Gumsur, it is clear that the Sub-Divisional Magistrate of Chatrapur had no jurisdiction to issue the notice. It was no doubt open to the District Magistrate to have issued the notice under section 110 when he received the charge-sheet, as his jurisdiction extends over the whole District and he would be a Magistrate within whose jurisdiction the accused lived, but he did not do so. The issue of notice is not a formal matter and it is clear that section 110 limits the powers to issue the notice to the Magistrate in whose jurisdiction the accused are. The issue of a notice under section 110 being a judicial act to be exercised after a due consideration of the materials placed before the Magistrate and not merely an executive order to be passed as a matter of course on the complaint by the Police, the Legislature evidently restricted the jurisdiction to issue the notice to the Magistrate in whose local limits the persons complained against were living or were making themselves

a danger to the public peace, as he would presumably have a knowledge of the local conditions and would be the fittest person to judge whether any action was necessary. It is to be noted that under section 107, clause 2 of the Criminal Procedure Code, the notice is to be issued by the Magistrate within the local limits of whose jurisdiction the person informed against is residing or the place where breach of the peace is apprehended is situate, while in section 110 the acts complained of must be done by a person within the limits of his jurisdiction. The question is concluded by the recent decision of Abdur Rahim and Napier, JJ., in *Nagireddy Kondareddy, In re* (1). In dealing with a similar objection taken under section 107 of the Criminal Procedure Code, where the District Magistrate sent on the records to the Divisional Magistrate without issuing a notice, the learned Judges observe that the District Magistrate cannot be said to have taken proceedings under the section until he issues notice to the person charged to show cause why he should not be proceeded against, that the Magistrate who issues the notice must be deemed to be the person who initiates proceedings and that the District Magistrate to whom the Police reported certain facts and who passed the matter on to the Head Quarter Deputy Magistrate cannot be said to have initiated proceedings and transferred it to the Head Quarter Deputy Magistrate for disposal. They also held that section 528 did not empower the District Magistrate to transfer the case to a Magistrate who had no local jurisdiction over the matter by reason of section 107, clause 2. A similar view is taken in *Nirbikar Chandra Mukherji* v. *Emperor* (2), where it was held that the fact that the District Magistrate directed a Subordinate Magistrate to draw up proceedings against a person not resident in the jurisdiction of the Subordinate Magistrate would not give the latter Magistrate jurisdiction, as the provisions of section 107 were imperative. *Surjya Kanta Roy Chowdhry* v. *Emperor* (3) and *King-Emperor* v. *Munna* (4), referred to with approval in *Nagireddy Kondareddy, In re* (1), are also in point. It is argued that the drawing up of proceedings by the Deputy Magistrate is only an irregularity. The question is one of jurisdiction and more appropriately falls under section 530 of the Criminal Procedure Code. It was treated as fatal to the validity of the proceedings in all the cases above referred to. My attention has been called to *Ohiduddin Choudhury* v. *Emperor* (5), where it was held that the procedure of the District Magistrate was only an irregularity, but I am bound by the decision of the Madras High Court which is supported by authority. No reasons are given in the above case for taking a contrary view and the decisions of the Calcutta High Court are not even referred to. I am of opinion that the Sub-Divisional Magistrate of Chatrapur had no jurisdiction to issue the notice and try the case and that the proceedings are void.

The next objection relates to the joint trial of the 1st and 2nd accused. They are brothers who have undivided properties, but they live separately. The 1st accused is the village Karji of Panchabubhuti and lives at Panchabubhuti. The 2nd accused is a Sirdar and lives at Gondhadhars. The two villages are about 10 miles distant from each other. It is contended that evidence against 1st accused has been used as evidence against 2nd accused and *vice versa* and that the parties have been greatly prejudiced thereby. The test to be applied in all such cases where a plea of misjoinder is raised is whether there has been habitual association between the persons charged in respect of the misconduct alleged on the complaint. The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member and where they are living separately, there is not even the presumption that one member knew and assented to the misdeeds of the other. In the present case there is no evidence of any association of the two accused in any particular act and even if the evidence against one is true, it is quite consistent with the ignorance of the other accused as to the wrong-

(1) 41 Ind. Cas. 990; 41 M. 246; 18 Cr. L. J. 878.
(2) 1 Ind. Cas. 78; 13 C. W. N. 580; 9 Cr. L. J. 148.
(3) 31 C. 350; 1 Cr. L. J. 344.
(4) 24 A. 151; A. W. N. (1901) 203.

(5) 44 Ind. Cas. 122; 19 Cr. L. J. 266.

ful acts alleged. There can be little doubt that one accused has been prejudiced by evidence against the other being used as evidence against him, and I am of opinion that both the lower Courts were wrong in not examining the evidence against each of the accused with a view of determining whether security should be demanded against him or not. I might in this connection refer to *Hari Telang* v. *Queen-Empress* (6), where it was held that it was not legal to try jointly two persons charged under section 110, clause (*f*).

Objection has also been taken to the admission of a large body of irrelevant evidence in the belief that it was admissible as evidence of repute. Evidence has been let in to the effect that *A* heard from *B* that the latter suspected one of the accused of misconduct. It seems to me to be clear that such evidence is not evidence of repute and is clearly inadmissible. Evidence of general repute under section 117, clause (3), does not, for the purpose of enquiry into conduct of persons under Chapter VIII, mean hearsay and repute has been clearly pointed out in *Rai Isri Pershad* v. *Queen-Empress* (7). The following observations are in point: "It is hardly necessary to say that evidence of rumour is mere hearsay evidence and hearsay evidence of a particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character; but to say that, because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind, these rumours are in themselves evidence under this section, is to say what the law does not justify us in saying." The case was considered in *Chintamon Singh* v. *Emperor* (8) where all that was held was that when an offence, *e. g.*, dacoity, was committed in another village, evidence of repute given by persons residing in that village was also admissible. In *Alep Pramanik* v. *King-Emperor* (9) it was held that persons ought not to be bound down under section 110 of the Criminal Procedure Code upon the mere statement of witnesses that they suspect or are under the impression that the persons proceeded against are thieves or dacoits, where no fact is mentioned to indicate that there was sufficient reason for their suspicion or impression.

The next objection is that the notice to the accused to show cause is vague and insufficient. The notice issued by the Divisional Magistrate runs as follows:—"Whereas it has been made to appear to me by the charge sheet submitted against you by the Sub Inspector of Police, Bugada station, under section 110 (*e*) and (*f*) of the Criminal Procedure Code, that you are habitually protecting thieves, habitually committing or attempting to commit or abetting the commitment of offences involving a breach of the peace and are so dangerous and desperate as to render your being at large without security hazardous to the community, you are hereby required to show cause why you should not be required to execute a bond for Rs. 500 with two sureties of Rs. 100 each to be of good behaviour for a period of two years." I am of opinion that notices under section 110 must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details which would enable the accused to know what facts he is to meet, though as pointed out in *Chintamon Singh* v. *Emperor* (8), it is not necessary to give a list of the witnesses. In *Nagireddy Kondareddy, In re* (1) it was held that a general notice which did not state when the threats complained of were uttered or who the persons threatened were or when the apprehension of a breach of the peace arose was vague and bad in

(6) 27 C. 781; 4 C. W. N. 531; 14 Ind. Dec. (N. S.) 511.

(7) 23 C. 621; 12 Ind. Dec. (N. S.) 413.

(8) 35 C. 243 at p. 262; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146.

(9) 11 C. W. N. 413; 5 Cr. L. J. 191.

law and that the proceedings were liable to be quashed on that ground. I am, however, of opinion that when a party does not during the trial seek for information and does not complain in the lower Court or show that he has been substantially prejudiced, the High Court in revision ought not to quash the proceedings in the absence of any proof of prejudice. In the present case I am unable to find anything to show that the accused were unable to cross-examine the prosecution witnesses effectively or cite their own evidence in consequence of the vagueness of the charge.

Turning to the merits I think the order ought not to have been made, as the evidence which is relevant is totally insufficient to bring the accused under section 110. The 1st accused is the Karji of Panchabhubhuti and the 2nd accused is the Sirdar of Gondhadhars. They own extensive properties and have several Panos in their service like other landlords in the district. So far as the 2nd accused is concerned, the Governor-General in Council presented him with the certificate Exhibit II in recognition of his help in preventing riots in 1889 and his good services in watching the frontier in 1894. He was also given a gun in 1905 and Coronation Medal in 1912 by the Government. He was also appointed Member of the Taluk Board. There is a large body of evidence of respectable Government officials and also of non-officials which, in my opinion, certainly outweighs the unreliable and interested evidence of the prosecution witnesses. Mr. Green, the Deputy Magistrate of Gumsur since 1913, within whose jurisdiction the accused live and who had ample opportunities of knowing their charactor, states that he never received petitions to the effect that the accused were receiving stolen property or were dangerous to the public and that he never came across any such complaints in the records prior to his time. He states that in his opinion the two accused are of good conduct. It is to be regretted that all kinds of insinuations were allowed to be made by the Police against Mr. Green, the more so as there is nothing, so far as I can see, to warrant the belief that Mr. Green who is a responsible Government servant of long standing acted improperly. The Sub-Divisional Magistrate has fallen into a strange error when he states that P. W. No. 10 complained against the 1st accused and 40 persons having cut his crop and Mr. Green took the case on his file and dismissed it as false. P. W. No. 10 states in his evidence that he complained to the Superintendent of Police who referred him to a Magistrate and that he never filed any complaint before the Deputy Magistrate, Mr. Green. Far from dismissing any case brought by P. W. No. 10, Mr. Green dismissed a case filed against P. W. No. 10 Mr. Narayanamurthy, D.W.No. 1, who is a Pleader and who was chairman for 15 years, states that 2nd accused was a Member of the Taluk Board, that he has known accused Nos. 1 and 2 for 10 or 12 years and that they are reported to be good men. There is no cross-examination of this witness as to the unreliability of the source of his information. The District Magistrate discredits him because, in his opinion, he made contradictory statements as to his having been retained as a Pleader by the accused. He states that he was never retained as a Pleader by the accused and immediately afterwards states that he was engaged as their Pleader in a case. What the witness evidently meant is that he had no general retainer as Vakil to appear in all their cases, but was only engaged on a special occasion by them and there is no contradiction if the well-known distinction between a Pleader having a general retainer to appear for a party and his being engaged only in a special case is kept in view. D. W. No. 2 was the Sub-Assistant Surgeon of Russalkonda for 8 years prior to 1912. He states that he has only heard good reports of their character. As the prosecution has let in evidence of acts said to have been committed 7 or 8 years ago, his evidence is certainly relevant. D. W. No. 3 was the Stationary Sub-Magistrate of Russalkonda in 1910 and Tahsildar of Gumsur Taluk in 1913. He states he does not remember having heard any bad reports about the 2 accused. D. W. No. 5 is a land-holder and merchant who has 1,500 or 1,600 *bharnams* of land and who was a Taluk Board and Union Member. He speaks to the good character of the accused and says he has known them for 25 years and never heard that the accused caused thefts to be committed or harboured thieves or received stolen property. His pur-

chasing skins from Panos as a skin merchant is no ground for discrediting his evidence nor is his having testified to the 1st accused's character on a previous occasion. There is nothing in his cross-examination to suggest he does not own 1,500 or 1,600 *bharnams* of land. D. W. No. 6 is the trustee of a temple and owns 180 *bharnams* of land paying a *kist* of 80 or 90 rupees. He speaks to the conduct of the accused and says that they are known to be respectable persons in the Mittah. D. W. No. 7 also speaks to their good character. D. W. No. 8, who says he is school-master and owns 150 *bharnams* of land, states that accused have good characters and are not known to be receivers of stolen property or abettors of thefts or harbourers of thieves. D. W. No. 9 is a Karnam and he speaks to the character of the accused. D. W. No. 10, who is an *inamdar* and owns 700 *bharnams* of land, states that he has known the accused for 15 or 16 years and that their character has been good and that he never heard any reports against them. D. W. No. 11, who lives near the accused's village, states that accused get an income of Rs. 25,000 from their lands, that they are respectable and charitable persons. D. W. No. 12, who owns about 450 *bharnams* of land, states that he knows the accused well and that they bear a good character. D. W. No. 14, who is a retired Deputy Collector and who was in Gumsur Division in several capacities for several years till April 1913, states that he knows the accused well and that he never heard any one say that they received stolen properties, harboured thieves, or forcibly carried away properties. He says that 2nd accused's conduct was excellent. This witness had ample opportunities of knowing their character and his evidence shows that at any rate till 1913 they bore a very good character. D.W. No. 15 is the Sub-Assistant Director of Survey, who was in charge of Gumsur Division in 1909 and 1915. He says he heard nothing against their character and that he knows that their character is good from conversations he had with them and the ryots. D.W. No. 16 was a Revenue Inspector of Gumsur for 3 years (1906-1910). He says that their character is good and that he never heard complaints about their having received stolen property or harboured thieves or taken forcible possession of property. D.W. No. 17, who was a Deputy Ranger for 1913 and 1915, also speaks for their good character. D W. No. 18 who owns 300 *bharnams* of land says he has known accused since their infancy and that they have always borne a good character and that he never heard anything against them. D. W. No. 19, who was Deputy Collector in Gumsur in 1902, 1905 to 1909, 1911 and 1912, states that he knows accused Nos. 1 and 2, that their conduct was good, that accused No. 2 was Member of the Taluk Board and that he never heard that they harboured thieves or received stolen property. D. Ws. Nos 22 and 23, who own lands in the neighbourhood, also speak to their good character. D. W. No. 24, who was Tahsildar of Gumsur from 1911 to 1914, states that their character was good and that he heard nothing against them. As 1st accused was his subordinate he had special means of knowing his character. D.W. No. 25, who is a retired Tahsildar and at present manager under the Maharaja of Bobbili, states that he was Sub-Magistrate of Gumsur from 1910 to 1912 that he knew 2nd accused and that he heard nothing against his character. D. W. No. 26 is a retired Deputy Tahsildar, who says he knows accused Nos. 1 and 2 from 1888 and that he never heard anything against them. D. W. No. 27 is the Revenue Inspector who has been there for about 3 years, and he states he heard nothing against the accused. D. W. No. 28, who was a Revenue Inspector, says that during his stay in the division the character of accused Nos. 1 and 2 was good and that he heard nothing against them. I am unable to agree with the Divisional Magistrate who dismissed the defence evidence summarily as being of a negative and intangible character and not of persons living on the spot. It is difficult to believe that, if the accused were notoriously bad persons or were guilty of even a fraction of the acts attributed to them, Deputy Collectors, Tahsildars, Sub-Magistrates, Revenue Inspectors and persons owning lands in the vicinity would not have heard of it. Nor am I able to appreciate the remarks of the District Magistrate that the evidence of Mr. Green's subordinate has to be discounted, as I see nothing which casts any doubt on the *bona fides* of

Mr. Green. The evidence of the prosecution witnesses is vague and indefinite as to time and some acts complained of take us back to several years. It also appears to me that men who bore a good character till a few years ago would not suddenly have degenerated into thieves and dangerous persons. The evidence of the defence official witnesses cannot be, therefore, rejected so summarily as the District Magistrate has done.

Before discussing the prosection evidence, it is necessary to bear in mind the circumstances under which the present complaint was laid by the Sub Inspector who, as found by the Divisional Magistrate, has identified himself with the faction opposed to the accused in the dispute about Gochabadi land. The 1st accused has taken a lease of the village from some of the junior members and had also purchased some shares and was in possession for a long time. The Sirdar of Koradabadi tendered *pattas* to tenants alleging that he was entitled to 1/5th share. The disputes culminated in 1897 by the High Court deciding that the Koradabadi Sirdar could not tender *pattas* [see *Raghu Gowdo* v. *Gowdo Chandro Naiko* (10)]. Exhibits 32 and 33 series are the documents under which 1st accused got possession. The Koradabadi Sirdar having failed in the High Court did not file a regular suit, but tried to get possession through the Mahapatros who had lent moneys to Gochabadi Mokassadar. The lessors of 1st accused at one stage supported him but afterwards took sides with the Sirdar and the Mahapatros. Proceedings were taken by 1st accused under section 145 on the 13th April 1914 and order (Exhibit 44) was passed in favour of the 1st accused and his possession was confirmed. No suit was filed to contest this. The Koradabadi Sirdar then wanted to prevent 1st accused reaping paddy and filed a criminal complaint of theft of paddy which was dismissed. Disputes continued. The 1st accused again applied under section 145 in April 1916 and the order Exhibit P 3 was passed directing that 1st accused should not be disturbed as regards 4/5ths of the estate and the counter-petitioner as regards 1/5th. The order as regards 1/5th was ultimately upset by the High Court. Taking advantage of the order of Mr. Arudt, the Special Assistant Agent, the Koradabadi Sirdar attempted to enter on the lands and cut the crops, but the tenants who raised the crops objected that it was they that should harvest and not the landlord who had at best only a claim to the Rajabhagam after tenants harvested. The 1st accused filed a suit on the 23rd November and got a temporary injunction Exhibit P.4. The Koradabadi Zamindar was in the meanwhile harvesting the crops and it was alleged that though the order of the Civil Court was shown to the Police they declined to interfere. The evidence of the constable P. W. No. 22 supports this. Mr. Green then passed an order, dated 27th November 1916, directing the Police to obey the order of the Civil Court. The Magistrate finds, and there can be little doubt from the evidence, that throughout these proceedings the Sub-Inspector of Police, who is responsible for the initiation of the proceedings under section 110 against the accused and who is a relation of the Mahapatros, was an active partizan of the opposite party. It was after the order of Mr. Green and when the Mahapatros and the Sirdar were defeated in their attempts to get possession that proceedings were initiated under section 110 against the accused. Under these circumstances the evidence of the Sub-Inspector and the Police witnesses has to be received with considerable caution.

As already pointed out, the charges against the accused are (1) habitually protecting theives, (2) habitually committing or attempting to commit or abetting the commission of offences involving a breach of the peace, (3) being dangerous and deeperate.

The second charge relates to cutting crops and taking forcible possession of lands. The chief items are Gochabadi lands, Panokyari lands and lands in Singapur. As regards Gochabadi lands I have already given a history of the dispute. The case against the 1st accused that he was present and came to the land with a number of persons is clearly disproved, as the 1st accused was on that date at Berhampore. The Sub-Divisional Magistrate observes in this part of the case: "My opinion of this affair, as far as it relates to the first accused, is that he did send his men to Gochabadi to make

(10) 7 M. L. J. 243 at p. 246.

a show of force but that he did not intend to use force. His idea was obviously to hold up proceedings in Gochabadi while he took steps in Civil Courts. I cannot acquit 1st accused of all blame in this matter, even though the ultimate responsiblity for it rests on other shoulders." It appears from the evidence that the lands were shared on the Rajabhagam system and if this is so, the *ryots* were justified in objecting to the landlord cutting the crops even assuming that the Sirdar was entitled to 1·5th of the lands. The order of Mr. Arudt was admittedly set aside by the High Court. The 1st accused would well have been within his legal rights if he took steps to prevent the opposite side from unlawfully entering on land in his possession, especially as Mr. Arudt's order referred to a fifth unspecified share. It is difficult to see how on the findings of the Magistrate the case is one for security under section 110.

As regards the Panokyari lands the contesting parties were P. W. No. 19 and one Govinda Naiko. Lakkow Prodhano purchased the lands in 1910 under Exhibit III and leased them to Govinda Naiko by the deed Exhibit V*a*. In 1913 the brother of P.W. No. 13 got a sale-deed from the same vendor, Exhibit V *b*. The dispute between the rival claimants is pending in second appeals in the High Court. Exhibits V *a* and VI are leases in favour of Govinda Naiko. *Prima facie* title is in Govindo Naiko and the Magistrate states that Exhibits 4, 5, 6 and 7 show that Govindo Naiko has a title. The learned Magistrate was wrong in stating that 1st accused admitted bringing his men to cut the crop. His Vakil denies, it and I have not been referred to any part of the record supporting the Magistrate's statement. It is clear that 1st accused had no interest in the land. As remarked by the Magistrate, P. W. No. 19 is a bitter enemy of the 1st accused and it is difficult to see how his statement can be accepted. No report was sent to the Police and it is extremely unlikely that P. W. No. 19 or the enemies of the 1st accused would not have filed complaints, if as a matter of fact 1st accused went to the land with several men and carried away the crops. The paddy was not taken to accused's house but was in Govinda Naiko's house at Khyrokadi. Exhibit 22 shows that the accused were discharged in the theft case and Exhibit 23 that the District Magistrate upheld the order of discharge. I find it difficult to see how the accused can be ordered to furnish security on so flimsy materials.

As regards the Singapur lands the Magistrate has fallen into the error already pointed out by me that Mr. Green took the complaint of P. W. No. 10 on his file and threw it out. It appears from the evidence that Mr. Green threw out the complaint against P.W.No. 10. The evidence of P. W. No. 10 is worthless, especially as he wants to make out that the complaint which was thrown out was concocted with the assistance of the Deputy Collector.

As regards the dispute between P. W. No. 9 and D. W. No. 29 about lands, it is clear from the evidence that D. W. No. 29 obtained a decree Exhibit 24 against P. W. No. 9. It also appears that he got possession. P. W. No. 9 says that accused Nos. 1 and 2 cut the crops with the help of Panos 5 years ago. The statement of P. W. No. 9 that the Deputy Collector (who was not then Mr. Green) asked him to complain against the Haddis and Panos and not against 1st accused, is on the face of it absurd. It seems to me impossible to act on evidence of this kind, relating to an occurrence said to have taken place 4 or 5 years previously. The evidence of P. W. No. 11 is equally worthless. He is a servant of the opposite faction. He says he complained to no body about the alleged conduct of the 1st and 2nd accused even though according to him the Karji sent him to the Police station with a false report.

The evidence as to forcible cutting and carrying away of crops is, therefore, worthless and cannot, in my opinion, be accepted. As regards the complaint about the rescue of prisoners, it is said to have taken place so long ago as 1908. There is little to connect Sola Pano with the accused. It is difficult to see how the accused can be held to be liable for the acts of the Panos in rescuing a fellow Pano. It not unfrequently happens that amongst the lower classes a fellow casteman who is arrested is rescued by the other villagers turning up, and it is a

large order to hold the landlord liable simply because some of his servants rescued others. It does not appear that any finding was recorded in the trial that accused had any hand in the rescue of Sola Pano. His plea seems to have been that he escaped while the constables escorting him were asleep. P. W. No. 28, the constable, speaks to the contents of reports and to his evidence in the case. The originals ought to have been produced, if it was intended by the prosecution to rely on them. The second case about a rescue is limited to an attempt in 1915 by the 1st accused and the evidence is equally worthless. It is difficult to see why, if the evidence of P. W. No. 22 is true, no steps were taken against 1st accused at the time. The evidence of this witness as to 1st accused turning up at Gochabadi with 300 men is false, as 1st accused is proved to have been at Berhampore on the date and the Magistrate finds that he was not at Gochabadi when the *ryots* turned up and refused to allow the Koradabadi servants to cut the crops. P. W. No. 16 states that he turned up with 12 men to support P. W. No. 22 and that the Panos of 1st accused ran away but 1st accused remained there. This is improbable. He admits that neither he nor the constable reported that 1st accused attempted to rescue the prisoners.

As regards complaint of theft or the abetment of theft, the evidence of witnesses who say that they heard from *A* that he suspected the Sirdars or that theft was at their instance has, for the reasons already given by me, to be excluded. It is not evidence of repute and if the thefts are sought to be proved, the witnesses who have a direct knowledge of the affair ought to have been called. The Magistrate seems to have thought that because Panos committed theft and some prosecution witnesses state that they are accused Panos, the case against the accused is proved. It is well known that Panos like Marravars, Kallars and other tribes are addicted to theft and lawlessness especially, during the non-cultivating seasons. The District Magistrate in his judgment says that Panos are notoriousry addicted to crime. Under these circumstances great caution has to be used in fixing liability on the landlords, especially as almost every landlord in those parts has to employ Pano cultivators. In this connection I may refer to the observations in *Nilkamal Das* v. *Emperor* (11), where it was held that the facts that a landlord has tenants of bad character under him, that he lends money to tenants of bad character under him when they are in difficulty and that he mediates between his tenants who are accused of theft and their victims, are not grounds for requiring security under section 110. If these remarks are borne in mind and hearsay evidence excluded, there is very little reliable evidence to show that accused either took part in or abetted thefts. They are rich and influential persons, and it is difficult to believe that they either profited by the small thefts or instigated Panos (who required little inducements to thieve) to commit theft. The fact that in 2 or 3 cases they interested themselves in the case against the Panos, even if true, is quite consistent with a desire to help servants whom they considered wrongly charged. The Magistrate erred in thinking that in spite of acquittals of the persons actually charged with offences the facts relied on by the prosecution in those cases can be relevant evidence against the present accused. I need only refer to the observations in *Nagireddy Kondareddy, In re* (1) already referred to.

As regards forest offences, any inference that particular forest officials may draw as to the persons who committed theft will not be evidence of repute. The Court has to test the sources of the information that led them to infer that the accused had anything to do with the thefts. Statements in forest department files will not be evidence by themselves. As other landlords besides the accused have Pano servants, the fact that the Forest Ranger was of opinion that, from the nature of the wood stolen, others ought to be behind them would apply generally to landlords, and there is no special reason why the accused should be charged in particular. The forest officials were not likely to be afraid of the village Karji (the 1st accused) and there is no reason why they did not prosecute him. The illicit grazing

(11) 6 C. L. J. 711; 6 Cr. L. J. 403.

of the buffalos on one occasion in respect of which compensation was levied by the forest department, even if true, would not be a ground for requiring security under section 110; nor would the remarks in a file that some *shicaries* on one occasion used the gun of 2nd accused be sufficient.

As regards the evidence of P. Ws. Nos. 14 and 15 it is difficult to see how, even if it is true, any case of theft can be made out. First accused told P. W. No. 14 that his servants brought timber without orders and offered to pay the price, which offer the merchant accepted. P. W. No. 15 says that stolen timber was found near the village where 1st accused and several others lived. The fact that 2nd accused purchased the logs and paid Rs. 75 for them would not show he was the thief.

As regards evidence of repute the prosecution witnesses are not men of any special consequence and the evidence is in my opinion more than counterbalanced by the evidence of officials and respectable residents, which I have already referred to. Several prosecution witnesses are on bad terms with the accused and evidence of the sort they give is easily procurable by the Police Sub-Inspector P. W. No. 1, who is on bad terms with the accused and who launched the present prosecution after all attempts to help the Mahapatros and the Sirdar in the land dispute between them and accused had failed. The Magistrate is of opinion that the Sub-Inspector P. W. No. 1 is the champion of the faction opposed to the accused, and I have little doubt that the present proceedings were not instituted *bona fide* by P. W. No. 1.

The case has been very fully argued on both sides, and I have little hesitation in holding that both on the points of law and the questions of fact raised the order requiring security is unsupportable. I set aside the order and direct that the bonds if executed by accused Nos. 1 and 2 be cancelled.

Order set aside.

M.C.P.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 250 OF 1918.

March 22, 1918.

Present:—Mr. Justice Wilberforce.

JIA LAL—PETITIONER

versus

PHOGO MAL AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—City Magistrate, whether permanent Court—Jurisdiction.

The Court of the City Magistrate is not a permanent Court with a perpetual succession of Judges; so that where a City Magistrate has been transferred, his successor has no power to sanction a prosecution in respect of an offence committed before his predecessor. In such a case the Sessions Judge alone is competent to grant the necessary sanction under section 195 of the Criminal Procedure Code. [p. 287, col. 1.]

Criminal revision from the order of the Sessions Judge, Lahore, dated the 11th February 1918.

Messrs. *Durga Das* and *Amin Chand*, for the Petitioner.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—In this case the petitioner applies for revision of an order of the Sessions Judge of Lahore, to the effect that the City Magistrate should record his opinion as to whether a prosecution should be sanctioned under section 195, Criminal Procedure Code, and should himself decide the case. The legality of this order is questioned on the ground that the Magistrate who tried the case out of which the application for sanction arises, has been transferred and that under these circumstances only the Court to which he was subordinate, could grant the necessary sanction. As an authority for this proposition *Muhammad Ishaq* v. *Muqim-ud-din* (1) is quoted. The original case was tried by the City Magistrate, and Counsel for the respondents argues that his Court is a permanent one with a perpetual succession of Judges and that, therefore, *Muhammad Ishaq* v. *Muqim-ud-din* (1) does not apply. Counsel for the respondents also relies upon a Madras case quoted as *Phina*

(1) 19 Ind. Cas. 178; 7 P. R. 1913 Cr; 207 P. L. R. 1913; 14 Cr. L. J. 178.

Singh v. *Empress* (2). Following, however, the principle adopted in *Muhammad Ishaq* v. *Muqim-ud din* (1), I cannot hold the Court of the City Magistrate to be a permanent one with a perpetual succession of Judges. The Court in question is only of recent creation and is a Court not known to the Criminal Procedure Code. I, therefore, hold that only the Sessions Judge is competent under the provisions of section 195 to grant the necessary sanction.

Counsel for the respondents also referred to an order passed by Mr. Coldstream, the first Sessions Judge, who took cognizance of this case. Mr. Coldstream passed an order on the 14th February 1917 that the matter was one for the City Magistrate to decide. This order I hold to be opposed to law. The order in question was not followed by Rai Bahadur Lala Damodar Das, who on the 31st October 1917 held that the City Magistrate should sumbit a report for final orders. It is true that Rai Bahadur Lala Damodar Das had no power to reverse the order of his predecessor and that for this reason his order is equally *ultra vires*. As, however, the whole case is now before me on revision, it is not necessary to consider how far the parties are bound by the orders of Mr. Coldstream, or Rai Bahadur Lala Damodar Das.

I accept the application for revision and direct the Sessions Judge to decide whether sanction should be given or not.

Revision accepted.

(2) 25 P. R. 1889 Cr.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 86 OF 1918.

CRIMINAL REVISION No. 35 OF 1918.

July 29, 1918.

Present:— Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

BHUBAN RAM AND OTHERS—ACCUSED —PETITIONERS

versus

BIBHUTI BHUSAN BISWAS—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 290—Public nuisance, user of premises giving rise to—Proprietors of premises, whether liable—Master and servant—Master, liability of, for servant's acts.

Speaking generally, where the user of premises gives rise to a nuisance the person liable under section 290 of the Penal Code is the occupier for the time being, whoever he may be. A proprietor who is not in occupation of the premises is not liable, unless his conduct amounts to an abetment of the offence under that section. [p. 288, col. 1.]

The general rule is that a master is not criminally answerable for the acts of his servant. [p. 288, col. 1.]

Reference made by the Sessions Judge, Dinajpur under section 438, Criminal Procedure Code.

Babus *Dasarathi Sanyal* and *Debendra Narain Bhatta*, for the Petitioners.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Dinajpur under section 438, Criminal Procedure Code. The learned Sessions Judge states the facts as follows: "A steam paddy husking machine was set up in Dinajpur Municipality in 19.2, with the permission of the Municipality. Up to December 19.7 it appears to have worked only by day and there was no complaint. But in that month it began working both by day and by night and a complaint was filed on the 11th January 1918 by ten persons living near it that the dust, smoke, smell and noise of the machine were a public nuisance both by day and by night. The District Magistrate thereupon prohibited the working of the mill by night and summoned the proprietors and the manager under section 290, Indian Penal Code. At the trial the persons living close to the mill, said that they were annoyed by

the mill in various ways but chiefly because it disturbed their sleep at night. One man who signed the petition, however, said that it did not inconvenience him at all, and 19 defence witnesses who live in the same neighbourhood but rather further away, deposed that the mill caused them no annoyance. The trying Magistrate held that the working of the mill at night in a residential portion of the town was objectionale and that the noise of it amounted to a public nuisance and he fined the manager and the three proprietors Rs. 50 each under section 290, Indan Penal Code."

The learned Sessions Judge was of opinion that the conviction of the proprietors was bad in law and he recommended that their conviction should be set aside. He was of opinion, however, that there was nothing in the conviction of the manager.

We have heard the matter argued on behalf of the persons convicted by Mr. Sanyal and on behalf of the Crown by the Deputy Legal Remembrancer. In the result we agree with the Sessions Judge that the conviction of the proprietors of the mill should be set aside. The general rule is that a principal is not criminally answerable for the acts of his agent. In the present case the proprietors of the mill were not living on the premises; two of the three proprietors live in the United Provinces and the third lives in Darjeeling. Speaking generally, the person liable where the user of premises gives rise to a nuisance, is the occupier for the time being, whoever he may be. The occupier in the present case is the servant of the proprietors. No doubt the proprietors might be liable for abetment. But in the present case abetment is neither proved nor charged. In this view we must set aside the conviction of the three proprietors, Bhuban Ram, Ramananda Ram and Deo Chand Ram.

As to the conviction of the manager, Mr. Sanyal has argued that the facts do not bring the present case within the definition of a public nuisance to be found in section 268, Indian Penal Code. That section, so far as it is necessary to quote it, says that a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity.

As to this question, though there may be some conflict in the evidence we are of opinion that there were materials before the Magistrate on which he was at liberty to find that the working of the mill at night amounted to a public nuisance, within the words I have read. In this view we are not disposed to interfere with the conviction of the manager or to interfere with the sentence passed upon him. The application made on behalf of the manager must, therefore, be refused.

As regards the proprietors, we were referred to certain cases decided in England [*Rex* v. *Medley* (1) and *Reg.* v. *Stephen* (2)]. These cases were decided under the Common Law. In India the question is merely how the Statute should be construed and the English cases cited are, in our opinion, no authority on the construction of the Penal Code.

The fine imposed on the proprietors must, if paid, be refunded.

Application partly allowed.

(1) (1834) 6 Car. & P. 292.
(2) (1866) 1 Q. B. 702; 7 B. & S. 710; 12 Jur. (N. S.) 961; 14 L. T. 593; 14 W. R. 859; 10 Cox C. C. 340.

PENHEIRO *v.* JOTINDRA MOHAN SEN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3388 OF 1915.

June 25, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

MARIE PENHEIRO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JOTINDRA MOHAN SEN—DEFENDANT—RESPONDENT.

Succession Act (X *of* 1865), *ss.* 269, 293—*Executor, power of, to deal with property of deceased—Legacy—Assent of executor, effect of.*

An executor, after having given his assent to a legacy, is not competent to deal further with the property bequeathed. [p. 290, col. 1.]

An executor, although he has the power to dispose of the property of the deceased in such manner as he thinks fit under section 269 of the Succession Act, must be able to give reasons for doing so. [p. 290, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 22nd May 1915, affirming that of the Munsif at Sadar, dated the 31st December 1914.

FACTS.—This appeal arises out of a suit for a declaration that a mortgage bond covering the properties of the minor plaintiffs is inoperative.

The plaintiffs are minors. Their entire homestead, two-thirds of which they inherited from their father and the remaining one-third they got as legatees under the Will of their step-grandmother Isabella Penheiro, who died in July 1910 after appointing by her Will one Macdonald Polacco as executor who took out Probate on 1st of June 1911, was mortgaged by Macdonald Polacco on the 29th of December 1912 to defendant. The recital of the mortgage was as follows:—

"I, Polacco, as executor to the estate of Isabella Penheiro hereby hypothecate the land.....on behalf of legatees Marie Penheiro and Anthony Penheiro..... I execute this mortgage instead of one time barred executed on 29th December 1911." But before the mortgage, Macdonald Polacco had executed a lease on 14th May 1912 in respect of one-third of the homestead as executor and guardian, etc., of the minor plaintiffs. This lease not being in question, the first Court granted the plaintiffs a decree which was set aside by the lower Appellate Court. The plaintiffs, therefore, preferred an appeal to the High Court.

Babu *Charu Chandra Sen*, for the Appellants.—It appears that the mortgage in its entirety is void and inoperative. The executor Macdonald Polacco having given his assent to the legacy was not competent to deal further with the property. His assent divested his interest as executor therein and transferred the bequest to the legatees. From the moment of the cessation of his interest as executor, he could not dispose of the property in any way. See section 293 of the Indian Succession Act.

He could deal with the property so long as he had interest in the property as executor. Refers to section 269 of the Succession Act.

Moreover, no necessity for the mortgage has been established, so the mortgage is inoperative. At any rate the mortgage is inoperative at least in respect of the two-third of the homestead inherited by the minors from their father. The person who executed the mortgage was neither executor, nor administrator in respect of this two-thirds. He was neither the guardian of the minor plaintiffs nor did he purport to act as guardian while executing the mortgage, and no necessity for the mortgage has been established nor was he acting for the benefit of the minors as a *de facto* guardian. So the mortgage can by no means be enforcible as against the minors' property.

JUDGMENT.

WALMSLEY, J.—This appeal is preferred by the plaintiffs, who are minors represented by a guardian. They inherited two thirds of their ancestral homestead from their father. The remaining one-third was bequeathed to them by their grandmother or step grandmother Isabella Penheiro. One Macdonald Polacco was appointed executor by the Will of Isabella Penheiro and he took out Probate. About a year after the grant of Probate he executed a lease in respect of one-third of the homestead and in the following December, *i.e.*, 18 months after the Probate was granted he mortgaged the entire homestead to the defendant No. 2 in the name of defendant No. 3. We are not now concerned with the lease. The suit out of which the present appeal arises was brought by the plaintiffs for a declaration that the mortgage executed by this Macdonald Polacco was inoperative. The first Court granted the plaintiffs a decree. An appeal was preferred by defendant No. 3. It was heard

ex parte and the learned District Judge reversed the order of the first Court and dismissed the suit.

The plaintiffs have now preferred this appeal, and two arguments have been advanced. The first is that the mortgage is entirely void and the second is that, at any rate, it is void with regard to the two-thirds share inherited by the minors from their father.

So far as the second point is concerned, it seems to me quite clear that the decision of the learned Judge was wrong. The first Court found that Polacco was not the guardian of the minors and the document itself does not pretend to show that he was acting as their guardian. The first Court also found that there was no necessity for the mortgage. That being so, it is quite clear with regard to the two-thirds inherited from the father that the mortgage was inoperative.

The first point relates to the entire mortgage and I think it is equally strong. The executor appears to have given his assent to the legacy and, having done that, he was not competent, as the learned Munsif, said, to deal further with the property as provided by section 293 of the Succession, Act. It may also be said that an executor although he has the power to dispose of the property of the deceased in such manner as he thinks fit under section 269, must be able to give reasons for doing so; and in the present case the finding of the first Court that there was no necessity for the mortgage at all has not been displaced by the learned District Judge. It appears to me, therefore, that the decision of the lower Appellate Court is wrong and must be reversed and the suit decreed with costs in all Courts. The costs of this Court will be on the *ex parte* scale, as nobody appears on behalf of the defendant-respondent.

PANTON, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 83 OF 1917.

February 25, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

NATHE PUJARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RADHA BINODE NAIK—DEFENDANT—RESPONDENT.

Hindu Law—Religious endowment—Trustee, whether can transfer office or trust property—Adverse possession as against trustee—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 124, applicability of.

A trustee of a public religious endowment cannot alienate his office and duties or the possession of the trust property at his own will either by sale or gift, so as to create a valid title in the transferee. He cannot even create a life-interest in favour of the donee in respect of the *shebaiti* right. He has no beneficial interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust. [p. 293, cols. 1 & 2.]

Section 10 of the Limitation Act applies only where the person setting up adverse possession claims adversely to the beneficial owner. Where, however, a person has been performing the duties of a *shebait* of an idol and applying the trust funds to the proper purposes of the trust and claims the right to hold that office and to perform those duties, section 10 of the Limitation Act has no application and he can acquire that right as against the original *shebait* by adverse possession. [p. 295, col. 2.]

By Article 124 of the Limitation Act a suit for possession of an hereditary office is barred after 12 years from the time when the defendant takes possession adversely to the plaintiff. Articles 134 and 144 do not apply to such cases. [p. 293, col. 2; p. 294, col. 1.]

Letters Patent Appeal from a decision of Mr. Justice Roe, dated the 20th March 1915, in Second Appeal No. 2532 of 1915, affirming that of the Subordinate Judge, Cuttack, dated the 26th August 1915, reversing that of the Munsif, Puri, dated the 9th January 1915.

Mr. *Sushil Madhab Mullick*, for the Appellants.

Messrs. *Hasan Imam* and *Achlendra Nath Das*, for the Respondent.

JUDGMENT.

MILLER, C. J.—In this case the appellants (plaintiffs Nos. 2 to 24) seek for a declaration that certain lands in Mauza Brahmeswarpur in the Puri district are the *debutter bazyafti* of Sri Brahmeswar Deb who was the plaintiff No. 1 in the suit and that they, the remaining plaintiffs, are the *marfatdars* on his behalf. They also seek

for possession of the said lands as against the defendants, who themselves claim to be the *marfatdars* on behalf of the idol. The appellants base their claim upon the fact that they are the descendants of the original *marfatdar* of the idol and say that in the year 1879 their ancestors, the then *marfatdars* or *shebaits*, appointed one Rashbihari Naik, the father of the defendants, to act as manager or agent on their behalf and that on his death, which occurred some two or three years before this suit was instituted, all right or title, if any, which he may have had in the lands or in the office of *marfatdar* or *shebait* of the deity, came to an end and did not devolve upon his heirs. They further contend that the late Rashbihari Naik did not and never could acquire any legal right in the *marfatdar* title, as such title could not lawfully be transferred. The defendants' case as originally pleaded was that their father Rashbihari Naik acquired a valid title from the plaintiffs' ancestors by a deed of gift dated the 25th April 1879 to the *marfatdari* rights in respect of the lands in dispute, for the management of the same on behalf of the deity and that they succeeded by inheritance to the same on their father's death. They further say that if the deed of 1879 was by Hindu Law invalid, then their father acquired by adverse possession for more than twelve years a good title and that the plaintiffs' suit is barred by limitation.

If the deed of 1879 in fact purported to transfer the absolute interest in the *marfatdari* rights to Rashbihari Naik, and was not merely the appointment of an agent to act for the *marfatdars* who retained the title in themselves, then there can be little doubt that such a transaction, is according to Hindu Law invalid. In section 439 of Mayne's Hindu Law and Usage the learned author, in dealing with the devolution of the trust created by religious endowments of this description, says: "In no case can the trustee sell or lease the right of management though coupled with the obligation to manage in conformity with the trusts annexed thereto, nor is the right saleable in execution under a decree." This summary of the law would appear to be in conformity with a long series of decisions which it is unnecessary to refer to.

Whatever contention the respondents may have urged in the Courts below, it was conceded before us that the trustees of a public religious endowment, such as this is admitted to be, could not alienate their office and duties or the possession of the trust property at their own will either by sale or gift so as to create a valid title in the transferee. The appellants' contention was that the deed in question did not purport to transfer either the office or the property of the trust but merely appointed Rashbihari Naik to act as agent during his lifetime for the trustees, the office and possession of the property being retained in the latter; or at most that the transfer was that of a life-interest only to the donee and that the office and right to possession of the estate reverted on his death to the appellants as heirs of the donors, and that in these circumstances no title by adverse possession could arise either in Rashbihari Naik or his children, the respondents.

Two translations of the document of the 25th April 1879 were produced and submitted to us, but they did not differ in any material respect. I take that which was checked by the officer of this Court, who was conversant with the language of the original. It is executed by 12 persons and recites that the lands scheduled at the end of the document forming *mans* 61. 17. 2 of *naik* and *nanaik* land belong to Sri Brahmeswar Deb installed in Brahmeswarpur Mauza and were settled by their ancestors (4 in number), who paid the *bazyafti jama* to the Government and with the remainder of the produce managed the festivals of the aforesaid Deb and that after their death four of the signatories were carrying on the management. It then proceeds as follows:—

"But in the recent mutation of names we being the relatives and co-sharers of the above-mentioned *reportdars*, our names have been entered in respect of the said land. Under the circumstances as we the co-sharers are many, and we could not collect and realise the rent appertaining to the *koth kismat* of the aforesaid Deb

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from the Mufassil in time and as we are unable to manage the festivals, etc., regularly, we, in a sound condition of mind and of our own free-will, without any coercion make over the aforesaid *mans* 61·17·2 of *koth kismat* and the temple, trees thereon and moveable property of the aforesaid Deb to Babu Rashbihari Naik, son of Minaketan Naik, inhabitant of Berboi Mauza, Pergana Limbai, who pays much attention to the affairs of the aforesaid Deb, as *marfatdars*, and specially because the aforesaid Deb is the family god of the said Babu. We do hereby execute and agree that from this day forth the said Babu, as *marfatdar*, shall remain in possession, shall collect and realise the produce of the said land and the arrears of dues from the *raiyats* and the future dues from them and shall pay the Government dues according to the *kists* and carry on the festivals, etc., of the Thakur with the balance of the income and shall credit the balance to the *kotha chandar* of the aforesaid Thakur. With that he will make improvement of the temple and the property of the Thakur in the future. He shall bring the *pattas* and *kabuliyats* into force with the *raiyats* He shall carry on the festivals and *bhogs* and shall pay the customary dues to the other *sabaks*, *pujaris* and *sankhuas*. If after this, they do not attend to their duties then he shall settle it in consultation with us, and we shall continue to get what we have been getting out of the *khanja bhog* in the festivals. He will act according to conditions mentioned in the old *patta* of the *koth kismat* or according to the conditions to be laid down in the future settlement. He will get the *marfatdari* report of the said land duly recorded in his name. We give up our right and possession which we had in the *koth kismat* of the aforesaid Deb and in the above-mentioned land which we had till to-day and cease to have any concern in them in all respects. Neither we nor our heirs or relations have or will have, or will prefer any claim or objection from to-day and if preferred it will not be accepted in any Court. We execute this deed of gift so that it may be useful when necessary. We agree to this deed of gift. The 14th day of Magh 1286 V. S., corresponding to the 25th day of April 1879.

"It may be noted that we have borrowed Rs. 200 for the management of the *seba* and *puja* of the aforesaid Deb from Gouranga Naik, Taraboi, Pergana Limbai, and Gangadhar Swayin of Rencho, Pergana Limbai, and Babu Bhagirathi Naik of Berboi, Pergana Limbai, and Babu Rashbihari Naik. Babu Rashbihari Naik will pay the amount to the *mahajans* out of the property of the aforesaid Deb. Date and year as above." Then follows a schedule of the properties referred to.

It appears from the evidence that in accordance with the provisions made in the deed Rashbihari Naik got his name recorded as *marfatdar* and took over possession of the property, and until the time of his death in 1911 carried out the duties of his office apparently with credit to himself and satisfaction to every body concerned. It seems almost impossible to contend after reading this document that it was not intended to invest Rashbihari Naik with the office of *marafatdar* or *shebait* of the idol and to put him in possession of the property as trustee to perform the duties incidental to that office. All right and possession of the donors as *marfatdars* in the property in question is expressly handed over and all right to interference by them or their heirs for the future is in terms abandoned. The only reservations were that the donors should continue to get what they had all along been getting, *viz*, their share in the *khanja bhogs* at the festivals, a thing which they were entitled to in any event, and a somewhat nebulous right to be consulted in the event of the *sebaks*, *pujaris* or *sankhuas* failing to perform their duties after being paid their customary dues. It does not even appear that any advice that might be tendered, if the occasion contemplated should arise, was bound to be followed, and indeed from the later portion of the document it would appear that the new *marfatdar* would be within his rights in refusing to tolerate any interference in his conduct of the affairs of the office so long as those affairs were administered in accordance with the terms of the trust. In my opinion the deed purported to transfer both the office and the possession of the properties to Rashbihari Naik and to install him as *marfatdar*

with all the rights and duties appertaining to the office in place of those by whom he was appointed. The appellants contended, however, that what was transferred was a life-interest only and not an estate of inheritance and relied on the case of *Kalidas Mullick* v. *Kanhaya Lal Pundit* (1). Although it is true that the deed under consideration in that case was in many respects similar to the present document, the circumstances were entirely different. The donor in that case was a Hindu widow who had a life-interest only in the property transferred, and after the death of the transferee she executed a further deed of gift to the wife of the appellent. It was found by their Lordships that the first deed conveyed a life-interest only to the grantee. The only principle of construction to be derived from that case is that although the general rule is that indefinite words of gift are calculated to convey all the interest of the grantor, it is nevertheless necessary to read the whole instrument to gather the intention. According to the general rule a grant without words of limitation conveys an estate of inheritance, and I can find nothing in the present deed to indicate a different intention. On the contrary, I think the latter part of the instrument, which purports to bind not only the grantors but also their heirs and relations, seems to indicate an intention to transfer the possession of the property and the rights and duties of the office to the grantee in perpetuity.

Assuming, however, that the intention was to convey an estate for life only to Rashbihari Naik, the case of *Kalidas Mullick* v. *Kanhaya Lal Pundit* (1) (*ubi sup.*) is no authority for the proposition that the trustees of a public religious endowment have power to grant away even a life estate in the *shebaiti* rights attending the worship of the idol. Unless the appellants can establish this, it follows the grant to Rashbihari Naik, whether for his lifetime only or for the larger estate, would be invalid and his adverse possession would begin from the moment he assumed the duties of the office and took over possession of the property. In the case relied on no question was raised as to the validity of the document affecting the transfer to Ruttonmoni. And although it is stated in the judgment of the Privy Council that the property had been dedicated by the deceased father-in-law and husband of the grantor to the service of the two idols, it appears that in the High Court and in the Privy Council the case was argued upon the assumption that the grantor had full powers of alienation. The case appears to have been one where the beneficial ownership was retained, the property being subject to a trust only to apply part of the income for the support of the worship of the idol and the performance of religious festivals, and not as in the present case, where the whole property was transferred in perpetuity to the deity for religious purposes. In the former case the land is alienable (see Mayne's Hindu Law and Usage, section 438). In a case like the present it is clear that the trustee has no beneficial interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust. It was not contended before this Court that the transfer was necessary for the benefit of the trust. In *Ayancheri Kovilagath Rama Varma Tambaran* v. *Acholathil Varikoli Raman Nayar* (2) it was held that a lease for a term of years of the management of a temple and its properties, in consideration of an advance made for the purposes of paying off debts said to have been contracted for the purposes of the temple, was invalid. I can see no material distinction between such a case and the transfer of the office for the life of the transferee and, in my opinion, whether the deed of 1879 purported to convey the whole estate or a life-interest only the transaction was in either case invalid.

It remains to consider whether Rashbihari Naik, and through him the respondents, acquired by adverse possession a right to the office of *marfatdars* and to possession and management of the trust property so as to bar the appellants' claim. Rashbihari Naik was in undisturbed possession from 1879 until the date of his death in 1911, a period of over thirty years. By Article 124 of the First Schedule of the Limitation Act a suit for posses-

(1) 11 C. 121; 11 I. A. 218; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839 (P. C.).

(2) 5 M. 89; 2 Ind. Dec. (N. S.) 63.

sion of an hereditary office is barred after twelve years from the time when the defendant takes possession adversely to the plaintiff, and Article 144 would cover the case of the possession of property not coming within Article 134 or any of the other Articles. It was contended that section 10 of the Limitation Act applies so as to remove the bar. In my opinion, this section has no application to the present case. The respondents are not seeking to set up an adverse title to the beneficial owner, the plaintiff No. 1, nor is there any question as to the misappropriation or improper use of the trust property. The possession of Rashbihari Naik and his successors has been that of trustees, and the claim of the appellants is not founded on a breach of trust. It is a claim to dispossess the respondents from an hereditary office and to have it declared that the appellants are the rightful owners of that office. Had the respondents been claiming the land as their own property or had they been applying the proceeds to purpose not sanctioned by the trust, possibly section 10 might have been prayed in aid so as to deprive them of any benefit they might claim to derive from long possession. The case of *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (3) relied on by the appellants was a case where the Mohant of a temple granted to a company called the Barakar Brick and Tile Co., Ld., a *mokarrari* lease of *debutter* lands dedicated to the worship of an idol, thereby depriving the endowment of all further benefit in the property except the fixed rent. It was found that there were no circumstances of necessity to justify the grant. The grant itself was a breach of trust interfering with the rights of ownership vested in the deity. It was held that Article 134 of the Limitation Act did not apply as there was no "purchase" within the meaning of the Act, a lessee not being a purchaser. A passage in the judgment of their Lordships in that case, which says "The operation of this Article 134 is controlled by section 10 of the Act" was relied on by the appellants and by the learned Munsif before whom the present case originally came, but the mischief aimed at by section 10 was present in the case just cited whereas it does not exist in the present case. This distinction is made clear by a reference to the judgment of the Subordinate Judge. On pages 11 and 12 of the paper-book he discusses the question of the cause of action of the plaintiff No. 1 (the deity) whom the plaintiffs Nos. 2 to 24 (the present appellants) enlisted on their side in support of their claim. After finding that Rashbihari Naik had faithfully carried out all the duties imposed upon him by his office, he says "It is, therefore, clear that in so far as the deity is concerned he has no cause of action against the defendants", and dismissed his claim. In the appeal from that judgment to the High Court the plaintiff No. 1 takes no part, the appellants being the remaining plaintiffs Nos. 2 to 24, and it is not contended that the judgment of the learned Subordinate Judge erred in so far as it decided against the claim put forward in the name of the deity. The cases of *Kannan* v. *Nilakandan* (4) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5) afford instances of the proposition contended for by the respondents that although the *shebaits* or managers of a temple may not be able legally to transfer the *shebaiti* rights or the possession of the lands of the endowment, such rights can be acquired by adverse possession as against the original *shebaits* or their heirs. The former case was almost identical in its main features with the present. The defendant purchased from one of two co trustees or Uralans of a temple the right to manage the affairs of the temple and was put in possession of the property of the endowment. After more than 12 years had elapsed, the other co-trustee brought a suit to recover the property and the trusteeship on the ground that the purchase was invalid. It was not shown that the defendant had misapplied the temple property. It was held by Sir C. Turner, C. J., that the transfer was invalid. He intimated that if the defendant had committed a breach of trust he could have been removed from

(3) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 14 C. W. N. 1; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 36 I. A. 148 (P. C.).

(4) 7 M. 337; 2 Ind. Dec. (N. S.) 819.

(5) 23 M. 271; 27 I. A. 69; 2 Bom. L. R. 597; 4 C. W. N. 329; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591.

his office and held accountable for profits if not properly applied, but such a claim was not made, and he dismissed the suit on the ground that it was barred by Article 144 of the Limitation Act. The second of the above cases was one where the hereditary managers of the endowed properties of a religious foundation had purported to sell and assign the management and lands to the representatives of another institution. The Limitation Act of 1877 was then in force. The transfer was not valid, and the only question before their Lordships of the Privy Council was whether the suit to recover the office of manager and possession of the lands was barred by limitation. It was held that Article 124 of the Limitation Act applied to the suit brought for possession of the office. Sir Richard Couch in delivering the judgment of the Board said, "Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Article 144 of the same Schedule is applicable to the property." The case of *Jagamba Goswamini* v. *Ram Chandra Goswami* (6) was relied on by the appellants, but that was a case where the defendants were claiming the property as their own, freed from the uses created by the trust. The plaintiff was the *shebait* of a temple and claimed the land as part of the endowment made in 1771 for religious purposes. The defendant denied that the land in question was *debutter* property or that the profits were ever used for the worship of the deity, and claimed it as her own *brahmottar* property under a gift made by a former *shebait* to her late father-in-law. The Court found that the property was *debutter* property and was of opinion that section 10 would have been applicable but for the fact that the gift to the defendant's predecessor was made many years before 1871 when section 10 was first enacted, and it was held that the suit was barred by limitation. It is clear that that case is no authority for the proposition that the hereditary office of *shebait* of a temple cannot be acquired by adverse possession so as to bar a claim by those previously exercising that office or their heirs claiming through them. In my opinion, the right to administer the trust property of a public religious endowment within the limits imposed by the trust, and for that purpose the right to possession of the property as against those previously administering the trust or others claiming through them can be acquired by adverse possession, and in trusts of this nature it is only where a claim is set up adverse to the rights of the deity to whose worship the property is dedicated that section 10 of the Limitation Act could have any application so as to deprive the defendant of the rights conferred by the remaining portions of the Act.

The cases already referred to appear to me amply to support this view, but the case of *Balwant Rao* v. *Puran Mal* (7) would appear to settle the question beyond all doubt. There the effect of section 10 was fully discussed by Sir A. Hobhouse, who in delivering their Lordships' judgment in the Privy Council says: "Their Lordships are of opinion that the expression used by the Legislature 'for the purpose of following in his or their hands such property' means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trust in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section. But here there is no question of recovering the property for the trust of the endowment, because the defendant admits that he is a trustee, and says he is applying the property to the trusts of the endowment. ..... The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within section 10 of the Limitation Act." Every word of the passage just quoted might have been written in reference to the present case and it seems to me to be conclusive of the question under discussion.

As in this case the adverse possession began in the year 1879 when Rashbihari Naik first took over the office of *marfatdar*

(6) 31 C. 314.

(7) 10 I. A. 90; 6 A. 1; 13 C. L. R. 39; 4 Sar. P. C. J. 435; 3 Ind. Dec. (N. S.) 352 (P. C.).

and got possession of the property, it follows that long before the present suit was instituted he had acquired an indefeasible title and that the suit is consequently time-barred. The appeal accordingly will be dismissed with costs.

MULLICK, J.—I agree. Not claiming as strangers the defendants would not, even if they had established adverse possession for 12 years, be entitled to plead Article 144 of Schedule II of the Limitation Act as a bar to this suit.

Nor could they plead Article 134, as they do not claim to be purchasers for value.

Whether they had notice of the trust would in either case be immaterial.

Indeed being volunteers under a conveyance from trustees they could not, by reason of the provisions of section 10 of the Limitation Act, plead limitation at all in a suit by the *cestui que trust* to follow up trust property in their hands, which means a suit to recover trust property held otherwise than for the purposes of the trust. But here the defendants are holding the property in suit for the benefit of the trust, therefore section 10 has no application and the learned Subordinate Judge has rightly held that the *cestui que trust* has no cause of action.

As against the trustee plaintiffs, however, the defendants have validly acquired by adverse possession the status of trustees in respect of the property in suit.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1423 OF 1916.

February 5, 1918.

Present :— Mr. Justice Bakewell and Mr. Justice Krishnan.

S. R. M. M. C. T. MUTHIAH CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

A. L. V. R. ALAGAPPA CHETTY AND OTHERS DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution—Assets, payment of, and rateable distribution, application for, on same day—Priority, presumption as to—'Same judgment-debtor,' meaning of.

Where the payment of assets and an application for rateable distribution under section 73, Civil Procedure Code, are made on the same day, no presumption can be made by the Court as to which event was prior in time. The party challenging the action of the Court Officer must show that it was wrongful. [p. 296, col. 2.]

To entitle decree-holders to rateable distribution under section 73, Civil Procedure Code, the decrees should be against the same judgment-debtor, *i. e.*, the individuals must be the same. [p. 296, col. 2; p. 297, col. 1.]

Where the fund in Court is the property of the same person who is judgment-debtor under two decrees, he may be regarded as the same debtor in respect of that fund. [p. 297, col. 1.]

If the fund is the joint property of two persons, their respective rights cannot be ascertained without an enquiry which is beyond the scope of section 73. [p. 297, col. 1.]

Where, however, the joint debtors are entitled to the fund in equal shares, and the plaintiff claims only half, the provisions of section 73 can be enforced. [p. 297, col. 1.]

Second appeal against the decree of the District Court, Ramnad at Madura, in Appeal Suit No. 11225 of 1914, preferred against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 145 of 1913.

Messrs. *K. R. Guruswami Aiyar* and *A. Subbarama Aiyar*, for the Appellants.

Messrs. *A. Krishnaswami Aiyar* and *K. Narasimha Aiyar*, for the Respondents.

JUDGMENT.—The payment into Court of assets realised and the application for rateable distribution were made on the same day, and the officer distributing the assets should have ascertained which act was prior in point of time. He distributed the assets on the footing that the application was prior.

The plaintiffs who now challenge his action must show that it was wrongful, since there can be no presumption as to the order of events. The second point argued was that owing to an irregularity in the proceedings the application for execution made by the 1st defendant was not legally subsisting at the date of distribution.

A valid application within section 73 had been made and was on the file of the Court at the date of distribution, and we think that the requirements of the section had been fulfilled.

The third point is whether the decrees were against the same judgment-debtor. The appellants obtained a decree for money against 3rd and 4th defendants personally and respondents obtained a similar decree

against 3rd defendant. It has been held by this Court that the individuals must be the same [*Srinivasaiyengar* v. *Kanthimathi Ammal* (1)] and the precise point was decided by the Calcutta High Court [*Deboki Nundun Sen* v. *Hart* (2)].

It has been pointed out that if the fund in Court is the property of the same person who is judgment-debtor under both decrees, he may be regarded as the same debtor in respect of that fund [*Nimbaji Tulsiram* v. *Vadia Venkati* (3) and *Grant* v. *Subramaniam* (4)]; but if the fund is the joint property of two persons their respective rights thereto cannot be ascertained without an enquiry which is beyond the scope of section 73 [*Deboki Nundun Sen* v. *Hart* (2)].

It is, however, admitted here that the joint debtors were entitled to the fund in equal shares, and in the argument on this part of the case the plaintiffs did not claim more than half of the fund paid to the 1st defendant; and therefore the inquiry mentioned in *Deboki Nundun Sen* v. *Hart* (2) is unnecessary. We are, therefore, of opinion that the 1st defendant must account to the plaintiffs for their share of half of the fund in which the 1st defendant was not entitled to participate. The appeal is allowed to this extent and there will be a decree for plaintiffs for Rs. 1,118 with interest at 6 per cent. from 23rd July 1913 till payment with proportionate costs of both parties throughout.

Appeal allowed in part.

M. C. P.

(1) 5 Ind. Cas. 917: 33 M. 465; 7 M. L. T. 157.
(2) 12 C. 294; 6 Ind. Dec. (N. S.) 209.
(3) 16 B. 683; 8 Ind. Dec. (N. S.) 933.
(4) 22 M. 241; 9 M. L. J. 179; 8 Ind. Dec. (N. S.) 172.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 44 OF 1912.

July 30, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Holmwood.

UDOY NARAIN JANA—DEFENDANT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Abwab—*Annual payment for upkeep of embankments, nature of—Long-continued payment from time immemorial, whether creates title in favour of recipient.*

An annual sum claimed by the Government from Government *khas mahal* tenants in respect of certain embankments the upkeep of which is necessary for the preservation of the lands of the tenants, is not an *abwab*. [p. 297, col. 2.]

A long-continued payment beyond the memory of man of an annual sum is in itself a title in favour of the recipient of such sum. [p. 297, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Midnapur, dated the 6th of November 1911, modifying that of the Munsif, 2nd Court, at Contai, dated the 17th of September 1910.

Babus *Nilmadhab Bose* and *Hari Bhusan Mukherjee*, for the Appellant.

Sir *Rash Behary Ghosh* and Babu *Ram Charan Mitra*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a claim by the Secretary of State for India in Council for a small sum of money which is described as *peshkash*. The principal defence that has been urged before us is that the annual sum claimed is an *abwab*. The facts negative that suggestion. The claim is by the Secretary of State, not as a landlord, but as representing the Government and claiming payment of that which is payable to the Government in respect of certain embankments the upkeep of which is necessary for the preservation of land, including that to which the present defendant is entitled. The claim does not rest in any sense on the relation of landlord and tenant. Therefore, we may at once negative the plea which suggests that the claim is bad as being an *abwab*.

Then it is said, what is the basis of this claim? The basis is long-continued payment beyond the memory of man, which in itself is a title in favour of the recipient of the annual payment. That in itself is sufficient. There is an authority of the Privy Council in the case of *Sumbhoolall Girdhurlall* v. *Collector of Surat* (1), where that was regarded as a sufficient defence for a claim of annual payment, though that payment had a vicious origin. Here there is no vice in the origin. On the contrary the consideration for the payment is most beneficent work. There is, in my opinion nothing in the answer that is advanced on behalf of the defendant.

(1) 8 M. I. A. 1; 4 W. R. P. C. 55; 1 Suth. P. C. J. 387; 1 Sar. P. C. J. 713; 19 E. R. 431.

The only matter to which exception may be taken in the decree of the lower Appellate Court is, that it is expressed in such wide, vague and inconclusive terms that it is perhaps difficult to know precisely what the determination of the Judge was on the various prayers in the plaint. But on behalf of the Secretary of State it is stated that all that is desired is a decree for money. There will be eliminated from the decree of the lower Appellate Court so much as is not a decree for payment of the sum of money claimed. This will be, not because we determine these declarations are erroneous, but because they should not be embodied in a decree in a suit of this character. The appellant must pay the costs of this appeal.

HOLMWOOD, J.—I agree.

Appeal dismissed; Decree modified.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 103 OF 1917.

August 9, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumaraswami Sastriar.

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MANGAYAR KARASU AMMAL, MINOR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 7, order under—Suit to set aside order, maintainability of—Appeal—Remedy proper.

No suit lies to set aside an order passed under section 7 of the Presidency Towns Insolvency Act. The proper remedy for the party aggrieved is to appeal against the order.

Hajee Abdul Lateef Sahib v. *Official Assignee of Madras*, 44 Ind. Cas. 847; 40 M. 1173, followed.

Appeal against the decree of remand by the Court of the District Judge, Chingleput, in Appeal Suit No. 531 of 1915, in Original Suit No. 55 of 1915.

FACTS.—The properties of an insolvent having vested in the Official Assignee of Madras, respondents applied by a claim for exemption of certain of these properties from being seized by the Official Assignee as the property of the insolvent. The claim having been disallowed, respondents filed the present suit to set aside the order.

Mr. *M. D. Devadoss*, for the Appellants.

JUDGMENT.—The point raised in this appeal was decided by one of us (the Chief Justice) in Original Suit No. 206 of 1911 on the file of the High Court on the Original Side and the decree was affirmed in appeal in *Hajee Abdul Lateef Sahib* v. *Official Assignee of Madras* (1). Following that decision, we allow the appeal and reverse the order and restore the decree of the Munsif with costs throughout.

Appeal allowed.

M. C. P.

(1) 44 Ind. Cas. 847; 40 M. 1173.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2625 OF 1916.

June 6, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

RAJANI KANTA GHOSH—PLAINTIFF—APPELLANT

versus

LALA ROUT AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Under-*raiyati *interest, whether transferable—Purchaser of portion of under-*raiyat, *rights of.*

The interest of an under-*raiyat* is not transferable. [p. 299, col. 1.]

A transferee of a portion of a non-transferable under-*raiyati* interest cannot get his title declared by a suit as against the landlord who is in peaceful possession of the land. [p. 299, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Midnapore, dated the 10th of August 1916, reversing that of the Munsif, 1st Court at that place, dated the 8th of April 1915.

FACTS appear from the judgment.

Babu *Jyotish Chandra Hazra*, for the Appellant.—The question whether a portion of an under-*raiyati* is transferable is one of first impression. There are cases which lay down that if the whole of an under-*raiyati* holding is transferred that works a forfeiture. It would not be right to infer from this fact that a portion also is not transferable. Take the analogy of occupancy holdings. The whole is not transferable but a portion is. Applying

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the same principle, the transfer of a portion of an under-*raiyati* holding ought to be held binding upon the *raiyat* landlord. Besides, suppose it is not transferable, how can the *raiyat* landlord forcibly eject the transferee. He is liable to be sued under section 9 of the Specific Relief Act and also under the ordinary law for recovery of possession on establishment of title.

[FLETCHER, J.—But have you any title?]

There is no law which says that a portion of an under-*raiyati* is not transferable, therefore, why should a part transferee of an under *raiyati* holding be held to have no title?

Babu *Mohini Nath Bose*, for the Respondents, was not called upon.

JUDGMENT.—This appeal is preferred by the plaintiff against the decision of the learned Subordinate Judge of Midnapore, dated the 10th August 1916, reversing the decision of the Munsif of the same place. The plaintiff sued for declaration of title and for possession as a transferee of a portion of a non-transferable under-*raiyati* interest. The Judge held that he got no title, and, therefore, there could not be a declaration of title in this case. It is quite clear that the learned Judge was right. The interest of an under-*raiyat* is clearly non-transferable. How can the plaintiff by a document say that he has got a transfer of a portion thereof? It may be that the possession of the plaintiff, if he had been in possession, was lawful and not illegal and, if he had his possession disturbed, then he might have sued under the provisions of section 9 of the Specific Relief Act. But that is not the case here. In the present case, the facts are these: The landlord is in peaceful possession of this land and the plaintiff having no title thereto asks for a declaration of title and relief consequent thereupon. It is quite clear that the learned Judge of the lower Appellate Court was right in holding that, in these circumstances, the plaintiff was not entitled to get the reliefs asked for. The present appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FULL BENCH.

STAMP REFERENCE IN CIVIL MISCELLANEOUS No. 180 OF 1917.

August 6, 1917.

Present:—Sir George Knox, KT., Ag. Chief Justice, Mr. Justice Rafique and Mr. Justice Piggott.

In the matter of KHUB CHAND AND OTHERS.

Stamp Act (II of 1899), ss. 38, 40, 57—Document, insufficiently stamped—Deficit duty levied by Collector—Reference to High Court, whether competent.

Where a Collector holding that a document is not sufficiently stamped levies the deficit duty and penalty and then certifies that the document is sufficiently stamped, the case before the Collector is fully decided and a reference to the High Court under section 57 of the Stamp Act is not competent In such a case there is no room for any further disposal by the High Court in accordance with section 59 of the Act. [p. 301, col. 1.]

Stamp reference made by the Junior Secretary to the Board of Revenue, United Provinces, to the Hon'ble High Court under section 7 (1) of the Stamp Act.

FACTS as given in the reference made by the Board of Revenue are the following:—

"On 13th January 1914, one Khub Chand and his sons executed a mortgage deed.....in favour of one Shankar Lal for Rs. 20,500 on a stamp of Rs. 205, mortgaging their proprietary rights in land together with their mortgagee rights in certain other immoveable property secured by a mortgage deed, dated the 1st May 1909, executed in their favour for Rs. 16,000 by one Ganga Prasad.

"On the 15th February 1916, Khub Chand and others sold a portion of the mortgaged property to the mortgagee, Shankar Lal, for Rs. 17,000 out of the mortgage-debt of Rs. 20,500, the remaining property being left hypothecated with the mortgagee for the balance of the mortgage money, namely, Rs. 3,500 and the interest on that sum..... This deed was executed on a stamp paper of Re. 1 only.

"On the 2nd April 1916, another sale-deed .....,being virtually in lieu of the former, was executed by the said vendors in favour of the same vendee in respect of the same property which had been sold by means of the sale-deed, dated the 15th February 1916, for the same amount of consideration, *viz.*, Rs. 17,000, and on the same terms, the only difference being that the sale of a house worth about Rs. 300, which house was mentioned only casually at the end of the

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body of the previous sale-deed, was in the new sale-deed effected by means of express provisions made in the body of the deed itself. This second sale-deed was also executed on a stamp of Re. 1 only. It was impounded by the Sub-Registrar of Agra and sent to the Collector of the district under section 38 (2) of the Stamp Act. The Collector held that the sale-deed was not sufficiently stamped and that the deficient stamp duty payable amounted to Rs. 4 as noted on the margin (foot-note*). He levied this deficient duty and penalty of Rs. 5 under section 40 (1) (*b*) of the Act."

GROUNDS.—In the first place no additional duty would appear to be due on account of the house worth Rs. 300, as its value is clearly included in the sale price of Rs. 17,000. The main question, however, is whether the Collector was right in holding that because the property sold (except the house) formed a part of the property previously mortgaged by the vendor to the vendee and on which duty had been paid already, the mortgagee was entitled to deduct from the duty payable on the sale-deed the amount of duty paid in respect of the mortgage under section 24 of the Stamp Act. It will be observed that only a portion and not the whole of the property mortgaged under the deed of the 13th January 1914 was transferred to the mortgagee and it would appear, therefore, that the full duty of Rs. 170 in respect of Rs. 17,000 was payable on the sale-deed [*In re Nirabai* (1)]. If this view is correct the Board are doubtful whether the realization of the additional duty can be ordered by them now.

(1) 29 B. 203; 6 Bom. L. R. 844.

*Duty on Rs. 17,000 *plus* Rs. 300 on account of the house, or Rs. 17,300 under Article 23, Schedule I ... ... Rs. 175

Minus

Duty on Rs. 17,000, representing the proportionate amount of the mortgage money in respect of the whole of which stamp duty has already been paid under Article 23, Schedule I, read with section 24 of the Act... ... 170

Net duty	... ...	5
Duty paid	... ...	1
Balance due	... ...	4

The case is complicated and the decision of the Hon'ble High Court is solicited on the following two points:

(*i*) Whether the second instrument of sale is correctly stamped with a duty of Rs. 5 as assessed by the Collector, or whether it should be assessed to a duty of Rs. 170 following the Bombay ruling.

(*ii*) Whether the Chief Controlling Revenue Authority has any powers of revision under section 56 (1) of the Act over the action of the Collector under section 40 (1) (*a*) and (*b*) or over his action under section 40 (1) (*b*) either *before or after* he has given a certificate under section 42 (1).

As regards the latter point attention is invited to *Reference undur Stamp Act*, *s.* 57 (2). It was held in that case that the Chief Controlling Revenue Authority has no such powers, though the learned Judges of the High Court constituting the Bench which disposed of the reference held divergent views in the matter.

The Hon'ble Munshi *Narayan Prasad Asthana*, for Khub Chand.

Mr. W. *Wallach* (Officiating Government Advocate), for the Crown.

JUDGMENT.

KNOX, AG. C. J.—This is a reference made to this Court by the Chief Controlling Revenue Authority. It is said to be made under the provisions of section 57, sub-section (1) of the Indian Stamp Act, 1899. It is not a case that was referred to the Chief Controlling Revenue Authority under section 56, sub-section (2). Therefore, if it falls at all under section 57, sub-section (1), it must be deemed to be a case otherwise coming to the notice of the Chief Controlling Revenue Authority. In its order of reference the Chief Controlling Revenue Authority states it as a case coming to the notice of the Board while scrutinising the monthly statement of cases of the infringement of the Stamp Law of Agra submitted by the Controller under rule 204 of the Stamp Manual.

The point arises whether the record before us is the record of a case within the meaning of section 57, sub-section (1). The questions involved, so far as stamp duty is concerned, have been before the Collector of Agra under section 38 (2) of the Stamp Act. The Collector has held that the sale-

(2) 25 M. 752.

deed in question was not sufficiently stamped, that the deficit stamp duty payable amounted to Rs. 4. This deficit duty he had levied together with a penalty of Rs. 5, under section 40, sub-section (1), clause (*b*) of the Act. We understand that the deficit duty and the penalty have both been paid. This is in accordance with the statement made by the Chief Controlling Revenue Authority. Presumably, therefore, the Collector has certified by endorsement upon the deed that it is now duly stamped. Under section 40, sub-section (2), this certificate is for the purposes of the Indian Stamp Act conclusive evidence of the matter stated therein. The case before the Collector has been fully decided and there appears to be no room for any further disposal in accordance with section 59, sub-section (2) of the Indian Stamp Act. The very same point that is before us came before the Madras High Court. [See *Reference under Stamp Act*, *s.* 57 (2).] The learned Judges before whom the reference came were divided in their opinion. Two of the learned Judges arrived at the opinion that section 57 of the Indian Stamp Act did not give the High Court jurisdiction as there was nothing regarding which the High Court could be asked to pronounce judgment. The learned Chief Justice took a contrary view. After the hearing of arguments addressed both by the learned Vakil for Khub Chand and the Government Advocate, I am of opinion that the view taken by the Madras High Court was the correct view and that this is not a case within the meaning of section 57. No definition of the word "case" has been cited in the argument on either side, and I know of no definition by the Indian Courts upon the meaning of this word. I find on referring to Wharton's Law Lexicon, 11th Edition, page 147, that the word "case" is defined as (1) a trial, (2) a trial involving some point of law so important as to be published in the law reports as a precedent.

This confirms me in the view I have taken and I would return this reference to the Chief Controlling Revenue Authority with the opinion that the matters referred are, under the circumstances, not within the jurisdiction of this High Court.

RAFIQUE, J.—I agree.

PIGGOTT, J.—I ageee.

Reference answered accordingly.

MADRAS HIGH COURT.

CIVIL APPEAL No. 377 OF 1916.

January 29, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

A. K. T. K. M. SANKARAN NAMBUDRIPAD—PLAINTIFF—APPELLANT

versus

S. N. RAMASAMI IYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Revenue Recovery Act (II Mad. of 1864), s. 42—Land Improvement Loans Act (XIX of 1883), s. 7 (1) (c), sale under, effect of—Prior encumbrances, whether saved—Interpretation of Statutes—Proviso to section, whether can be considered.

The provisions of section 42 of the Madras Revenue Recovery Act apply to a sale under section 7 (1) (c of the Land Improvement Loans Act XIX of 1883. Such a sale is free from prior incumbrances. [p. 302, col. 1.]

The fact that the first instalment of a loan taken under Act XIX of 1883 was applied towards meeting the expenses of argicultural improvements already started on the land or that an extension of time was granted by the Government to the borrower, does not make it the less a loan taken for making an improvement within the meaning of the Act. [p. 303, cols. 1 & 2.]

Per *Ayling, J.*—Where there is doubt as to the true meaning of the substantive part of a section, it is legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. [p. 303, cols. 1 & 2.]

Per *Seshagiri Aiyar, J.*—The language of section 7 (*c*) of Act XIX of 1883 amounts to a declaration that the land is charged with the payment of the revenue. [p. 305, col 1.]

Where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section, but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. [p. 305, col. 1.]

The effect of section 42 of Madras Act II of 1864 is not only to discharge pre-existing incumbrances upon the property on which the arrear is due, but also pre-existing incumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter. [p. 305, col 2.]

Secretary of State v. *Pisipati Sankarayya*, 8 Ind. Cas. 414; 34 M. 433; 8 M. L. T. 323; (1910) M. W. N. 722; 20 M. L J 794, followed.

The effect of section 7 (1) (*c*) of Act XIX of 1883 is to make a declaration on behalf of the Government that it has a first charge on the property for the loan advanced in respect of that property, just as under section 2 of the Madras Revenue Recovery Act the Government has a first charge for arrears of Government revenue. [p. 306, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 148 of 1915.

SANKARAN NAMBUDRIPAD v. RAMASAMI IYER.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *V. Ramesam*, Government Pleader, for the Respondents.

JUDGMENT.

AYLING, J.—The main point for our disposal in this appeal is the general question raised in the single issue framed—Whether the provisions of section 42 of Madras Act II of 1864 apply to a sale under section 7 (1) (*c*) of the Land Improvement Loans Act (XIX of 1883): in other words, whether such a sale is free of prior encumbrances

The Subordinate Judge has decided that it is and in my opinion he is right. The point is not covered by authority, as the cases quoted on appellant's side, *Ramachandra* v. *Pitchaikanni* (1) and *Chinnasami Mudali* v. *Tirumalai Pillai* (2), all relate to sales under clause (a) [and not clause (*c*)] of section 7 (1). A comparison of the various clauses (*a*), (*b*), (*c*) and (*d*) shows that the framers of the Land Improvement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and a sale for the same purpose of other lands, whether belonging to the defaulter or some one else. The same distinction was present to the minds of the learned Judges in the earliest of the above cases, *Ramachandra* v. *Pitchaikanni* (1): after referring to various sections of the Revenue Recovery Act they say, "the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration", and again, "arrear of *abkari* revenue is not due upon any specific land owned by the *abkari* renter." This in fact seems to be the main ground on which their decision is based. The judgment in *Chinnasami Mudali* v. *Tirumalai Pillai* (2) also draws the same distinction. The above decisions are, therefore, of no help to appellant in the present case, and indeed indirectly tend to a conclusion adverse to him.

The learned Vakil for appellant has argued that the words "in all or any of the following modes" and "as if" contained in section 7 have reference solely to procedure and were not intended by the Legislature to import the operation of section 42 of the Revenue Recovery Act. The weak point in this argument is that he is unable to indicate (and we are unable to detect) any difference between the procedure laid down for bringing to sale the lands on which arrears of land revenue have accrued and other lands liable to sale for the same arrears. On this view, the inclusion of a special clause (*c*) is unexplained.

In this connection, reference has been made to a decision of this Court in *Secretary of State* v. *Pisipati Sankarayya* (3), in which Miller and Munro, JJ., held that all sales of land for arrears of land revenue were free of encumbrances whether the lands sold were those on which the arrears accrued or other lands belonging to the defaulter. It may be argued that on this view of the law the enactment of clause (*c*) in addition to clause (*a*) is in any case unnecessary. I think the explanation lies in the fact that the Land Improvement Loans Act is an Act of the Government of India and that there is no reason to suppose that it was framed with sole regard to the provisions of the Madras Revenue Recovery Act. Other Revenue Recovery Acts in force in 1883 recognised a distinction between the conditions of sale of land on which arrears had accrued and other lands belonging to the defaulter: *vide* sections 11 and 12 of Bengal Act VII of 1868, sections 94 (*f*) and (*g*), and 108 of the Central Provinces Land Revenue Act XVIII of 1881 and sections 133 and 135 of Act XVII of 1876, Oudh Land Revenue Act. Even assuming, therefore, that the framers of the Land Improvement Loans Act shared the view of the Madras Act II of 1864 taken by the learned Judges in *Secretary of State* v. *Pisipati Sankarayya* (3), this is not inconsistent with their having deliberately distinguished the cases, having in mind the provisions of the Acts in force in other parts of India. Even in this Presidency so far as I am aware, the *Secretary of State* v. *Pisipati Sankarayya* (3) was the first case in which the

(1) 7 M. 434; 2 Ind. Dec. (N. S.) 886.
(2) 25 M. 572.

(3) 8 Ind. Cas. 414; 34 M. 493; 8 M. L. T 323; (1910) M. W. N. 722; 20 M. L. J. 794.

broader view of the applicability of section 42 was expressed; and, with all respect to the learned Judges in that case, I am inclined to think the learned Judges who decided *Ramuchandra* v. *Pitchaikanni* (1) were inclined to take the narrower view. There is no reason to suppose that the framers of section 7 of the Land Improvement Loans Act acted under the impression that there was no difference in this respect.

I am inclined to think that while the words "in all or any of the following modes," if they stood alone, might be indicative only of procedure, some wider meaning should be attached to the words "as if" in clause (*c*), when contrasted with the words "according to the procedure, etc.," in clause (*d*). The use of the latter words is significant and shows at any rate that the framers of the Act had other words in their minds, which might have been more suitably employed to express the meaning contended for by appellant's Vakil.

There is, however, another argument, to my mind conclusive on the point, furnished by the proviso to the section which runs: "Provided that no proceeding in respect of any land under clause (*c*) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest, and, where the loan is granted under section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest."

This clearly implies that the interests of prior mortgagees are affected by a sale under clause (*c*) and is in fact incapable of any other meaning. Mr. C. V. Ananthakrishna Aiyar's only argument in this connection is that the words of a proviso cannot be used to extend the operation of the section to which it is attached. This is no doubt true, and is clearly established by the judgment of the Privy Council in the case on which he mainly relied, *West Derby Union* v. *Metropolitan Life Assurance Society* (4). But where there is doubt as to the true meaning of the substantive part of a section, it is surely legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. This is recognised by Lord Herschell in his judgment in the very case referred to. It cannot be said that the words of the main part of the section are so clearly in appellant's favour as not to be at any rate ambiguous; and here we have a proviso which is a perfectly compatible with one interpretation and clearly incompatible with another. It must also be noticed that one main objection of their Lordships to reference to provisos is inapplicable to the present case: *viz*, that provisos are frequently inserted simply to allay the apprehensions of persons against whom the Act was never intended to apply. This cannot be said of the exception against mortgagees which is contained in the proviso itself. There is nothing, as far as I can see, in the judgment of their Lordships in that case to preclude reference to the proviso for the interpretation of the section with which we are dealing: and it seems to me to be conclusive against appellant.

I must, therefore, hold that a sale of land under section 7 (1) (*c*) is free of encumbrances.

Two other objections raised on behalf of appellant may be briefly noticed. It is pointed out that Rs. 2,500 of the first instalment advanced was devoted to discharging a loan privately taken for the purpose of paying for an oil engine, the installation of which on the land was part of the improvements for which the loan was granted. Appellant contends that to this extent the loan from Government cannot be said to have been taken for the purpose of making an improvement within the meaning of section 4 of the Act. No authority is quoted and I am unable to accept such a contention. A considerable time usually elapses between the application for a loan under the Act, and its disbursement to the borrower: and in the present case the borrower being anxious to set about the work arranged to purchase the engine on the hire purchase system, and apparently took a temporary loan from some private persons to enable him to discharge the earlier instalments. There

(4) (1897) A. C. 647; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820.

is nothing in all this to affect the essential object for which the loan was taken from Government or the borrower's liability under the Act.

The second objection is that, because the first instalment of the loan was not utilised within the period allowed by the Government rules, the disbursement of the second instalment cannot be treated as the disbursment of a loan under the Act, and to the extent of that instalment no priority can be claimed for it over plaintiff's mortgage. This contention is also baseless: it is not denied that the first instalment had been utilised to the satisfaction of the Government officers on the specified improvements prior to the disbursement of the second instalment: and I fail to see how the action of Government in relaxing the strict operation of the rule regarding the time limit in favour of the borrower can prejudicially affect Government's right in this connection.

I would dismiss the appeal with costs of 2nd respondent.

SESHAGIRI AIYAR, J.—Although I agree with the conclusion at which my learned brother has arrived, having regard to the fact that the point argued is practically one of first impression and to the important issues involved in its decision, I have ventured to add a few words of my own.

The facts have been stated by my learned colleague and it is unnecessary to repeat them.

The main point for consideration is, whether a sale for the loan advanced by the Government in respect of agricultural improvement of a property avoids previous existing encumbrances upon that property. I do not agree with Mr. C. V. Ananthakrishna Aiyar that unless the loan is advanced for making future improvements, the provisions of the Act have no application. Where in anticipation of a loan from Government work which satisfied the definition of the term 'improvement' is started, in my opinion, the loan must be taken to have been granted for the purpose of making the improvement. The test is not whether the improvement was subsequently made but whether the money was applied for the construction of agricultural improvements upon the property. Nor do I think that the fact that time was extended for completing the work in regard to which the first instalment of payment was made, in any way affects the validity of the subsequent advances. The provision in the rules for the completion of the work within the time stipulated is minatory in its nature, and it is as much open to the Government to extend the time for performance as it is open to any private party to do in respect of contract fixing a time for performance. The rules do not bind the Government to refuse the loan if the time stipulated has been exceeded.

On the main question, I have been greatly influenced by the contention of the learned Government Pleader on the inutility of clause (*a*) of Act XIX of 1883 if clause (*c*) of that section is intended to have the same result as clause (*a*). I am prepared to agree with the learned Vakil for the appellant that the words "as if they were arrears of land revenue" would *prima facie* only attract the procedure prescribed in the Revenue Recovery Act and not the substantial declaration contained in sections 2 and 5 of that Act. The decisions of this Court have been uniform on that question. See *Ramachandra* v. *Pitchaikanni* (1), *Ibrahim Khan Sahib* v. *Rangasami Naicken* (5), *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (6) and *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (7). But in clause (c) of section 7 we have, in addition to the words "as if they were arrears of land revenue," a preceding and a subsequent clause which gives a different complexion to the policy of the Act. The first four words 'out of the land' and the last five words "in respect of that land" make it clear that the loan granted is to be regarded as a first charge upon the property. In *Ramachandra* v. *Pitchaikanni* (1) which was under the Abkari Act, two eminent Judges of this Court, while holding that the words "in like manner as for the recovery of arrears of land revenue" only denoted the procedure to be

(5) 28 M. 420.
(6) 26 M. 230; 12 M. L. J. 368.
(7) 19 Ind. Cas 694; 38 M. 353; 25 M L J. 393; 13 M. L T. 498; (1913) M. W. N. 581.

adopted, say, "Arrear of Abkari revenue is not due upon any specific land owned by the Abkari renter." That, to my mind, is the keynote to the construction of similar provisions in other Acts. In the case of Abkari rent, in the case of income-tax, in the case of cesses under the Local Boards Act, the amount payable to the Government is not due in respect of any specified land, whereas the essence of the stipulation under Act XIX of 1883 is that the loan is payable out of and in respect of the land for improving which the loan is granted. In my opinion, the language of section 7, clause (*c*), amounts to a declaration that the land is charged with the payment of the revenue and when in addition to that declaration the Legislature refers back to Act II of 1864, I am inclined to think that the provisions of sections 2, 5 and 42 of that Act are intended to be read with clause (*c*) of section 7 of Act XIX of 1883. Whatever doubt there may exist on this question is removed by the proviso, which in distinct terms says that the interest in the land which is available to the Government is restricted to that of the borrower and to that of the mortgagee.

Mr. C. V. Ananthakrishna Aiyar addressed to us an elaborate argument upon the inadvisability of utilising provisos to supplement the operative portion of a section. I adhere to what I said on this question in my judgment in *Annie Besant* v. *Emperor* (8). It is a well-known canon of construction that where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section; but where there is room for doubt regarding the construction of the section, it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. The observations of Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society* (4), to which the learned Government Pleader drew our attention, support this principle and there is nothing in the judgment of the other noble Lords to throw doubt on the correctness of the dictum of Lord Watson. In my opinion, the proviso is strictly and rightly in place in this particular instance. By the operative portion of clause (*c*) the Legislature provided that out of the whole land the loan shall be realized. The proviso releases rights other than those of the borrower and of the mortgagee, *e. g*, the rights of an occupancy tenant. Therefore, the proviso is aptly in place and has the further effect of elucidating the meaning of the operative clause.

There is only one other observation that need be made, and that is this: Section 7 provides for cumulative remedies to the Government to proceed against the borrower personally, they may proceed to sell the land: lastly, thay may also proceed to sell the land given as collateral security. Now, under clause (*a*) when the Legislature provided that the borrower can be proceeded against personally it would follow as a matter of course that his property can be attached and sold. It seems to me that even where properties other than those upon which revenue is due are sold under Act II of 1864, all pre-existing encumbrances on such properties are wiped off. During the course of the argument I felt some little doubt as to whether the decision of Justices Miller and Munro in *Secretary of Sate* v. *Pisipati Sankarayya* (3) was right. But, on closely examining the sections of the Revenue Recovery Act, I feel that the effect of section 42 is not only to discharge pre-existing encumbrances upon the property on which the arrear is due, but also pre-existing encumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter. Section 32, to which Mr. C. V. Ananthakrishna Aiyar drew our attention, does not save the encumbrances as was contended. Therefore if the Government avail themselves of the remedy provided by clause (*a*) and if the words "as if they were arrears of land revenue" were to be construed as only indicating the procedure to be adopted, then it would follow that the previous existing encumbrances would subsist and that the Government would only be entitled to the surplus sale proceeds, if any, after satisfying such en-

(8) 37 Ind. Cas. 607: 39 M. 1164 at p. 1195; (1916) 2 M. W. N. 497; 4 L. W. 625; 32 M. L. J. 151; 18 Cr. L. J. 239; 21 M. L. T. 190.

cumbrances. If clause (*c*) is also to be similarly interpreted, the Legislature must be deemed to have been guilty of redundancy. According to Mr. Ananthakrishna Aiyar, under clause (*c*) also, if a sale is effected for the loan the encumbrances would still subsist. I do not think Courts will be justified in imputing to the Legislature the enacting of an unnecessary provision of law where they can give a consistent meaning to it otherwise. It is clear, whereas under clause (*a*) the ordinary remedy is given, under clause (*c*) the remedy of avoiding existing encumbrances is provided by the Legislature. At first sight it looks as if the Legislature was not conscious that under the Madras Revenue Recovery Act the sales of property other than those upon which arrears are due would not avoid the existing encumbrances. Very likely the Imperial Government had in mind the provisions of Bengal Act VII of 1868, which by section 11 enables the Collector to sell only the tenure on which the rent is due and by section 12 to exclude previous encumbrances only in respect of that particular tenure. The Madras Legislature has given a more drastic remedy for arrears of revenue than is given in Bengal. However that may be, there can be no doubt that the effect of section 7, clause (*c*), is to make a declaration on behalf of the Government that it has a first charge upon the property for the loan advanced in respect of that property just as under section 2 of the Revenue Recovery Act the Government has a first charge for arrears of revenue. In this view, the decision of the Subordinate Judge is right, and I agree that the appeal should be dismissed with costs of the 2nd respondent.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 500 OF 1917.

June 21, 1918.

Present :—Mr. Justice Fletcher and Mr. Justice Panton.

RAKHAL CHANDRA DE—

PLAINTIFF—APPELLANT

versus

CHAIRMAN OF THE SURI MUNICIPALITY—

DEFENDANT—RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), *ss.* 202, 204, 233—*Encroachment on Municipal street by projection—Right to run up projection.*

A person who has, without any objection on the part of a Municipality, encroached over the surface of a Municipal street by a projection, has no right to run up the projection to any height he likes, even though he does not thereby make any further encroachment in breadth over the street. [p. 308, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 5th January 1917, affirming that of the Munsif, Suri, dated the 14th March 1916.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"The plaintiff-appellant has a *pucca* house within the Municipality of Suri adjoining the Ahmadpur Road on the east of it. To the east of the road is a drain. Projecting over the drain is a platform, which is a part or continuation of the verandah of the plaintiff's house. Over this platform and verandah is a roof; that roof is supported by pillars standing on the platform. Over this roof is another roof. Some years ago it was considered necessary to open out and re-build the drain, which evidently flowed beneath the platform. The evidence is, the Magistrate of the District and some Municipal Commissioners went to the spot and at the request of the Magistrate and on the understanding that the pillars, roofs, etc., should not be interfered with, the platform was demolished. Later on the Municipality served the plaintiff with notices under sections 202 and 204 of the Municipal Act (Act III of 1884 B. C.) to remove the platform, roofs, pillars etc. The plaintiff thereon instituted this suit praying for —

(1) A declaration that the Municipality is not entitled to take any such steps under sections 202 and 204.

(2) An injunction restraining the Municipality from demolishing the structures.

For the first claim the plaintiff urged the platform was built before 1864 and so the Municipality should have proceeded under section 233 of the Municipal Act and their action under sections 202 and 204 is illegal.

As regards the other structures, plaintiff contended that these, too, have been existing from before 30 years and under Article 146 (A) of the Limitation Act the Municipality cannot demolish them. It was also urged, relying on *Eshan Chunder Mitter* v. *Banku Behari Lal* (1), that these structures also come under the purview of section 233 of the Municipal Act.

The learned lower Court dismissed the plaintiff's suit as regards injunction, holding that as the platform does not any longer exist, no suit for injunction regarding it can lie. That the platform is no longer existent, is clear to me. Both the plaintiff and the defendant have vied with each other to show that it was he who demolished the same; then again the learned lower Court held a local inspection and he has endorsed the finding that no platform exists. So I cannot but accept that finding. So I hold no suit for injunction as regards the platform can lie and the plaintiff's claim in this respect must be dismissed.

As regards the other structures I have been led through the evidence by the learned Pleaders for both sides. The plaintiff has failed to prove that they have been existing since 1864 or for the last 30 years. * * *

Thus in the result I find the plaintiff has failed to substantiate his claims and so his suit should be dismissed; accordingly his appeal must stand dismissed."

Babu *D. N. Bagchi*, for the Appellant.—The plaintiff is the appellant, and the appeal arises out of a suit for an injunction restraining the defendant Municipality from demolishing the verandah, platform, etc., which are said to be a projection on the Municipal road, in accordance with notices under sections 202 and 204 of the Bengal Municipal Act served on the plaintiff. The verandah was erected about ten or eleven years before the institution of the suit on the platform which has been existing ever since 1864. If the projection or encroachment has been existing since 1864, then sections 202 and 204 do not apply to the case but the section applicable is section 233. If the Municipality cannot take action under section 202 and 204, then they cannot demolish the structure without paying some compensation to the plaintiff as contemplated by section 233 of the Bengal Municipal Act. If there is a building or platform abutting on the road from 1864 and if a superstructure is built on the pre-existing platform without any projection or encroachment on the road, it cannot be said to be a new projection or encroachment, because the plaintiff cannot be said to have gone an inch beyond the pre existing platform. If it is a vertical erection on the old platform, it cannot be said to be a new projection or encroachment over the road liable to be demolished by a notice of this kind.

Dr. *Dwarka Nath Mitter*, for the Respondent, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Birbhum, dated the 5th January 1917, affirming the decision of the Munsif of Suri. The case is this: The defendant Municipality served notices on the plaintiff under sections 202 and 204 of the Bengal Municipal Act requiring him to remove an obstruction or encroachment on the street and to remove a projection that had been placed against or in front of his house. The plaintiff thereupon brought the present suit for an injunction to restrain the defendant Municipality from acting on the statutory notices. Assuming that such a suit lies, I think the facts found in this case are conclusive. What is found is this: The encroachment has been removed under section 202 and it no longer exists and, therefore, it no longer existing, there can be no ground at present on which the Municipality can proceed further in the notice under section 202 and no question as to whether the plaintiff is entitled to claim an injunction can arise. With regard to the projection that has been required to be removed under section 204, the facts found are these:—This thing was erected 10 or 11 years ago. That

(1) 25 C. 160; C. W. N. 660; 13 Ind. Dec. (N. S.) 109.

there has been a projection, there cannot be any doubt. The case set up by the plaintiff is this: That as he has encroached on the surface of the street, therefore, he has a right to run up the projection to any height he likes, provided that he does not make any further encroachment in breadth on the street. That is clearly wrong. The reason why these projections are prohibited by the Act is obvious. If the projection encroaches on the street, for the safety and convenience of the passers-by or for other conveniences, the law authorises the Municipality to serve notices to remove it. I see no reason to interfere with the judgment of the learned District Judge. The present appeal, therefore, fails and must be dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 227 OF 1917.

February 15, 1918.

Present:—Mr. Justice Bakewell and Mr. Justice Krishnan.

MADDIPOTI PERAMMA—PLAINTIFF—APPELLANT

versus

GANDRAPU KRISHNAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 18 (3), 20, 47—Sale by Official Receiver—Purchaser obstructed in taking possession—Enquiry by Insolvency Court—Order directing delivery to purchaser—Civil Procedure Code (Act V of 1908), O. XXI, rr. 97, 98—Jurisdiction of Insolvency Court—Suit for declaration of obstructor's title, injunction and possession, maintainability of—Evidence Act (I of 1872), s. 41.

The power conferred by section 18 (3) of the Provincial Insolvency Act is intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of questions of title as between the insolvent and third parties. This provision is not intended to confer jurisdiction over a person against whom the insolvent has merely a right enforceable by suit. [p. 309, col. 1.]

An Insolvency Court has, therefore, no jurisdiction to institute an enquiry under Order XXI, rules 97 and 98, Civil Procedure Code, into an alleged resistance to a purchaser at the Official Receiver's sale taking possession of the property. [p. 309, cols. 1 & 2.]

Where an order has been passed by the Insolvency Court directing the removal of the obstruction and delivery of possession to the purchaser, the aggrieved party has a right to file a suit for a declaration of his title and for an injunction restraining delivery of the property to the purchaser. It will not be correct to embody a prayer in such a suit for the setting aside of the order of the Insolvency Court, as that is a matter within the jurisdiction of the High Court. [p. 309, cols. 1 & 2.]

Hajee Abdul Lateef Sahib v. *Official Assignee of Madras*, 44 Ind. Cas. 847; 40 M. 1173, *Official Assignee of Madras* v. *Mangayar Karasu Ammal*, 47 Ind. Cas. 298; 40 M. 1173 (*foot-note*) and *Pita Ram* v. *Jujhar Singh*, 43 Ind. Cas. 573; 39 A. 626, distinguished.

Per *Krishnan, J.*—Under section 18 (3) of the Provincial Insolvency Act, the Court has power, in a proper proceeding instituted before it by the Receiver, to enquire into and decide on the merits of an adverse claim to possession set up by a third party. [p. 310, col. 1.]

The rules of the Civil Procedure Code can be availed of only where section 47 of the Insolvency Act applies. To apply that section it must be shown that there was some proper proceeding under the Act in the Insolvency Court, for section 47 merely provides for the procedure to be adopted "in regard to proceedings under this Act." [p. 310, col. 1.]

An order passed by an Insolvency Court under Order XXI, rules 97 and 98 without jurisdiction may be set aside by the High Court on appeal, but that does not bar a fresh suit by the aggrieved party. [p. 310, cols. 1 & 2.]

Second appeal against the decree of the District Court, Godavari at Rajahmundry, in Appeal Suit 323 of 1915, preferred against the decree of the Court of the Additional District Munsif, Rajahmundry, in Original Suit No. 113 (Original Suit No. 493 of 1914 on the file of the Court of the Principal District Munsif, Rajahmundry).

FACTS appear from the judgment.

Mr. *B. Narasimha Rao* (with him Mr. *D. Appa Rao*), for the Appellant.—The order of the Insolvency Court was without jurisdiction. The sale was by the Official Receiver in exercise of the powers vested in him and the enquiry into an alleged obstruction to possession can only be made on the Receiver's application. A general enquiry into the rights of third parties is not within the purview of the section. The Receiver's power to sell is created by Statute and not by virtue of an order of Court. There was no proceeding before the Court with reference to such sale within the meaning of section 47. The purchaser who initiated the enquiry was no party to the insolvency proceedings.

Plaintiff's right of appeal against the order did not bar his additional right to

have the order vacated in a suit. He could elect his remedy.

Mr. *P. Narayanamurthy*, for the Respondent.—The power to enquire into an alleged obstruction is conferred on the Insolvency Court by section 18 (3) of the Provincial Insolvency Act. The order was competent to the Court to pass. The provisions of the Civil Procedure Code, in the absence of any express statutory prohibition, apply to proceedings under special laws. In any event, the present suit was not maintainable. The plaintiff's remedy was to appeal against the order of the Insolvency Court and as he has not done so, the order is final and cannot be vacated in a fresh suit.

JUDGMENT.

BAKEWELL, J.—Under section 18 of the Provincial Insolvency Act the appointment of a Receiver vests the property of the insolvent in him, and under section 20 it is the duty of the Receiver to realise that property and he has power to sell it. This power is exercised by virtue of the authority conferred by the Statute, and not of a decree or order of the Insolvent Court directing a sale. There was, therefore, no proceeding before the Court with respect to such sale within the meaning of section 47 and the rules of the Civil Procedure Code relating to the sale of property in execution of a decree or order do not apply.

It is argued that under section 18 (3) the Court had power to remove a person in possession of property of the insolvent from possession, but this power is evidently intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of questions of title as between the insolvent and third parties. This is indicated by the proviso to this sub-section, which limits this power to persons whom the insolvent has "a present right so to remove." I do not think that this provision was intended to confer jurisdiction over a person against whom the insolvent had merely a right enforceable by a suit.

The parties to this suit were not parties to the proceedings in insolvency pending before the District Court in which the order in question purported to be made, and that Court was, therefore, not competent to try the issue now raised between these parties and its finding is not binding upon them (Civil Procedure Code, section 11).

I think, however, that the first prayer of the plaint is not correct in form in asking that the order of the District Court should be set aside; that is a matter within the jurisdiction of the High Court.

The cause of action is the threat of the defendant to obtain possession of property by means of irregular proceedings and the prayer of the plaint should be for a declaration of plaintiff's title and an injunction.

The appeal is allowed and the suit is remanded to the Court of first instance for trial on the merits. Costs throughout will abide the result.

KRISHNAN, J.—The facts of this case necessary for the disposal of this second appeal are these. The plaint property was sold by the Official Receiver as the property of the insolvent, the 1st defendant, and it was purchased by the 2nd defendant. In attempting to take possession, the 2nd defendant was obstructed by the plaintiff who claimed the property as his own. The 2nd defendant then applied to the Insolvency Court to order the removal of the obstruction and to put him in possession. This petition was filed under Order XXI, rules 97 and 98 of the Civil Procedure Code, and the plaintiff and the 1st defendant were made counter-petitioners. After a summary enquiry the Court passed an order for the delivery of the property to the 2nd defendant. Plaintiff has brought the present suit for a declaration of his title and for an injunction restraining the 2nd defendant from taking possession under that order, and for possession if he is removed from possession pending suit.

Both the lower Courts have dismissed the suit on the preliminary ground that it is not maintainable, plaintiff's only remedy being, according to them, an appeal against the order of the Insolvency Court. Plaintiff contends before us that that order is no bar to his suit, as it was passed without jurisdiction. A copy of the order has been filed in this Court as it was not filed in the lower Courts, and both sides have consented to this course.

I agree with my learned brother in thinking that the order of the Insolvency Court was one passed without jurisdiction. It was sought to be supported as a competent

order under section 18, clause (3) of the Provincal Insolvency Act, or under section 47 of that Act read with rules 97 and 98 of the Civil Procedure Code.

Section 18, clause 3, is clearly intended, as pointed out by my learned brother, for the purpose of helping the Receiver to get possession of the insolvent's property: under it the Receiver but no one else can apply to the Court to direct a third party who is in possession of the insolvent's property to deliver it up to him, if the insolvent has a "present" or actual subsisting right to its possession. I consider that under that section the Court has power, in a proper proceeding instituted before it by the Receiver, to enquire into and decide on the merits of an adverse claim to possession set up by a third party, adopting the proper procedure for it. But in my view this question does not arise in this case, as no application whatever was made by the Receiver under the section. He elected to sell the property as that of the insolvent leaving it to the purchaser to take such steps, as he thought fit, to get possession of it. The application to the Court was made by the purchaser under the Code of Civil Procedure and the Receiver was not even a party to it: such an application clearly does not lie under section 18. The purchaser is a stranger to the insolvency proceedings and by his purchase he got no more rights than the insolvent himself had, to get possession of the property from the third party. The rules of the Code of Civil Procedure can be availed of only if section 47 of the Insolvency Act applies. To apply that section, it must be shown that there was some proper proceeding under the Act in the Insolvency Court; for section 47 merely provides for the procedure to be adopted "in regard to proceedings under the Act." See *Guntapalli Narasimhayya* v. *Malapati Veeraraghavulu* (1). As that has not been shown, it is clear that the order of the Court on the application of the purchaser deciding in a summary way that plaintiff has no title to the property and that he should give up possession, was without jurisdiction.

That being so, I am of opinion that the order cannot be treated as a bar to the plaintiff's suit and that the suit is maintainable as an ordinary civil suit. Under section 41 of the Evidence Act it is open to the plaintiff to show that the order pleaded against him was delivered by a Court not competent to do so, that is, not having jurisdiction to do so and he has done that in the present case. It may have been open to him to apply to the High Court to set aside the order as one without jurisdiction, but it cannot be said that he was bound to do so or that it was his only remedy, though he would have been well advised if he had adopted that course. He was entitled to choose his remedy and the fact that he did not choose to come to the High Court cannot affect his right of suit under the general law. I think, therefore, his suit is maintainable.

The case of *Hajee Abdul Lateef Sahib* v. *Official Assignee of Madras* (2) and the case referred to in the foot-note to it, *Official Assignee of Madras* v. *Mangayar Karasu Ammal* (3), were both cases which arose under the Indian Insolvency Act and were brought to contest orders passed by the Madras Insolvency Court between the Official Assignee on the one side and the third party claiming title on the other. The orders being with jurisdiction under section 7 of the Act, the suits were held not maintainable. These cases are thus clearly distinguishable from the present case. The case of *Pita Ram* v. *Jujhar Singh* (4) is also distinguishable, as that was a case where the third party had himself elected to apply under section 22 of the Provincial Insolvency Act as he was entitled to do and though he had a right of suit as well, the learned Judges held that as he had elected to adopt one remedy and failed, he could not be allowed to fall back upon the other. Such a question does not arise at all in the present case. Here the plaintiff was brought into the Insolvency Court by the purchaser, that and in a proceeding which the Court was incompetent to adopt; the fact that he did not plead to the jurisdiction of that Court cannot give that Court jurisdiction, nor can it be treated as an election of his remedy by the

(1) 42 Ind. Cas. 525; 6 L. W. 694; (1917) M. W. N. 857; 41 M. 440.

(2) 44 Ind. Cas. 847; 40 M. 1173.
(3) 47 Ind. Cas. 398; 40 M. 1173 (*foot-note*).
(4) 43 Ind. Cas. 573; 39 A. 626.

plaintiff. The Allahabad case, therefore, does not apply.

No other authority has been cited before us. I am, for the reasons above stated, of opinion that the lower Courts were wrong in dismissing the plaintiff's suit as not maintainable. I would, therefore, set aside their decrees and remand the suit to the District Munsif for trial and disposal on the remaining issues. As pointed out by my learned brother, the prayer in the plaint to set aside the order of the District Judge is not correct in form; but it is not material to the plaintiff and will, therefore, be disallowed.

I agree to the order proposed by my learned brother as to costs also.

M. C. P.

Appeal allowed; Suit remanded.

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN SECOND APPEAL No. 872 OF 1912.

June 26, 1912.

Present :—Mr. Justice Tudball.

MOTI BEGAM—DEFENDANT—APPELLANT

versus

HAR PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Mortgage, suit on—Defendant claiming prior charge—Suit decreed—Appeal by defendant - Court-fee payable.

In a suit on foot of a mortgage one of the defendants claimed that she had a prior charge on the property sought to be sold. The defendant's contention was overruled and the suit was decreed. Defendant appealed praying for a declaration that she had a prior charge over the property and that it could only be sold subject to that charge:

Held, that the defendant's prayer was for a declaration with consequential relief and that she must, therefore, pay *ad valorem* Court-fee on the amount of the charge claimed by her. [p. 313, col. 1.]

FACTS of the case appear from the following

OFFICE REPORT.—The suit out of which this appeal has arisen was brought by the plaintiff for recovery of Rs. 2,500 on account of principal and interest on foot of a mortgage, dated 4th May 1893, by enforcement of hypothecation lien.

Musammat Moti Begam, one of the defendants, defended the suit on the allegation that the property sought to be sold was conveyed to her as security for her dower-debt under a prior bond executed by her deceased husband, Sayed Hasan, on 9th February 1892, which bond was subsequently renewed by the heirs of her deceased husband on 5th August 1910. The said defendant contended that the property could not be sold until payment of the money due to her on account of her dower-debt secured by the deed of mortgage which she put up as a shield.

The suit was valued at Rs. 2,500, and a Court-fee of Rs. 150 was paid thereon.

At the trial of the suit the Court held that the plaintiff's mortgage was prior and decreed the plaintiff's suit. A decree was accordingly passed for sale of the mortgaged property under Order XXXIV, rule 4.

Musammat Moti Begam appealed to the lower Appellate Court, setting up *inter alia* a plea of priority and genuineness of the mortgage held by her. The lower Appellate Court modified the decree of the Court of first instance by extending the time for payment of the decretal amount, and in other respects the appeal was dismissed.

The appeal was valued at Rs. 2,500, and a Court fee of Rs. 150 was paid thereon. The proper valuation of the appeal was Rs. 2,519 inclusive of interest from date of suit to date fixed for payment of the decretal amount awarded in the decree appealed from, and a Court-fee of Rs. 155 was payable upon that valuation. Rs. 150 having been paid, there is, therefore, a deficiency of Rs. 5 to be made good by the defendant-appellant for the lower Appellate Court.

Musammat Moti Begam has preferred this second appeal and the relief sought by the appeal is that the Hon'ble Court will be pleased to allow the appeal and declare that the appellant has a prior charge for the amount of her dower-debt and the property can be sold only subject to her charge. The appeal is valued at Rs. 2,500, and a fixed fee of Rs. 10 has been paid, apparently on the ground that a mere declaration is sought by this appeal.

I think a Court-fee of Rs. 10 paid in this Court is quite inadequate. The defendant-appellant seeks by this appeal to go behind the decrees of the Court below, decreeing the plaintiff's claim for sale of the mortgaged property and declining to accept

the plea set up by the defendant in the Courts below and repeated in this Court in a somewhat different form.

The suit was a suit for sale on a mortgage on the basis of which the Courts below have passed a decree in plaintiff's favour. The defendant comes to this Hon'ble Court in second appeal, and by making a prayer in the form of a declaration wants to get rid of those decrees. Assuming that the defendant-appellant does not state in distinct words that the decrees below should be set aside, one should see what will be the consequence, if the declaration prayed for, be granted. Leaving out the question that the appellant is avoiding the decree passed against her, it is evident that the property will be subjected to a double charge created by the mortgages held by the parties and out of sale-proceeds the plaintiff may not get anything after meeting the prior charge of the defendant.

I am quite certain that the appellant is seeking for a declaration with a consequential relief, and, as such, she must pay *ad valorem* Court-fee of Rs. 175, on the amount of her mortgage, *i. e.*, Rs. 3,000. Rs. 10 having been paid, there is therefore a deficiency of Rs. 165 due from defendant-appellant for this Court.

Total deficiency due from defendant-appellant for this Court and lower Appellate Court is Rs. 170.

The following objections to the report of the Stamp Reporter were raised by Counsel for the appellant :—

1. The object of the appeal is not to get rid of the decrees of the Courts below nor does the appellant seek "by this appeal to go behind the decrees of the Courts below decreeing the plaintiff's claim for sale of the mortgaged property", as remarked by the Stamp Reporter.

2. The appellant is desirous that the decree for the sale of the property may be allowed to remain intact but, it may be declared that her dower-debt is a prior charge. Almost a similar question arose in a case of *Rup Chand v. Fateh Chand* (1) and it was decided that a Court-fee of Rs. 10 on the memorandum of appeal was sufficient.

3. Having regard to the above circumstances the Court-fee of Rs. 10 paid by the appellant on the memorandum of appeal is sufficient.

4. The Court-fee in the Court below was paid on the amount of the mortgage money under section 7 of the Court Fees Act and was sufficient and the Stamp Reporter is not justified in demanding any Court fee on the amount of interest on the memorandum of appeal either in this Hon'ble Court or in the Court below.

REPLY OF STAMP REPORTER.—In submitting the papers to you under section 5 of the Court Fees Act, I beg to add that the ruling relied upon by the learned Counsel has no application at all to this case, and that according to the long standing practice of this Court *ad valorem* Court fee is always charged on *pendente lite* interest.

I cite two cases, *viz.*, *Nepal Rai* v. *Debi Prasad* (2) and *Baji Lal* v. *Gobardhan Singh* (3).

These are converse cases. In these cases the appellants sought to get rid of the liability imposed by the decrees appealed against, while in the present case the appellant is seeking to impose a further liability on the property in suit. In the second ground of appeal the appellant distinctly assails the concurrent findings of the Courts below that the right of the appellant under the deed was barred by time and extinguished for all purposes under the law. The relief sought by the appeal may be read thus:—

It may be declared that the appellant has a prior charge for the amount of her dower-debt and that the property can be sold only subject to her charge by reversing the concurrent findings of the Courts below, in so far as they affect her deed, on the ground set forth in the memorandum of appeal.

I most respectfully submit that a very substantial consequential relief is involved in the case and under section 7, clause (*iv*) (*c*), read with clause 1 of the Court Fees Act, the appellant must pay *ad valorem* Court-fee on the amount of her own deed amounting to Rs. 3,000.

If the appeal prevails and the Hon'ble Court holds that the appellant has a prior charge and directs the property to be sold subject to her prior charge, the appellant may apply for sale of the property under Order XXXIV, rule 12, and the Court acting

(1) 11 Ind. Cas. 977; 8 A. L. J. 821; 33 A. 705.

(2) A. W. N. (1905) 40; 2 A. L. J. 105; 27 A. 447.

(3) 1 Ind. Cas. 1000; 6 A. L. J. 155; 31 A. 265.

under Order XXXIV, rule 13, may first satisfy the prior charge out of the sale-proceeds and then give the balance to the plaintiff-respondent. If the law allows such a procedure, the appellant will get her mortgage money on payment of Rs. 10 without bringing a fresh suit.

In any case I most humbly sumbit that it is manifestly a case in which the appellant is not only trying to get rid of the liability imposed upon her by the decree but to impose a further liability on the property, and as such the appellant must pay *ad valorem* Court-fee on the further charge thus imposed.

NOTE BY THE TAXING OFFICER.—I have heard the learned Counsel and am not convinced by his arguments. In the appeal to the District Judge, Saharnapur, full Court-fee was paid. In this appeal the whole of the decree is attacked by the second ground. I agree with the Stamp Reporter that the full Court-fee should be paid on this appeal, but Mr. A. Raoof maintains that he seeks merely a declaration and that the case is one of general importance in view of the Full Bench ruling, *Ram Shankar Lal* v. *Ganesh Prasad* (4). At his request I submit the question for the decision of the Hon'ble Taxing Judge.

The Stamp Reporter should quote the rulings on which he relies.

Mr. *A. Raoof*, for the Appellant.

JUDGMENT.—The amendment has been made. Court-fee must be paid on the amount of the prior charge. I allow two days to make good the deficiency.

Order accordingly.

(4) 29 A. 385; 4 A. L. J. 273; A. W. N. (1907) 97; 2 M. L. T. 248 (F. B.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 523 OF 1917.

March 5, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

RAICHAND MOTICHAND GUJAR —DECREE HOLDER—APPELLANT

versus

DHONDO LAXUMAN BHURE—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 182—*Execution of decree—Instalment decree—Default in payment of instalment, effect of—Limitation.*

A decree for Rs. 800 odd made on the 28th June 1910 provided that the debt should be paid off by eight annual instalments of Rs. 100 each, and there was a term in the decree that on failure to pay any one of these instalments before the next had become due, the creditor could call in the whole amount of debt with interest at the agreed rate. No instalment was ever paid and in September 1915 the decree-holder applied for execution of the decree:

Held, that the right to execute the decree for the whole amount of the debt having accrued to the decree-holder as a complete legally enforceable right before the end of 1910, and the limitation allowed to him within which to enforce it being three years, the application for execution was barred by time. [p. 314, col. 1.]

Appeal from the decision of the First Class Subordinate Judge, A. P., at Belgaum, in Appeal No. 65 of 1916, confirming the decree passed by the Subordinate Judge at Chikodi, in Darkhast No. 342 of 1915.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUGDMENT.

BEAMAN, J.—The point raised here is one of considerable interest and must, I think, have been one of frequent occurrence. We are not referred to any decision of our High Court upon it. The appellant, however, relies upon a decision of the Allahabad High Court in the case of *Shankar Prasad* v. *Jalpa Prasad* (1), which would appear to be conclusive in his favour. With great respect, I am doubtful whether the reasoning of that judgment will stand critical analysis and I will briefly give my reasons for being of a different opinion.

The point arises in this way upon an instalment decree in a very common form. A debt of roughly Rs. 800 had to be paid off by eight annual instalments of Rs. 100 each, and there was a term in the decree that on failure to pay any one of these instalments before the next had become due, the creditor could call in the whole amount of debt with interest at the agreed rate. It is found as a fact that no instalment was ever paid. The decree was made on the 28th June 1909. In September 1915, the creditor presented this Darkhast, and the question decided in the Court below was one of limitation. It was decided against the judgment-creditor. The ground of appeal is that it was optional with him to waive all breaches on the part

(1) 16 A. 371; A. W. N. (1894) 115; 8 Ind. Dec. (N. S.) 241.

of the debtor to fulfil his obligations under the instalment decree and so, at the very end of the eight years, sue for at least three instalments in arrears then due. If this view be correct, it follows that the creditor would likewise be entitled to sue, within three years of failure to pay the last instalment, for the total amount of debt with interest. But that right had accrued to him as a complete legally enforceable right before the end of 1910 and the period of limitation allowed to him, within which to enforce it, would have been three years, no longer. I am entirely unable to accede to the argument that that right assumes the nature of a recurring right under an agreement such as this. For the effect would be that no matter how complete the right to call in a definite sum of money had become, the judgment-creditor might ignore it and extend the period of limitation, perhaps to the extent of some twenty instead of three years; as for example, if the instalment decree had provided for the repayment of the capital sum over a period of twenty years. Such decrees are by no means infrequent. Now, let me carry the analysis a little further. In all decrees of this kind the provisions for the payment of instalments are provisions in favour of the debtor, not the creditor. The very form of an instalment decree pre-supposes that the creditor's rights to that extent are curtailed and the debtor's rights enlarged. The right to pay by instalments, subject to conditions, is the debtor's not the creditor's right. The creditor's right is to enforce the payment of the full amount upon breach of condition, thus putting an end to the instalment decree as an instalment decree.

This analysis will, I think, at once reveal what seems to me, with great respect, the basic fallacy of the Allahabad decision. Nor do I think that the correct principle is in any way impaired by what is after all rather a sentimental consideration veiled in a specious argument, that construing decrees of this kind, as I would construe them, would be to compel the creditor to act harshly towards the debtor. When we remember that in any event the creditor has three years in which to consider his position after breach of condition, I confess, it appears to me, almost absurd to say that by dealing on principles of strict reasoning and logic with these decrees we should offer inducements to creditors to press too hardly upon their debtors. For after failure on the part of the debtor to pay one year's instalment and in the absence of any intention on his part to pay any further instalment in the future, it ceases to become a question of indulgence at all. What the creditor would do, on the principle permitted by the Allahabad Court, would be no more than to balance the pecuniary advantages and disadvantages of enforcing the decree at once or waiting for the last instalment. If I am to accede to the view pressed upon me by the learned Pleader for the appellant, it would always be open to the judgment creditor under a decree of this kind, allowing him ample interest, to sit quiet for a lengthy period and then call in the capital, with the accumulated interest, as though no right had been conferred upon him perhaps ten years earlier to the sum then due, a right governed by the ordinary law of limitation.

In my view, this and all similar cases fall to be decided on some such principle as I have endeavoured, perhaps roughly, to outline. If I am so far right, on the finding of the fact by the lower Court, this Darkhast is not in time, and this appeal ought to be dismissed with all costs.

HEATON, J.—I agree.

In this particular case, which is the case of a decree payable by instalments, the first instalment was payable on the 6th of June 1910, and it was provided that in case of default in paying an instalment within the time fixed for the payment of the next instalment thereafter, the plaintiff should recover in one sum the whole amount due at that time, together with interest, by the sale of the mortgaged property. Ordinarily the mortgagee would, of course, have been entitled to recover the mortgage debt in one lump sum after the expiration of the period of six months fixed by the decree. In this particular case he is not entitled to recover the entire sum unless the judgment-debtor fails to pay one of the instalments of Rs. 100, which is less than one-eighth of the entire sum. That is in itself a very great privilege to the judg-

ment-debtor, a great disadvantage to the creditor. But supposing that the debtor fails to take advantage of this valuable privilege, what follows? One would suppose, at least I should suppose, that what followed naturally would be that the privilege would be cancelled and that the judgment-creditor would thereupon become entitled to recover the whole debt in the usual way. And this result would be in consonance, it seems to me, with ordinary legal and equitable principles and is exactly what would be expected from the application of common sense and fair dealing. And as a matter of fact it is generally understood, in this Presidency by our Judges, that what I have just described is the principle which underlies the framing of instalment decrees. We have here a case in point. The trial Judge and the Judge of first appeal both of them unhesitatingly accepted the principle which I have indicated, a principle which leads to the conclusion that where the privilege is not taken advantage of by the judgment debtor, the decree ceases to be an instalment decree and becomes enforceable as an ordinary decree for the payment of a lump sum. This, of course, is a view which for all ordinary purposes is beneficial to the creditor. It enables him immediately to get in the whole of the debt instead of waiting for the prolonged period covered by payment of instalments. But it happens here, and it has often happened before, that the judgment-creditor is negligent of his own interests. He allows time to elapse, and when he finds that more than three years have passed without his enforcing the right to get in the judgment-debt as a whole and finds himself faced by a point of limitation, then he turns his back on the arguments which one would expect from him at ordinary times and takes to those which would for ordinary purposes be appropriate to the judgment-debtor. This revolutionary method of argument is, of course, not of a kind which appeals to a Court, for Courts prefer consistency of principle.

I have said what I consider to be the ordinary principle, and all that remains is to consider whether, in this particular decree, there are to be found indications that it is based on that principle, or whether it is intended by this particular decree to provide for some different solution of the question, what is to happen on failure to pay an instalment. I have quoted the passage pertinent to the point from the decree and it seems to me to be one of an ordinary kind, one which we must interpret by the principle which I have indicated. Therefore, I think that the lower Courts were quite right in dismissing this Darkhast as time-barred, and that the decree of the lower Court ought to be confirmed.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 6, 8 AND 9 OF 1917.

May 23, 1918.

Present:— Justice Sir George Woodroffe, KT., Justice Sir Charles Chitty, KT., and Justice Sir Syed Shamsul Huda, KT.

IN L. P. A. No. 6 OF 1917

SHIB CHANDRA ROY CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARENDRA LAL RAI CHOWDHURY—PLAINTIFF AND JOTINDRA NATH BOSE AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

IN L. P. A. No. 8 OF 1917

JOTINDRA NATH BOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARENDRA LAL RAI CHOWDHURY—PLAINTIFF AND KHOGENDRA NATH BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

IN L. P. A. No. 9 OF 1917

TARAN KRISHNA NASKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARENDRA LAL RAI CHOWDHURY—PLAINTIFF AND JOLINDRA NATH BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Co-sharer* zemindar *purchasing tenure—Suit against neighbouring* zemindars *and their tenants for declaration of title—Decree, whether* res judicata *as regards* zemindari *title—Permanent tenure-holder, whether represented by* zemindar *in title suit—Possession, constructive, whether claimable by trespasser—Revenue Survey map, accuracy of—Presumption.*

The plaintiff, who was proprietor of a 4/5ths share of a *zemindari*, purchased a teunre under it in execution of a decree for his share of the rent. One

of the defendants having successfully put forward a claim to the tenure in the execution proceeding on the ground that he held it under some other defendants who were the proprietors of another *zemindari* adjoining that of the plaintiff, the plaintiff brought a title suit against all the defendants and also the defaulting tenure-holder, asserting his 4-5ths *zemindari* title and his right to the tenure, in which it was decided that as a certain river formed the boundary between the two neighbouring *zemindaris*, the plaintiff had title to the lands in suit:

Held, that the decision was *res judicata* between the parties not only as regards the plaintiff's title to the tenure but also as regards his *zemindari* title to the lands in suit: [p. 327, col 2]

Held also, that the decision could not operate as *res judicata* against the persons to whom the tenure was mortgaged before its execution sale and who purchased the same in execution of a decree on the mortgage, as those persons were not made parties to the suit and could not have been represented by the defaulting tenure-holder, who held only the equity of redemption, so that those persons were entitled to show that some of the lands purchased by them in execution of the mortgage decree were not included in the defaulting tenure, but as regards such of those lands to which the plaintiff's *zemindari* title was declared in the previous suit, those persons being parties to the present suit should pay to the plaintiff such rent as was agreed upon between themselves and the rival *zemindars* from whom they got settlements of those lands. [p. 329, col. 2.]

There is a rebuttal presumption of accuracy in favour of the Revenue Survey map. [p. 328, col. 1.]

A trespasser cannot claim the benefit of constructive possession. [p. 329, col. 1.]

The interest of a permanent tenure-holder is not represented by either of the rival landlords in a suit between themselves to establish title to lands comprising the tenure. [p. 329, col. 2.]

Letters Patent Appeals against the decrees of Mr. Justice Fletcher, differing in opinion from Mr. Justice Smither, dated the 30th May 1917, in Appeals from Original Decrees Nos. 387, 478 and 431 of 1914 respectively.

FACTS appear from the following judgment of

FLETCHER, J.—These appeals are preferred by the defendants Nos. 1, 2, 3 and 4 against the judgment of the learned First Subordinate Judge of Alipore, dated the 31st of March 1914, decreeing the plaintiff's suit. The plaintiff brought the suit for a declaration that the lands mentioned in the schedule to the plaint, being the lands included in *khatian* No. 85-1 prepared and published under the provisions of the Bengal Tenancy Act, appertain to Mahal Ushpara, Touzi No. 2999, and that the plaintiff is entitled to the entire rent of the said lands and for other relief. The plaintiff's title is as follows:—The plaintiff was the owner of 1/5th of Mahal Madrasa, bearing the Touzi No. 145 in the Collectorate of the 24-Perganas. The remaining 4/5ths of the said Mehal formerly belonged to Hari Mohan Roy and Peary Mohan Roy. Within such Mehal there is a *taraf* called Ushpara and in that *taraf* there is a Mouza Gangapur Bagmari. On the 25th of Chait 1286 B. S. one Gokulmoni Dassi executed a *kabuliyat* in respect of 1,000 *bighas* appertaining to the said Mouza in favour of Hari Mohan Roy and Peary Mohan Roy, and on the 2nd of Assar 1287 B. S. she executed a similar *kabuliyat* in favour of Kaiballya Nath Biswas, the then owner of 1/5th of the Estate Touzi No. 145.

In the year 1290 a measurement was made of the land in the possession of Gokulmoni. She was found to be in possession of 1,819½ *bighas* and a fresh *kabuliyat* was executed by her. Then Peary Mohan Roy, who had acquired his brother's share in the property, sued Gokulmoni for arrears of rents in respect of his share and obtained a decree. In execution of such decree Gokulmoni's tenure was brought to sale and purchased by Peary Mohan Roy. One Tasseruddi Mondal then put in a petition under section 335 of the Code of Civil Procedure and obtained an order for restoring him to possession, but before that order was made Peary Mohan instituted a suit No. 138 of 1890 against Gokulmoni, Tasseruddi and the owners of Touzis Nos. 172 and 173 for establishment of his title to and confirmation of possession of the said tenure. This suit was decreed in the First Court. An appeal was then preferred to the High Court. Whilst such appeal was pending, Peary Mohan parted with his interest in the Touzi and the tenure to Maharaja Sir Jatindra Mohan Tagore, the late father of defendant No. 6. Ultimately the judgment was upheld on appeal.

Gokulmoni had executed two mortgage-deeds in favour of Ram Kristo Nashkar—one in Bhadra 1293 and the other in Aswin 1295. Ram Kristo brought a suit on these mortgages and obtained a decree. In execution of this decree the mortgaged properties were brought to sale. Some of the morigaged properties were purchased by Ram Kristo Nashkar and the remainder by Parmessar Mal.

Parmessar Mal, having failed to obtain possession of the property purchased by him, brought two suits against Maharaja Sir Jatindra Mohan Tagore and others for establishment of his title and obtained decrees which were affirmed on appeal on the 5th November 1903. Parmessar Mal then sold his interest to Ram Kristo Nashkar's executor, the defendant No. 1. In 1906 and 1909 the plaintiff sued the Maharaja and the defendant No. 1 for arrears of rent but only obtained a decree for the amount admitted by defendant No. 1.

In 1903 a partition was effected by the Collector between the plaintiff and his co-sharer; the plaintiff became the owner of the *taraf* Ushpara, the *taraf* being given the Touzi No. 2999, but in the Record of Rights prepared and published under the provisions of the Bengal Tenancy Act the lands mentioned in the schedule to the plaint were included in *khatian* No. 85-1, and described as belonging to the owners Nos. 147-1, 147-2, 172, 173 and 2999 and in the possession of the defendants Nos. 1, 2 and 3. On this the plaintiff brought this suit for establishment of his right to the property in dispute as a part of his Mahal Ushpara bearing Touzi No. 2999 and for a declaration that he is entitled to the entire rent receivable in respect of the same. The defendants No. 4 are the owners of the adjoining Mouza Tardaha. On the 19th of March 1860 the then owner of Mouza Tardah granted to Tarak Nath Bose, the predecessor-in-interest of the defendants Nos. 2 and 3, a lease of 300 *bighas* rent free for the first seven years and ultimately at a rent of 8 annas a *bigha*. The 300 *bighas* was stated in the lease to lie "east of the Samedgiriganj" which it is common ground is the river Bidyadhari. On the 6th of April 1870 the predecessor-in-title of the defendant No. 4 granted a permanent lease to one Jadab Chandra Banerjee of 725 *bighas* within the boundaries mentioned therein at a rent rising ultimately to 9 annas a *bigha*.

Gokulmoni, as already stated, acquired the interest granted to Jadab Chandra Banerjee by two *kobalas*, dated respectively the 24th February and the 11th July 1879. Gokulmoni mortgaged by two mortgages, dated respectively the 31st of August 1886 and the 25th of June 1888, both her lease-hold interest held from the predecessor of the plaintiff and that originally granted to Jadab Chandra Banerjee in favour of Ram Kristo Nashkar as mentioned before. On the 12th of September 1889 the suit already mentioned was brought to enforce these two mortgages and a decree was passed on the 31st of December 1890, which was upheld on appeal. In execution of this decree the property was brought to sale, a portion of the mortgaged property was purchased by Ram Kristo Nashkar and the rest by Parmessar Mal. Parmessar Mal, being unable to obtain possession of the property purchased by him, brought a suit against Maharaja Sir Jatindra Mohan Tagore to recover possession of the same. Parmessar Mal was successful in that suit. The judgment of this Court in that suit was delivered on the 2nd of April 1903, the Court holding that whether the mortgaged property was held out of the Estate Nos. 172 and 173 or Estate No. 145, the mortgages to Ram Kristo Nashkar were valid mortgages. On the 16th of May 1902 Maharaja Sir Jatindra Mohan Tagore brought a suit against the Boses to recover possession of a portion of the land covered by the decree in Suit No. 138 of 1890, which was in their possession, and on the same date the Maharaja brought a similar suit to recover from the Nashkars a portion of the land covered by the same decree in excess of the 1,819½ *bighas* in possession of the Nashkars—both these suits were withdrawn.

On the 5th May 1903 Parmessar Mal sold his interest to Doyal Nashkar, executor of the Will of Ram Kristo Nashkar, as already stated. Then followed two suits I have already mentioned for rent by the present plaintiff against Nashkar. These suits were only partially successful. Now it is obvious in the present case that the main point to determine in this appeal is what is the boundary between the Mouza Gangapur Bagumari and the Mouza Tardah. The learned Subordinate Judge came to the conclusion that as it had been determined in the Suit No. 138 of 1890 that the river in its present position is the boundary between the two Mouzas, the matter is *res judicata* and he has, therefore, not considered the very careful report and map prepared by the Commissioner in the present case.

Of course, if the river in its present course must be taken as the boundary between the two Mouzas, then doubtless the judgment of the learned Judge is correct.

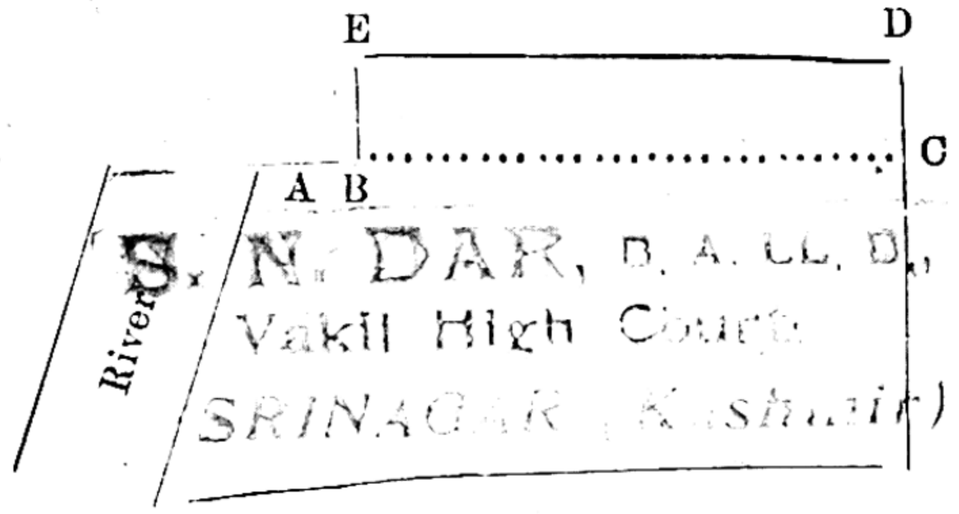
But, in my opinion, the matter cannot be disposed of in so simple a manner. The plaintiff in Suit No. 138 of 1890 was entitled to the equity of redemption of Gokulmoni's tenure held out of Estate No. 145 and was also entitled to 4/5ths of the Zemindari interest. Even if it be assumed in favour of the plaintiff as against the Panihati Zemindars that by reason of the judgment in Suit No. 138 of 1890 there is an estoppel as regards 4/5ths of the property in dispute, the Nashkars and the Boses have a distinct and separate interest in maintaining the Record of Rights as at present. With regard to the Nashkars the present suit seeks for a declaration that they are liable to pay rent at the rate of 12 annas a *bigha* for the whole of the land in dispute as being held under Gokulmoni's tenure held out of Estate No. 145. Unless it is open to them to contest the fact that the property is not held out of Estate No. 145, then they will be liable to pay rent at the rate of 12 annas a *bigha*, as claimed by the plaintiff in this suit, instead of the lower rate reserved by the lease to Jadab Chandra Banerjee of which they are the assignees. The Boses, in the event of the matter being *res judicata*, are in a worse position for unless the property in their possession is held out of Estates Nos. 172 and 173, they have no interest in the land in dispute which is the plaintiff's case. Both the Nashkars and Boses have therefore a very material interest as to whether the disputed property lies within the limits of the Estate No. 145 or within the limits of the Estates Nos. 172 and 173, and the case cannot be disposed of as it has been by the learned Subordinate Judge by simply saying that the Nashkars and the Boses will pay their rent to the plaintiff instead of Panihati Zemindars. No estoppel as against the Nashkars can arise by reason of the judgment in Suit No. 138 of 1890. They claim under mortgages which were prior in date to the institution of that suit and not being represented in that suit, they are not bound by the decision [*Sita Ram* v. *Amir Begam* (1)]. As regards the Boses, they claim under a permanent heritable lease. It has been argued that they were represented in Suit No. 138 of 1890 by their landlords. Whatever may be the correct view as to common tenants being represented by their landlords, a tenant having a permanent and heritable right cannot, I think, be so represented. This was the view taken in the case of *Seshappaya* v. *Venkatramana Upadya* (2). It is, therefore, I think, essential (whatever may be the position of the Panihati Zeminders), in order to adjudicate on the rights of the Nashkars and Boses, to determine whether the property in dispute forms a portion of the plaintiff's estate or whether it forms a part of the Estates Nos. 172 and 173.

The report of the Commissioner in the present case and his map are to the effect that the plan prepared in Suit No. 138 of 1890 is wrong. I was much struck during the argument in this appeal that the learned Vakil for the respondent did not refer to the map prepared by the Commissioner but attempted to support the judgment appealed against on the ground that the judgment was *res judicata* and in so far as it was not *res-judicata*, it was an important piece of evidence and ought to be given effect to. But unless a case of estoppel arises, it is the duty of the Court to consider whether the judgment in Suit No. 138 of 1890 is correct. That judgment proceeded on the footing that the river was the boundary between the two Mouzas and that boundary was ascertained by a relay of the survey map. But rivers in India frequently alter their courses, and we have to see whether the river shown in the earlier survey map is in the same position as the river shown in the map prepared in Suit No. 138 of 1890. I think the Commissioner in this case has shown that the map in Suit No. 138 of 1890 was incorrectly relaid. It was not suggested that the Commissioner has not done his work well. He was called as a witness by the plaintiff and was only cross-examined as to whether the instrument he used was correct. The instrument he used was the property of the Court and there is no reason to think it was not accurate now at the time of the Revenue Survey map, which was purported to be relaid in Suit No. 138 of

(1) 8 A. 324; A.W.N. (1886) 101; 5 Ind. Dec. (N.S.) 105.

(2) 5 Ind. Cas. 732; 33 M. 459; 20 M. L. J. 752; (1910) M. W. N. 26.

1890, Mouza Gangapur Bagmari was bounded on the west by the river along the southern $\frac{2}{3}$rds of its western boundary. Tardah was on the other side of the river. If the river has moved west since the Revenue Survey, it has left Gangapur Bagmari and there is land between. In the Revenue Survey the shape of Gangapur Bagmari is roughly



The distance from A on the river side to B is less than half the distance from B to C. There has been no change in the area B C D E. In the map prepared in Suit No. 138 of 1890 the distance from the river bank to B is greater than the distance from B to C. That is, the river is more than twice as far west of B than it was at the time of the Revenue Survey. The river has, therefore, moved westwards. Further, in the Revenue Survey map starting from the south the line of the river is a little east of north, but in the map prepared in Suit No. 138 of 1890 it is west of north. Nor is the report of the Commissioner in this suit the first occasion in which it has been suggested that the map in Suit No. 138 of 1890 is inacurrate.

In the Rent Suit No. 2 of 1906 brought by the present plaintiff a map (Exhibit B 145) was prepared. This map shews the river far west of the old boundary, and the Commissioner appointed in that suit reported that the river "as it at present exists lies far to the west of the western boundary line as laid down in my map according to the Revenue Survey map."

The Commissioner in this suit reported that the area of the land described in *Khatian* No. 85/1 lying within Gangapur Bagmari was *bighas* 2,131-1 3-0 *gundas* equivalent to local *bighas* 1,887-15-10-17 *gundas*, an area sufficient to satisfy the 1,819$\frac{2}{3}$ *bighas* comprised in the lease to Gokulmoni by owners of the Estate No. 145.

In my opinion we ought to accept the report and map of the Commissioner prepared in the present case and accept as the boundary between the two Mouzas the red line shown on the Commissioner's map as the relay of the boundary line from the Revenue Survey map.

Further, I do not think that the decision in Suit No. 138 of 1890 gives rise to a case of *res judicata* as regards 4/5ths of Zemindari interest in Mouza Gangapur Bagmari. The plaintiff in that suit sued for possession on the lease granted to Gokulmoni by the owners of Mouza Gangapur Bagmari. No doubt the issue was raised as to whether the property sued for was within the limits of Mouza Gangapur Bagmari or of Mouza Tardah. The title to the zemindari interest at the date of the grant of the lease to Gokulmoni would be a matter in issue in that suit, but when once it was determined that the lease to Gokulmoni was a valid lease and covered the land in dispute, it was wholly immaterial to inquire whether or not the plaintiff in that suit had also acquired a fractional interest in the Zemindari. The fact that the plaintiff had a 4/5ths share in the zemindari interest in Mouza Gangapur Bagmari did not affect his claim in that suit in any way. The plaintiff in that suit was bound to succeed or fail on his proving or failing to prove that Gokulmoni had a valid lease of the property sued for. I think that the plaintiff in the present suit is not litigating under the same title as the plaintiff in Suit No. 138 of 1890 and, therefore, he is not entitled to use the judgment and decree in that case as an estoppel against the Panibati Babus in the present case.

It is a matter for comment also that the plaintiff has never realised more rent than the Rs. 1,424, which is given in the compromise petition before the Collector as the rent of Mouza Gangapur Bagmari. The learned Judge seems to think that it is doubtful whether there ever was a *bari* known as Puti Babu's *bari*: Puti appears to be a name commonly applied to a person whose proper name is Preonath. The 59 *kabuliyats* produced by the Boses and the boundaries given in the same strongly support the case of the Boses. The conduct of the defendants in either not appearing

before the Commissioner or appearing by representatives who were of no assistance is to be condemned, but I am satisfied that the Boses have in fact been in possession of the land they claim.

The plaintiff has clearly not been in possession of the lands outside the limits of his Mouza as shown in the map of the Commissioner. His whole case as to this land rests on the judgment in Suit No. 138 of 1890 and, in my opinion, that judgment does not assist him in the present suit.

In the result, I think we ought to set aside the judgment and decree passed by the learned Subordinate Judge and in lieu thereof we ought to declare that the western boundary of the plaintiff's Mouza is the red line shown in the Commissioner's map prepared in this suit as being the relay of the western boundary shown in the Revenue Survey map. As to lands within that boundary in the possession of the Nashkars, the plaintiff will be entitled to get rent at the rate of 12 annas a *bigha*.

The rest of the plaintiff's claim ought to be dismissed. I think there ought to be no order as to the costs of this suit either in this Court or in the Court below.

SMITHER, J.—The plaintiff is proprietor of Gangapur Bagmari, in his Estate No. 2999, formerly a part of Touzi No. 145. This is not now questioned. He asserts that the lands in suit are his property as appertaining to that estate, and by adverse possession.

He also says that the lands are included in a tenure, called Gokulmoni's tenure, held under him by defendant No. 1, who is bound to pay rent at the rate of 12 annas per *bigha*. These are his principal assertions.

But in the Record of Rights entries have been made showing not only the plaintiff, but also the proprietors of Estates Nos. 147-1, 147-2, 172 and 173 as proprietors of these lands; and defendants Nos. 2 and 3, and not only defendant No. 1, as tenants.

Therefore, the plaintiff wants a declaration that all the lands are included in his Estate, and that defendant No. 1 is bound to pay him rent for all the lands.

These are the principal prayers.

The plaintiff says that the lands in suit now (plaint, paragraph 14) were also in suit in No. 138 of 1890 (Alipore Subordinate Judge's Court) and that it was then decided that all the lands, extending to the river Bidyadhari on the west, were within his Estate, and that the proprietor of Estates Nos. 172 and 173 had no title or possession in them. In the Thak map, Gangapur Bagmari extends westward to the river.

In Suit No. 138 it was decided that the river was still the boundary on a relay of the Thak map, and a decree was given accordingly.

If the river is still the boundary, and has not moved away westwards, the plaintiff succeeds, as against the Tardah Zemindars, proprietors of Estates Nos. 172 and 173.

In fact the relay of the Thak in suit No. 138 was incorrect. The river then was, and still is, far west of the Thak boundary of Gangapur Bagmari. Of the reasons for holding this, sufficient have been stated by my learned brother. We agree on that point, which is a very important point in this case.

But I am unable to agree that the decree in Suit No. 138 has no effect by way of *res judicata*, as between the plaintiff and the Tardah Zemindars.

The plaintiff in that suit was 4/5ths proprietor of the present plaintiff's estate, and was also proprietor of Gokulmoni's tenure. Against him, in an execution proceeding, one Tasseruddi had succeeded on a claim that he, Tasseruddi, held the lands under a tenure under the Tardah Zemindars, Estates Nos. 172 and 173. On this, the plaintiff sued, asserting, paragraphs 1 and 4 of that plaint, his 4/5ths proprietary title, and, paragraphs 2 and 5, his right to Gokulmoni's tenure. He said, paragraph 6, that Tasseruddi had successfully claimed, as holding under a tenure under the Tardah Zemindars. He asserted, paragraph 7, that the land was not in Tardah at all, and that neither the Tardah Zemindar nor Tasseruddi had any right in it. He said, paragraph 8, that he made the Tardah Zemindars parties, because they had set themselves up to be proprietors of the land. He prayed for a declaration of his title and for other reliefs.

The Tardah Zemindars contested the suit to the end, through a period of 8 years. In their written statements, Exhibits 37 and 38, they denied that the lands were in Bagmari, in the plaintiff's estate (Exhibit 37, paragraph 4, Exhibit 38,

paragraph 3) and they asserted that they were in their own estate, Tardah Nos. 172 and 173 (Exhibit 37, paragraph 6, and Exhibit 38, paragraph 3). They denied that the plaintiff had possessed the land as of Bagmari (Exhibit 37, paragraphs 5 and 7, and Exhibit 38, paragraph 6). They asserted possession through their own tenants (Exhibit 37, paragraph 6, Exhibit 38, paragraph 4) and they asserted that by their, the defendants' long possession, and owing to the plaintiff's not having possession, any claim of the plaintiff was barred by limitation (Exhibit 37, paragraph 5, Exhibit 38, paragraph 5). The tenants defendants also fought the suit. The Tardah Zemindars had granted a *patta* under which the tenants claimed.

The only issues framed were:—

First.—Is the suit barred by limitation ?

Second.—Do the disputed lands or any of them appertain to *thak* No. 145 or to *taluks* Nos. 172 and 173?

A Commissioner was deputed to relay the *thak* maps. He says in his report, Exhibit 10, that his instructions were to ascertain "whether the land was in *taluk* No. 145, Bagmari, as claimed by the plaintiff, or in *taluk* Tardah Nos. 172 and 173 of the answering defendants." In his judgment, Exhibit 49, the learned Judge, in first appeal in that suit, says, "the plaintiff, therefore, files this suit, in which he seeks to have it declared that the disputed plots appertain to Mouza Gangapur Bagmari, and for establishment of Zemindari title in 12 annas 16 *gundas*, *i. e.*, 4/5ths, etc."

The judgment states the contention of the parties, and then proceeds to ascertain the boundary between the two estates; and finds in favour of the plaintiff, relying partly on the Commissioner's report. The finding is not very clear here, but the decree declares the plaintiff's title (Exhibit 52 confirming that decree).

Having found this point in favour of the plaintiff, that judgment proceeds to discuss the question of possession, which was claimed, through various tenants, by both Zemindars. Finally, it concludes, "upon the whole I came to the conclusion that the plaintiff's title prevails and as it is not shown that it is barred by limitation, he is entitled to the reliefs claimed."

It is to be noticed that while the finding as to title is that the plaintiff's title prevails, the finding as to possession is not that the plaintiff had possession within twelve years but only that it was not shown that he was barred.

On this there was an appeal to the High Court, which delivered the judgment, Exhibit 50.

In this judgment, it is noticeable how well the Court and the parties understood that the Zemindar's interest was at stake. That was the issue: and the judgment takes it to be almost the only question for decision. It states, "The plaintiff sues for a declaration of his title to and confirmation of possession of two plots of land, on the allegation that they belong to Mouza Gangapur Bagmari, Estate No. 145, of which he is the proprietor of a share of 12 annas 14 *gundas*." The Court then found that the question of title was settled by the decision of the Court of first appeal, but remanded the case for re-hearing of the question of limitation. The First Appellate Court then again, Exhibit 51, decided the question of limitation in favour of the plaintiff, and so confirmed its original decree. The decree is Exhibit 52.

There was an appeal by the Tardah Zemindars to the High Court. Their appeal was dismissed. The decree is Exhibit 54. It was argued before us that the Zemindari title was not really in dispute but only title to the tenure of Gokulmoni. That if that plaintiff had succeeded as entitled ty Gokulmoni's tenure, he would have won the whole case, and so no decision as to the Zemindar's title would have been necessary.

But the holder of the Zemindari title was to get the rent, and had other valuable interests, whoever might be held to have tenancy right, and the tenure of Gokulmoni might be held not to cover the land or to be good, and yet the Zemindari title might stand. The Tardah Zemindars had actually granted a *patta* purporting to cover the land or some of it: and they asserted title in themselves, as Zemindars, to all the land: and they denied the plaintiff's title and tried to keep him out of possession, through tenants denying him, and recognizing themselves. The

plaintiff had, I think, every right to sue for a declaration of his Zemindari title as against those Tardah Zemindars and the question was fought out, and as between the parties to that suit, that decision is binding. It would perhaps have been better if the owners of the remaining 1/5th share of the Zemindari had been made parties, but their absence would not leave the question open as between persons who were parties. That plaintiff claimed interest as Zemindar in 4/5ths of the land, and as tenure-holder in all the land, and he got that interest declared. The present plaintiff is the representative of that plaintiff, in respect of the 4/5ths proprietary interest, and also owns the remaining one-fifth.

The result is, in the absence of any subsequent change by adverse possession or other causes, that the present plaintiff, by virtue of that decision, has proprietary interest in 4/5ths of the land then in suit, as against the Tardah Zemindars.

That land has to be located.

I agree in accepting as correct the map and report of the Commissioner in the present case. He has relaid the map prepared in suit No. 138. The land then in suit includes land outside the land covered by the *thak* map.

As to the *thak* relay I would accept the blue line, as recommended by the Commissioner in paragraph 17 of his report, and not the red line, accepted by my learned brother. I find no reason not to accept the Commissioner's view. He seems to have done his work very carefully.

Therefore (as I find also that the plaintiff is not time-barred), the plaintiff will get a declaration that he is sixteen-annas proprietor of all the lands within the blue line, and is four-fifths proprietor of all the lands between the blue line and the orange line, *vide* the Commissioner's map, and paragraph 18 of his report.

As to limitation—It was argued that since the decision of Suit No. 138 the plaintiff's rights have been destroyed in some of the lands, by the adverse possession of defendants Nos. 1, 2 and 3 and of the Tardah Zemindars through them.

But since that decision the Tardah Zemindars have not realised rent from them.

These defendants Nos. 1, 2 and 3 have never claimed proprietary right or any other than tenancy right, for themselves. They came into the land as tenants, and have never asserted any higher right, and can now have no higher right on a plea of adverse possession as against the Zemindar.

In the plaint, the plaintiff asks for a declaration that he is entitled to rent at the rate of 12 annas per *bigha* for some land, and at the prevailing rate for other land: and the lower Court has given a declaration that he will get rent at 12 annas per *bigha* for all the lands in the possession of defendants Nos. 1, 2 and 3. This cannot stand.

I agree with my learned brother in finding that the Boses are in possession of the part of the land called Puti Babu's *bheri*. The lower Court has not come to clear findings as to the Boses' possession and has finally given directions as to what is to be done as to land which may hereafter be found to be in their possession. He has found that if they have possession, it is by permission of defendant No. 1. This is based on the *ekrar*, Exhibit A (94).

I find that the Boses have possession of the part of the land called Puti Babu's *bheri* (*vide* Commissioner's map and report), and that they held it before the existence of Gokulmoni's tenure, and not by permission of Gokulmoni.

The *ekrar* was executed in 1821, and it was not till 1884 that even on paper Gokulmoni had any right under the Bagmari Zemindars, in any land west of Andharia *khal*. The *ekrar* recognises the possession of the Boses of land west of the *khal*. In the *kabuliyat* of 1880, under which Gokulmoni then held, her western boundary was the *khal*.

Puti Babu's *bheri* is west of the *khal* between it and the river.

It was only in 1884, that Gokulmoni got a settlement purporting to cover land west of the *khal*, extending to the river. The Boses had held that land from long before that, and they never gave up possession. Whenever occasion arose, they successfully asserted it. It is to be noticed that in the *ekrar* itself, which was executed to provide for the work and expenses of keeping up embankments for the benefit

of both parties, it is admitted that the Boses were in possession not by permission of Gokulmoni, but as having a settlement of the land (*jamai*), *i. e.*, as of right. The deed provides for the continuance of the respective possessions of the parties, till boundaries are demarcated by the landlords. There is nothing to indicate that the Boses ever parted with possession, nor is it probable. When the decree-holder in Suit No. 138 took out delivery of possession, he found them there. They had not been parties to the suit. He brought another suit, to eject them. When that suit had been pending for two years, he withdrew, having lost the Zemindari interest. That was the last attempt to disturb the Boses: and they are not likely to have gone out voluntarily. But the Boses have never claimed any right higher than a tenancy right. They must pay rent to the Zemindar, the plaintiff. But it cannot be decided in this suit what the rent or rate of rent should be. They do not hold under Gokulmoni's lease.

Defendant No. 1 is in possession of the remaining *bheris*. Two of these are Andharia *bheri* and Dasani *bheri*. For them the plaintiff can get rent at Rs. 740 a year, as decided by the High Court, Exhibit B-149, and Exhibit 59, until the rent is altered.

The High Court left the question of rent open, in connection with the other two *bheris*, Jongra and Nazir's *bheri*.

The plaintiff's Zemindari title in part of these lands has been established and he is, therefore, entitled to rent. My learned brother and the learned Subordinate Judge have both held that this should be at twelve annas per *bigha*. It will be declared accordingly. The rest of the plaintiff's claim should be dismissed. I would allow the Tardah Zemindars and the Boses half their costs in this appeal, as they have succeeded in respect of a considerable part of their claims.

L. P. A. No. 6 OF 1917.

Babu *Ram Chandra Mitra*, for the Appellant.

Babus *Jogesh Chandra Roy*, *Prokash Chandra Majumdar*, *Ram Charan Majumdar* and *Nagendra Nath Ghose*, for the Respondents.

L. P. A. No. 8 OF 1917.

Babus *Ram Charan Majumdar* and *Nagendra Nath Ghose*, for the Appellants.

Babus *Ram Charan Mitra*, *Jogesh Chandra Roy* and *Prokash Chandra Majumdar*, for the Respondents.

L. P. A. No. 9 OF 1917.

Babus *Mohendra Nath Roy*, *Manmatha Nath Mukherjee* and *Satindra Nath Mukherjee*, for the Appellants.

Babus *Ram Charan Mitter*, *Jogesh Chandra Roy*, *Prokash Chandra Majumdar*, *Ram Charan Majumdar* and *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—The facts have been set out in the judgments of the learned Judges of this Court upon whose difference of opinion the matter has been referred to us; as also in the judgment of the Subordinate Judge. It is not necessary to repeat them in detail.

The suit is by the plaintiff against six defendants. It was dismissed by the Subordinate Judge as against defendants Nos. 5 and 6 and decreed against the defendants Nos. 1 to 4. On appeal to this Court the learned Judges differed and as there was, therefore, no judgment concurring in, varying or reversing the decree appealed from, it was ordered that the decree of the Subordinate Judge be affirmed and the cross-appeals dismissed, each party paying his own costs. The case has, therefore, been referred to us for decision under the Letters Patent.

There are three appeals before us in which the defendants severally are appellants. In Appeal No. 9 of 1917 the 1st defendant is Appellant, in Appeal No. 8 of 1917 the 2nd and 3rd defendants are appellants and in Appeal No. 6 of 1917 the 4th defendant is appellant. In each of the appeals the plaintiff and the defendants other than the appellants are respondents, the 5th and 6th defendants not appearing in any of the appeals.

The plaintiff is the owner of Taraf Ushpara in Estate No. 2999, formerly part of Touzi 145. In Ushpara there is a Mouza called Gangapur Bagmari. In the western portion of Bagmari there is a *mokarrari* lease which was formerly held by one Gokulmoni Dassi and is now held by the 1st defendant. The land covered by this lease is the subject-matter of this suit. The plaintiff says that the whole of the lands in suit are his property appertaining to Ushpara No. 2999, and that he is entitled to the entire rent for the land. He brings this suit because in the Record of Rights

entries have been made showing not only the plaintiff but also the defendant No. 4 (in respect of Estates Nos. 172 and 173) and the defendants Nos. 5 and 6 (in respect of Estates Nos. 147-1, 147-2) as proprietors of the land in dispute. It also shows that not only defendent No. 1 but also defendants Nos. 2 and 3 are in possession as tenants. These last named defendants are tenants of defendant No. 4. The suit has been dismissed as against the defendants Nos. 5 and 6 and we are no longer concerned with them. Estates Nos. 172 and 173 are represented by the 4th defendant. The estate is called the Tardah estate and its owners the Panihati Babus. This estate is to the west of that of the plaintiffs. The western portion of Bagmari abutting it has, so far as it is in cultivation, been recovered from *jungle*. As the portion of Tardah abutting Bagmari was also *jungly*, a dispute has arisen as to the ownership of the lands. The suit, therefore, is one as between two Zemindars, namely, the plaintiff and the Tardah proprietors represented by the 4th defendant, and the point in issue is whether the land in suit wholly belongs as alleged to the plaintiff, or whether a portion of it belongs to the proprietors represented by defendant No. 4. It is admitted that the portions of Bagmari called Dasani Bheri and Andharia Bheri belong to the plaintiff but these defendants claim as their own the Bheris known as Jongra and Nazir which are said to be in the possession of defendant No. 1 as their *mokurrari* tenant, and Puti Babu's Bheri, which is said to be in the possession of their tenants defendants Nos. 2 and 3. All the defendants made common cause to resist the plaintiff's claim. The plaintiff's title to Estate No. 2999 is not in dispute, but whether the lands in suit are part of that estate.

The Subordinate Judge decreed the suit with costs against defendants Nos. 1 to 4. He declared the plaintiff entitled to the disputed land which is included in Khatian No. 85-1 as part and parcel of Touzi No. 2999, Mahal Ushpara, and awarding him possession of the same through his tenant the 1st defendant, who by his purchase of the tenure was said in the decree to stand in the place of Gokulmoni. Rent was awarded against him at the rate stipulated in the lease, *viz.*, 12 annas per *bigha* for all lands found in the defendant No. 1's possession as Gokulmoni's tenure on measurement of 80 cubits to a *rasi*, a cubit being equal to 18 inches. He then held that if the defendants Nos. 2 and 3 be found on the same system of measurement to be in possession of any portion of the disputed land in excess of what is stated in their lease, they were ordered to pay rent to the plaintiff at the above rate and the defendant No. 1 will get remission to that extent, or to the defendant No. 1. In coming to this conclusion the learned Judge held that the judgment given in a previous suit No. 138 of 1890 instituted on the 2nd of July of that year was *res judicata*. A main question in the present case is what is the boundary between Mouza Gangapur Bagmari and Mouza Tardah. In that suit judgment in which has been held to be *res judicata* the Court held that the Bidyadhari river in its present condition, which is practically represented by the orange line in the Commissioner's map, is the boundary between the two Mouzas. In the Thak map Gangapur extends westward to the Bidyadhari river. In Suit No. 138 it was decided that the river was still the boundary on a relay of the Thak map and a decree was given accordingly. If the river in its present course is by virtue of the previous decision or in fact the boundary between the two Mouzas, then the judgment of the Subordinate Judge is correct. On appeal to this Court both Fletcher and Smither, JJ., held that in fact the relay of the Thak in Suit No. 138 was incorrect. They held that the river then was and still is to the west of the Thak boundary. Fletcher, J., was of opinion that the report and map of the Commissioner prepared in the present case should be accepted as also the red line shown on the Commissioner's map as the relay of the boundary line from the Revenue Survay map. Smither, J., said he would accept the blue line as recommended by the Commissioner in paragraph 17 of his report. In either case the western boundary of Bagmari is placed well to the east of the present position of the Bidyadhari river, the course of which (both the learned Judges held) has changed. The difference between the judgments of our learned brothers on this point is that the red line is further to the east of the river than the blue line, with the result that (even apart from the question of *res judicata*) the plaintiff gets

less according to Fletcher, J.'s judgment than according to that of Smither, J. The adoption of the blue line gives the defendant No. 4 some 100 *bighas* less than he would get by adopting the red line.

In fact the learned Government Pleader who appeared for defendant No. 4 said he was satisfied with Fletcher, J.'s decision except as to Jongra Bheri. But the principal point of difference between our learned brothers is on the question whether the judgment in Suit No. 138 of 1890 was or was not *res judicata*, and if so, between what parties to this suit. Smither, J., agreeing with the Subordinate Judge, has held that it is *res judicata*, holding also that it is so as to 4/5ths of the land and other 1/5th not being represented in that suit. Fletcher, J., was of opinion that it is not *res judicata*. The result according to the Subordinate Judge is that the plaintiff practically gets all the lands sued for lying to the east of the present position of the Bidyadhari river. According to Fletcher, J.'s judgment the red line shown in the Commissioner's map, being the relay of the western boundary shown in the Revenue map, is the western boundary of the plaintiff's Mouza. It is declared that the plaintiff is entitled to rent at the rate of 12 annas per *bigha* in respect of lands within that boundary in the possession of defendant No. 1 and the rest of the claim is dismissed. By Smither, J.'s judgment the plaintiff gets a declaration that he is the 16-anna proprietor of all the lands in dispute east of the blue line and (by virtue of the previous decision) of 4/5ths of all the lands between the blue line and the orange line which runs close along the river. The area between the blue and the orange line is said to be 1,365 *bighas*. The plaintiff is held entitled to rent at 12 annas per *bigha* from the 1st defendant in respect of lands held by him. Both the learned Judges also held that the defendants Nos. 2 and 3 are in possession of part of the land called Puti Babu's Bheri and have been holding it before the existence of Gokulmoni's tenure which the defendant No. 1 now represents. They are ordered to pay rent to the Zemindar, the plaintiff, though the rent or rate of rent is not decided in this suit.

As there was thus no majority reversing the Subordinate Judge's judgment it stands and is the subject of the present appeal.

It is convenient to deal with this complicated appeal firstly as between the rival claimants to the Zemindari title. The issue then is whether the lands in suit belong to the Zemindari of the plaintiff or the Tardah proprietors (defendant No. 4). The points on this head are whether there is a *res judicata* by virtue of the decision in Suit No. 138 of 1890 as between the plaintiff and the defendant No. 4 (using that expression for the parties represented by him); whether the plaintiff's suit is barred by limitation, and whether his title has been lost by the alleged adverse possession of defendant No. 4 through his tenants defendants Nos. 1, 2 and 3. The second part of the case involves an enquiry whether the defendants Nos. 1, 2 and 3 are his tenants, and at what rate. It is only necessary to discuss the issue between the plaintiff and defendant No. 1, for the former defendants Nos. 2 and 3 have come to an arrangement to which I next refer. Defendant No. 1 contends that he is not bound by the decision in Suit No. 138 to which he was admittedly no party and in which (he contends) he was not represented. If so, his learned Pleader argues that it is open to him both to contend that the plaintiff is not his landlord and that if he is, he holds his tenancy under him on the terms under which he had a lease from the Tardah proprietors.

The plaintiff and the defendants Nos. 2 and 3 agree to the following terms :—

(1) That the plaintiff will be entitled to get from the defendants Nos. 2 and 3 to the extent of the plaintiff's interest, as will be determined by the Court in the lands hereinafter mentioned, rent at the rate of 8 annas only per *bigha* for the 16 annas as provided for in the *patta* Exhibit A-93, dated the 7th Chait 1236 B. S., for the lands of the part of Puti Babu's Bheri shown in the Commissioner's map in this case enclosed by a line indicated by the letters A. A. A. in red ink.

(2) That the plaintiff admits that the defendants Nos. 2 and 3 have got a permanent *maurasi mokarrari* right to the said lands with all the incidents of the lease Exhibit A-93, dated the 7th Chait 1236, B. S.

(3) That each party to this compromise will bear his own costs throughout.

(4) That the map prepared by the Commissioner will form a part of the decree.

Dealing with the primary issue of *res judi-*

cata first, the facts touching Suit No. 138 of 1890 are as follows:—

On the 6th April 1870, the Panihati Babus gave a permanent lease (Exhibit B 6) to Jadab Banerjee of three plots of land in Jongra Bheri of 301, 220 and 204 *bighas*, making in all 725 *bighas*, at a full rate of 9 annas per *bigha*. On 3rd December 1870 the same lessors gave another permanent lease to the same lessee of 795 *bighas* in Nazir's Bheri at a full rate of 8 annas a *bigha*. Then on 24th February 1879 the co-sharers of Jadab conveyed an 8 annas share in these lands and in another lease of 2,000 *bighas*, covered by a lease (not produced) of 17th July 1864 in Jongra Khal excluding (it is said) Jongra Bheri, to Gokulmoni Dasi. And on the 11th July 1879 Jadab sold the other 8 annas to Gokulmoni, who thus became entitled to the whole 16 annas under the two leases.

On the 6th April 1880 Gokulmoni took a permanent lease (Exhibit 7) from the 4/5ths owners of Bagmari Estate No. 145 of two plots of about 600 and 400, in all about 1,000 *bighas*. The 600 *bighas* are stated to be in Dasani Bheri and the 400 in Andharia Bheri As the leases from the Panihati Babus were of Jongra and Nazir's Bheris, it would seem that the land covered by the lease was in the main at least different, though it is said by the learned Pleader for defendant No. 1 that it is possible that in some respects there may have been overlapping. The full rate was 12 annas per *bigha*, which for 4/5ths of 1,000 *bighas* works out at Rs. 600. It allowed for increase of rent on increased area found on re measurement. On the 15th June 1888 a lease of the 1/5th interest was granted by the Bagmari proprietor, Kaivallya Biswas. The full rent was 150 for the 1/5th interest in the 1,000 *bighas*. The land was subsequently re-measured and on the 11th April 1884 the 4/5ths Bagmari proprietor gave Gokulmoni a fresh lease in respect of 1,819½ *bighas* (Exhibit 8). No similar lease was granted by the 1/5th proprietor but rent was paid as though such a lease had been granted. The position at this point is that Gokulmoni possessed a lease hold interest from the Bagmari proprietors of Andharia and Dasani Bheris and of the Jongra and Nazir's Bheris from the Tardah proprietors purchased from Jadab Banerjee and his co-sharers. Gokulmoni and her husband then executed two mortgages of 31st August 1886 and 26th June 1888. These are not in the paper-book but with consent we have referred to the mortgages which are printed in paper-book of the Appeal No. 83 of 1890. We are not concerned with the later mortgage, which was of Rannar Bheri. The earlier mortgage alone deals with the property in dispute in this suit. It mortgaged lands covered by the lease of the Tardah Babus to the Banerjees, *viz.*, 3,520 *bighas* which comprised the 2,000, 725 and 795 *bighas* above mentioned. There was no mortgage of the Andharia and Dasani Bheris. The subject of the lease from the Bagmari proprietors were not mortgaged. The mortgage was to Ram Kristo Naskar, predecessor of defendant No. 1. A mortgage decree was given on 31st December 1890. Four months before this Peary Mohan Roy representing 4/5ths Bagmari proprietors instituted Suit No. 138 of 1890. The way that suit came about was as follows: After the mortgages Peary Mohan Roy, in a suit for rent against Gokulmoni, executed his decree and purchased her *jote* subject to the right of the mortgagee, if any. Roy, got possession on which one Tasiruddi Mollah put in a claim which was allowed but before he could get possession Roy brought a suit to establish his title, being No. Suit 138 of 1890, in respect of which the issue of *res judicata* arises. In that suit it was decided that the lands in dispute (which are those in dispute now) were in the estate of the present plaintiff. Subsequently Ram Kristo Naskar executed the mortgage decree. Five plots covered by the first mortgage were sold, *viz.*, plots No. 3 (part of Jongra) and No. 5 (Nazir) to one Permeshwar Mal and plots Nos. 1, 2, 4 including the rest of Jongra Bheri, were purchased by the mortgagee Ram Kristo Naskar, Parmeshwar re-sold later to Dyal Naskar, with the result that the tenancy title in all the plots is in the first defendant. The conveyance by Parmeshwar (Exhibit 55) contains, it is said, an error in so far as the schedule speaks of rent being payable in respect of Chuk of 220 *bighas* and 795 *bighas* being payable to the plaintiff, for these were properties leased by the Tardah Zemindars. This, however, is not admitted. It appears to be the fact that the defendant No. 1 is in possession of all the lands which Gokulmoni held.

From the above recital of facts, however, it appears that Andharia and Dasani Bheris covered by the lease given by the Bagmari proprietors were not mortgaged or sold under the mortgage decree. Therefore, defendant No. 1 purports to show documentary title only as regards Jongra and Nazir's Bheris, and he can then only rely on his possession and that of his predecessor since 11th September 1893, when execution was had of the mortgage decree, as regards the rest of the property. However the documents may be, the parties have always proceeded and now proceed on the assumption that the defendant No. 1 has a tenant's title to the whole of Gokulmoni's *jote*, whether held under the Tardah or Bagmari proprietors. The plaint so deals with the matter and the learned Pleader for the plaintiff states that he admits that defendant No. 1 is the tenant of Gokulmoni's *jote* held under Estate No. 145 of the Bagmari proprietors.

Dealing with the question of identity of parties first, the plaintiff Peary Mohan Roy in Suit No. 138 represented (it is admitted) the present plaintiff as to 4/5ths, the other 1/5th not being represented, and the Roy Chowdhury defendants represented the Tardah estate now represented by defendant No. 4. The present defendants Nos. 1, 2, and 3 were not parties to the Suit No. 138, unless it can be said that defendants Nos. 2 and 3 were represented by their landlords, the Tardah proprietors, and that defendant No. 1 was represented by Gokulmoni Dasi whose properties he subsequently purchased. This point, so far as it affects the 1st defendant, I deal with later.

As regards the issue, there can be no question that the same issue was decided in Suit No. 138 as is in contest now. The dispute really ranges round the question whether the parties were litigating under the same title. It is argued for the defendant No. 4 that they were not, because what was in issue was, it is said, not the Zemindari title, but the *mokurrari* title of Gokulmoni which the then plaintiff had purchased. It may be conceded that the suit might have been framed in this way, in a manner to make it clear that it was a matter of indifference who was the Zemindar and that all that in which the plaintiff was concerned was to establish his right to the *mokurrari*, under whomsoever it might be held. It may also be that if pleadings are framed to call for a decision on one issue, the fact that others are unnecessarily introduced will not make a decision on such issues *res judicata*. It is unnecessary to discuss this point here. It is enough to say that on my construction of the pleadings and issues in the suit the Zemindari title was directly put in issue. I need not recapitulate the facts supporting this conclusion set out in Smither, J.'s judgment. There is an obvious reasou why the Zemindari title was put in issue, for the plaintiff was both Zemindar and purchaser of the tenure and, therefore. the party entitled to the rent if he established both titles. He was interested to establish both titles and in my opinion sought by his suit to do so. The Panihati Zemindars met him on that issue and the Court decided it. I am of opinion therefore that as between the rival Zemindars, the plaintiffs and defendant No. 4, the judgment in suit is *res judicata*.

Apart from *res judicata* the plaintiff has sought to establish his title on the facts to all lands up to the Bidyadhari river on the west or to the orange line on the map, which closely follows it and which he is willing to accept, being the boundary laid down in Suit No. 138. In other words, he contends that the judgment is not only *res judicata* but is correct as regards the boundary which in that suit was relaid from the survey-map. In Suit No. 138 the orange line on the map was found to be the western boundary and this practically corresponds with the Bidyadhari river. If this be the fact it is not necessary to rely on *res judicata*.

The Commissioner, however, was of opinion that Mouza Bagmari as shown in the map prepared in Suit No. 138 was not a correct representation of the Mouza as shown on the Revenue Survey map. He shows the position of the Bidyadhari river according to the survey map. It is not now found, he says, at that place. Its present position is shown. He says that the different positions of the river can only be explained in two ways. Either the river has, since the date of the Revenue Survey, changed its course or it was not properly delineated on the Survey map As regards the latter supposition, it is to be observed that there is a

rebuttable presumption of accuracy in favour of the Survey map. Has that presumption been rebutted? Both Fletcher and Smither, JJ., were of opinion that the river had moved westwards. As against this it has been argued that a case of alluvion and diluvion was not made, and that this is one of the smaller rivers in which it might not be expected. It is also said that a comparison of the areas show that the Survey map was incorrect. On the other hand it is admitted that the river is still a running stream and there is direct evidence in this case that the river has shifted owing to a "drying up". There is no evidence that the river has not changed its course and I am not prepared, therefore, to hold that the revenue map was wrong and that the relaying of it in Suit No. 138 was correct. I think we should adopt the blue line as the western boundary of Bagmari. The result, therefore, is that, as Smither, J., holds, the plaintiff is entitled, if his claim is not time-barred and if there has been no adverse possession, to a declaration that he is 16 annas proprietor of all the lands in suit within the blue line and is, by virtue of *res judicata* as between him and defendant No. 4, the four-fifths proprietor of all the lands between the blue line and the orange line as shown on the map attached.

I am of opinion further that the plaintiff's claim is not barred by limitation or lost by adverse possession.

It is said that defendant No. 4 has had adverse possession through his tenants. The pleading of this defendant in paragraph 19 of his written statement asserts a title by adverse possession and limitation against the plaintiff. The plaintiff put in issue his title by adverse possession. So also did the defendants Nos. 2 and 3, a matter with which we are not now concerned.

But defendants Nos. 1 and 4 did not and cannot do so now. The Subordinate Judge held, as did also the learned Judges of this Court, that limitation does not arise. I am of the same opinion. The Subordinate Judge says as regards limitation and adverse possession by defendants Nos. 2 and 3:—

"With regard to Gokulmoni's Chuk there is nothing to show that either Gokulmoni or her husband ever paid rent to the Panihati Zemindars and the rent receipts granted to Doyal Kristo by the said Zemindars relate to Mouzas in Beotab and Tardah. The *challans* by which Ram Kristo deposited rent to Sita Nath Das relate to Rannar in Koridanga and Kushdanga. It is not at all likely that the Maharaja, after having secured a decree in respect of the land covered by the Taluk No. 145, would allow any portion of it as shown in the map to be possessed by any third person. The *patta* granted by the Panihati Babus to Tarak Nath Basu (see Exhibit A-93) is a *jungle-bari* lease, in respect of certain *jungle* lands situated in Taraf Tardah in village Tardah, and the area was 300 *bighas*. In the Chapperbundi map Exhibit A (233) the *jungle* portion to the west belonged to several estates including Estates Nos. 172 and 173. The Mouzawari Exhibit E shows that in Bagmari the Estates Nos. 172 and 173 have 194 *bighas* (*quære* acres) 4 *cottas* 1 *chattack* of land, while in Gangapur according to Rudd's Robakary there was no land belonging to the said estates and so at the time of Revenue Survey this quantity of land, *viz.* 194 *bighas* (*quære* acres) and odd was detached from Gangapur Bagmari and assigned to Tardah. Thus on a consideration of the evidence before me I am of opinion that the defendants were never in possession of any portion of Gangapur Bagmari as appertaining to Tardah, and it is not at all likely that the owners of the adjoining Mouzahs would trespass into any portion of the plaintiff's Taraf in the face of the Revenue Survey map."

This question of adverse possession was argued before this Court but has not been gone into in detail in the judgments of the learned Judges of this Court, except that Smither, J., holds that since the decision of Suit No. 138 the Tardah Zemindars have not realised rent from defendants Nos. 1, 2 and 3. Whether the matter was seriously argued or not the point is clear enough. There is no documentary evidence to show that the Panihati Babus collected rent from Jadab Banerjee or from Gokulmoni. This was also held in the appeal in suit No 138. In that case also the Panihati Zemindars did not produce their account

books. It is a strong point that Gokulmoni, who had a lease from the Tardah proprietors, executed a *kabuliyat* in favour of the plaintiff: thus indicating that she could not get possession from the Tardah proprietors of the lands in suit. The *dakhilas* produced refer to lands admittedly belonging to Tardah and to Beota. After attorning to the plaintiff, Gokulmoni's possession would not be adverse. The learned Pleader for the defendant No. 4 laid most stress on possession of Puti Babu's Bheri, admitting that the evidence as regards the other Bheris was weak. The rent receipts granted to the Basu defendants by the Panihati Babus relate to 300 *bighas* only, which, it is contended, are ill-defined: and if (as I find) the title was in the plaintiff, the defendant No. 4 as a trespasser cannot claim the benefit of constructive possession. As regards the Babus themselves, they have never claims any right higher than a tenancy right.

According to the Commissioner's report the defendant No. 1 did not appear before him on the spot and the defendants Nos. 2 and 3 did not appear before him at all. They should have pointed out the lands of which they were in possession. They have not identified the Tardah lands. But the Amin says: "At the time of surveying the lands in suit no one of the defendants pointed out the portions which each defendant claims to be in possession of." These two objections as regards limitation and adverse possession fail.

It was also contended that there was a *res judicata* against the plaintiff. In judgment in Suit No. 2 of 1906 the decree was by consent for A and B plots (Andharia and Dasani Bheris) and the title to plots C and D (Jongra and Puti Babu's Bheris) was expressly left undecided. In the next Rent Suit No. 14 of 1909 there was no decision on title and the Panihati Zemindars were not parties. Rent was awarded as regards plots A and B which had been the subject of consent in previous suits. It is admitted by the plaintiff that this judgment is *res judicata* as regards the amount of rent (12 annas) payable in respect of Andharia and Dasani Bheris. But there is no *res judicata* as regards title.

I now pass to the case of the tenants. As regards defendants Nos. 2 and 3, as the Zemindari title of the plaintiff has been declared by the previous portions of this judgment, there will be a decree as against them in the terms agreed upon and previously mentioned.

As regards defendant No. 1 he has contended that the former suit, No. 138 was not *res judicata* either as against defendant No. 4 or himself. The former point I have dealt with. As regards himself he was not a party to the former suit and being a permanent tenant, he was not represented in the former suit by the contending landlords. But it is sought to bind him on the ground that Gokulmoni was a party and he now holds her interest. But Gokulmoni only represented the equity of redemption and did not, therefore, represent the mortgagee's interest. The fact that subsequently this defendant purchased under his mortgage part of her interest and later on the rest of her interest from Parmeshwar Mal will not have the effect, in my opinion, of making her at the time of suit No. 138 his (the 1st defendant's) predecessor-in-interest. Nor, in my opinion, have the cases, which hold that a mortgagee of an undivided share is bound by a decree in a partition suit to which his mortgagor is a party, any bearing on the question before us. The former suit No. 138 was therefore not, in my opinion, *res judicata* as against the defendant No. 1. What, however, is the effect of this finding? Defendant No. 1 does not claim any interest other than that of a tenant and it has been established in this case, to which he is a party that the plaintiff is his landlord. The result is that he must pay rent to the plaintiff, but as the former suit was not *res judicata* as regards him, the rent and incidents of his tenancy must be determined according as it is found that he is in possession of land covered by the lease given by the Bagmari proprietors to Gokulmoni or not. It is admitted that as regards Dasani and Andharia Bheris he holds these lands of Gokulmoni and must, therefore, pay the rent which she had to pay, that is 12 annas a *bigha*, and is otherwise governed by her lease. But as regards Jongra and Nazir's Bheris it is not clear what lands in these Bheris are covered by Gokulmoni's lease from the Bagmari proprietors and what are covered by lands leased by her from the Tardah proprietors. There must be an enquiry as to this and

rent must be paid at 12 annas for any lands found on enquiry to be covered by the lease of the Bagmari proprietors to Gokulmoni, and as regards these lands any other incidents of her lease will apply. In the case of lands of Jongra and Nazir's Bheris not so covered and formerly held under the Tardaha proprietors the incidents of their lease will govern, and the defendant No. 1 will pay to the plaintiff rent for lands in Nazir's Bheri at 8 annas a *bigha* and 9 annas rent for lands in Jongra Bheri respectively.

There will then be a decree to the following effect:—In my opinion the plaintiff has established his title as Zemindar to the whole of the disputed land in suit to the east of the blue line shown on the map and to 4/5ths of the land between the blue and orange lines shown on the map. In respect of the land the title to which is so declared the defendants Nos. 1, 2 and 3 are his permanent Mourasi Mokurrari tenants. The defendants Nos. 2 and 3 will pay rent in respect of Puti Babu's Bheri in their possession at the rate of 8 annas per *bigha* and the decree, so far as they are concerned, will be in terms of the agreement above stated. The defendant No. 1 will pay rent at the rate of 12 annas per *bigha* for the Bheris Andharia and Dasani in his possession and will hold the same on the terms of the lease granted by the Bagmari proprietors to Gokulmoni, and as regards Jongra and Nazir's Bheris I would direct an enquiry to determine the question what lands in these Bheris held by the defendant No 1 are comprised within the lease granted by the Bagmari proprietors to Gokulmoni Dasi and what lands, if any, were held under leases from the Tardah proprietors. In respect of lands in these Bheris found to have been comprised in the Mokurrari lease granted by the Bagmari Zemindars to Gokulmoni Dasi, the defendant No. 1 will pay rent to the plaintiff at the rate of 12 annas per *bigha* and will hold such lands on the terms of the lease last mentioned; and in respect of lands in these Bheris not so found but formerly held under the Tardah Zemindars, the defendant No. 1 will pay rent to the plaintiff at the rate of 8 annas for lands in Nazir's Bheri and 9 annas for lands in Jongra Bheri respectively and shall hold the lands under the terms of the lease granted by these Zemindars. Thus the rent payable (whether under the lease from the Tardah proprietors or under Gokulmoni's lease) is 16 annas to the plaintiff in respect of all land to the east of the blue line and only 4/5ths in respect of land between the blue and the orange line. The plaintiff's suit beyond what is above declared is dismissed.

In the appeal of defendants Nos. 2 and 3 each party will, as agreed, bear his own costs throughout. As regards the appeal of the defendants Nos. 1 and 4 each party will bear the costs of this appeal and of previous hearings, as each party has been to some extent successful in their claims. The cost of the further enquiry here directed will be disposed of on such enquiry by the Judge before whom it is held.

CHITTY, J.—I agree.

SHAMSUL HUDA, J.—I agree.

Decree modified.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 40 OF 1917.

March 12, 1918.

Present:—Mr Justice Beaman and Mr. Justice Heaton.

CHANDRAPPA BASAWANTRAO DESAI —PLAINTIFF—APPELLANT

versus

BHIMA DASSAPPA MANIKERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Grants, kinds of—Resumption—Burden of proof.

For the purposes of resumption all ancient grants fall into two main categories: grants of lands burdened with service, and grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume the lands. Grants under the second category are always resumable, unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability. In every case it is always a question of fact to determine, whether the grant in suit falls within the first or the second category and the burden of proof must necessarily be upon the grantor seeking to resume to show that either the grant was of a kind falling under the second category, or if a grant of the kind falling under the first category, that it was specially conditioned. [p. 331, cls. 1 & 2.]

CHANDRAPPA BASWANTRAO DESAI *v.* BHIMA DASAPPA MANIKERI.

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 204 of 1915, confirming the decree passed by the Subordinate Judge, Bail Hongal, in Civil Suit No. 78 of 1912.

Mr. *Nilkanth Atmaram*, for the Appellants.

Mr. *J. G. Rele*, for Respondents Nos. 1 and 3.

JUDGMENT.

BEAMAN, J.—This is one of a fairly common and always interesting class of cases. Where ancient grants in this country are brought into controversy at the suit of the grantor seeking to resume, the law has in this Presidency at any rate been clear, simple and invariable ever since I have had any practical knowledge of it. All grants of that kind for the purpose of applying this law fall into two main categories; grants of lands burdened with service, and grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services or at his own will to discontinue the services and resume the lands. Grants under the second category are always resumable, unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability. The first category has been sub-divided, though I think quite unecessarily, for the purpose of discussing the broad principles of law in the case of *Lakhamgavda* v. *Keshav Annaji* (1), into (*a*) grants burdened with service; (*b*) grants for services rendered in the past and to be rendered in the future, or, as we find in the older cases, *pro servitiis impensis et impendendis*. For the purpose of ascertaining the grantor's right to resume, this sub-division seems to me to have no relevance and to be of no assistance. Thus in every case of the kind it is always a question of fact and nothing more to determine, whether the grant in suit falls within the first or the second category. If it be found to fall within the first category, it is always *prima facie* irresumable. If it be found to fall within the second category, it is always *prima facie* resumable. And in every case the burden of proof must necessarily be upon the grantor seeking to resume to show that either the grant was of a kind falling under the second category, or, if a grant of the kind falling under the first category, that it was specially conditioned. Once these principles are clearly understood, I cannot see how there can ever be any difficulty in deciding cases of the kind we are dealing with, beyond of course the always extreme difficulty of ascertaining what the actual facts were in the case of very ancient grants, where the actual deed, if ever there was a deed, has long since been lost.

Here, I gather that the learned Judge of first appeal really meant to find that this grant was a grant of land burdened with services. He has referred to a very recent decision in the case of *Yellava* v. *Bhimappa* (2) which, again, has been followed and approved in the case of *Baslingappa* v. *Chandrappa* (3), as though this decision introduced some new element into the law. I do not think that it either did or was intended to. The reason why, as I understand it, the discussion was longer than is common in such cases to-day, was to rule out the rather vicious distinction drawn in a Calcutta case between "public" and "private" services. That distinction never has been recognised, as far as I know, in this High Court; and a very little reflection will show that in dealing with these ancient grants it would be virtually impossible to maintain such distinctions between the kind of services with which the lands were at the time the grant was made intended to be burdened. Nor in principle can the kinds of service so distinguished be of any value as affecting the application of the perfectly well-settled law. The most that could be said in favour of even noticing terms of this kind is that although the grants might have been in the first instance burdened with services and so irresumable, special conditions might be sought to be proved, and then it might become a question whether the grantor would be permitted under those conditions

(1) 28 B. 305; 6 Bom. L. R. 364.

(2) 28 Ind. Cas. 12; 39 B. 68; 17 Bom. L. R. 128.
(3) 35 Ind. Cas. 860; 18 Bom. L. R. 695.

to dispense with services in the performance of which the public indirectly had an interest. I think, however, that going into nice refinements of that kind only complicates this simple branch of the law quite unnecessarily and with very little likelihood of helping us in its practical administration.

Now, looking to the nature of this grant which is admittedly nearer two centuries than one century old, I see no reason whatever to doubt but that on the facts before them the Courts below have come to the right conclusion. It is in the first instance extremely improbable that an Inamdar or a Durbar would create and grant a state office of peon, annexing thereto state lands by way of salary. On the other hand, it is extremely probable that the grantors here did in those remote days grant certain lands so that the grantees and their descendants should, when called upon, render to the grantors the services of peons. However that may be, the only facts found here, and the only facts which could be found, are that the grantees have been in continuous possession rent-free for about one hundred and sixty years; and there is absolutely nothing known of the actual terms, if any terms there were, of the original grant. In my opinion, therefore, only one inference was possible, and that is the inference which the Courts below have drawn, *viz.*, that this was a grant of lands burdened with services. As such the lands were irresumable.

In my opinion the decision of the Courts below is right and this appeal (and the other sixteen companion appeals) ought to be dismissed with all costs.

HEATON, J.—In this case the first Court found what were the proved circumstances concerning the relations between the plaintiff, the Inamdar, and the defendant, who was grantee under him, and from those circumstances, undoubtedly correctly, inferred that the grant was not resumable. The same conclusion was reached by the Court of first appeal. In that Court, I gather from the judgment that the circumstances were not disputed and the only matter which the Court had to decide was whether, that being so, the lower Court was wrong in holding that the grant could not be resumed. The first Appellate Court decided, I think rightly, that the trial Court was not wrong. That is enough for the purpose of deciding this appeal. But some allusion has been made to a judgment of my own in the case of *Yellava* v. *Bhimappa* (2). It has been suggested in argument that this judgment is misunderstood, but I do not myself find any particular reason for supposing that it is. The only general importance of that judgment lay in the fact that we were declining to follow a decision which had been come to by the High Court of Calcutta. In every other particular it is merely a decision on the particular circumstances of that case; and though the decision may have been of the highest importance to the parties, it was not, excepting in the one matter I have mentioned, of any general importance.

I agree that this appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2228 OF 1916.

May 16, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

PRIONATH BOSE—PLAINTIFF—APPELLANT

versus

Srimaty KUSUM KUMARI DASSI—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 87—Landlord and tenant—Occupancy holding, non-transferable, mortgage of—Abandonment of holding—Landlord, right of, to recover possession.

Where an occupancy *raiyat* executes an usufructuary mortgage of his non-transferable holding and puts the mortgagee in possession, the landlord is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonement of the holding within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. [p. 334, col. 1.]

Appeal against the decree of the Additional District Judge, Midnapur, dated the 23rd

of August 1916, affirming that of the Munsif, 1st Court at Sadar, dated the 15th of March 1915.

FACTS of the case will appear from the following judgment of the lower Appellate Court:—

"This is an appeal by the plaintiff, whose suit for ejectment of the defendant from certain land has been dismissed.

The land in suit formerly constituted an occupancy holding, the tenant of which executed a usufructuary mortgage in favour of the defendant and put him in possession of the land. In accordance with the terms of the mortgage, the defendant paid the rents, which were accepted, but not in her own name. The plaintiff also alleged that the tenant refused to pay the rent and eventually surrendered the holdings to him. The only evidence adduced to prove the surrender is the plaintiff's own testimony and I do not consider that testimony to be sufficient. In any case under section 86 of the Bengal Tenancy Act no surrender is valid without the consent of the incumbrancer.

The plaintiff, however, relies mainly, in appeal, on the fact of the usufructuary mortgagee having been put in possession as entitling him to eject him. In support of this proposition of law he relies on the rulings reported as *Krishna Chandra Datta Chowdhury* v. *Khiran Bajania* (1) and *Rasik Lall Dutt* v. *Bidhu Mukhi Dasi* (2). They are both cases of a usufructuary mortgagee having been put in possession by the tenant. In the first case it was held that the landlord was entitled to eject the tenant, and in the second case it was held that he was entitled to eject the mortgagee. In the latter case, however, it was found that the tenant had abandoned his residence and made no arrangement for the payment of rent. These seem to have been the findings on those points on the first case, but then that case was decided under the previous Tenancy Act (VIII B. C. of 1869). In the Full Bench case reported as *Dayamoyi* v. *Ananda Mohan Roy* (3) it was laid down that the transfer of an occupancy holding otherwise than by sale does not entitle the landlord to re enter, unless there has been an abandonment or surrender by the tenant. What constitutes an abandonment, is defined in section 87 of the Bengal Tenancy Act. Amongst the essentials required by that section, is the abandonment by the tenant of his residence. In the present case the tenant has apparently not abandoned his residence, which, however, is in another village. Under these circumstances I am unable to hold that the tenant has abandoned the holding within the meaning of section 87, and that being so, the plaintiff is not entitled to eject the mortgagee. The appeal is, therefore, dismissed with costs."

Babu *Jyotish Chandra Hazra*, for the Appellant.—Upon the findings of fact arrived at in this case the appeal ought to be decreed. The Court of Appeal below has misapplied the Full Bench case reported as *Dayamoyi* v. *Ananda Mohan Roy* (3). There may be a forfeiture by the tenant in ways other than that laid down in section 87 of the Bengal Tenancy Act. The lower Appellate Court has only considered, whether there has been an abandonment within the meaning of section 87. It has not considered the Full Bench case in all its aspects.

Babu *Satcowripati Roy*, for the Respondent.—The mere fact that a tenant has executed a usufructuary mortgage of the entire holding, does not of itself cause forfeiture of the tenancy. Refers to *Bhupendra Nath Bose* v. *Bansi Tanti* (4). The Additional District Judge has found that there has been no abandonment by the tenant, consequently the suit has been rightly dismissed.

Babu *Jyotish Chandra Hazra*, in reply.—The Full Bench case was decided after the case in *Bhupendra Nath Bose* v. *Bansi Tanti* (4) and the conditions for a forfeiture are laid down there. If there is anything in *Bhupendra Nath Bose* v. *Bansi Tanti* (4) against the Full Bench that has been overruled by implication.

JUDGMENT.—This is an appeal by the plaintiff against the judgment of the learned Additional District Judge of Midnapur, dated the 23rd August 1915, affirming the decision of the Munsif of the same place. The suit was brought for *khas* possession. The plaintiff was the landlord. The defendant was

(1) 10 C. W. N. 499; 3 C. L. J. 222.
(2) 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094.
(3) 27 Ind. Cas 61; 18 C. W. N. 971; 42 C. 172; 20 C. L. J. 52 (F. B.).

(4) 22 Ind. Cas. 416; 40 C. 870.

an usufructuary mortgagee of the recorded tenant who had been put into possession and the plaintiff, therefore, sued the defendant to recover possession. What the learned Judge of the lower Appellate Court has found is this: He has found that the facts proved in this case do not show that the tenant abandoned the holding within the meaning of section 87 of the Bengal Tenancy Act. But it is laid down by the Full Bench of this Court in the case of *Dayamoyi* v. *Ananda Mohan Roy* (3) that where the transfer is the sale of the whole holding the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. The learned Judge in this case has only enquired into (*a*), namely, as to whether there had been an adandonment within the meaning of section 87 of the Bengal Tenancy Act. He has not enquired into either (*b*) or (*c*), as he ought to have, to find whether the landlord has a right of re-entry. The decree of the lower Appellate Court must, therefore, be set aside and the case sent back to that Court for the learned Judge to come to a conclusion as to whether there was a relinquishment of the holding or a repudiation of the tenancy and to pass a proper decree. Costs will abide the result of the re-hearing by the lower Appellate Court.

Case sent back.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2739 OF 1916.

July 9, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

FAZAR ALI MISTRI AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMIR BUKSH MIAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (*VIII B. C. of* 1885), *ss.* 88, 161—*Bengal Act I of* 1903, *s.* 3—*Landlord and tenant—Transfer of holding at fixed rent, validity of—Landlord's fee not paid, effect of—Adverse possession against tenant—Title acquired by adverse possession, whether incumbrance.*

A sale of the whole of a *raiyati* holding at fixed rent is not invalid merely because the landlord's fee is not paid. But when the sale is only of a part of such a holding the landlord is not bound to recognize the purchaser, as such a sale constitutes a division of the holding. [p. 336, col. 1.]

A title acquired by adverse possession against a tenant is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. [p 336, col 2.]

Gokul Bagdi v. *Debendra Nath Sen*, 11 Ind Cas. 453; 14 C. L. J. 136, relied upon.

Appeal against the decree of the Additional Subordinate Judge, Noakhali, dated the 2nd of September 1916, reversing that of the Munsif, 2nd Court at Sudharam, dated the 24th of June 1915.

FACTS.—One Munsur Ali was the recorded tenant under defendant No. 3. Munsur Ali sold the disputed land, which was a part of a *raiyati* holding, at a fixed rent to one Asrab Ali in 1899. Asrab Ali in his turn sold it to one Yakub Ali in 1904. Yakub sold it to one Fazar Ali defendant No. 1 in 1905, who again sold it to Abdul Kabir defendant No. 2 in 1908. Fazar Ali took a *barga* lease from defendant No. 2 after the sale. No landlord's fee was paid in respect of the first three transfers. In the last sale, however, in 1908 by defendant No. 1 to defendant No. 2 the landlord's fee was paid. But in spite of that the defendant No. 3, the landlord, sued Munsur Ali, the recorded tenant, for the entire rent and in execution of the rent-decree the entire holding was sold, the landlord himself being the purchaser. The disputed land was then settled by the landlord with the plaintiff, who brought this suit against the defendants Nos. 1 and 2 for declaration of title and for recovery of *khas* possession.

FAZAR ALI MISTRI *v.* AMIR BUKSH MIAN.

The first Court dismissed the suit on the ground that the last sale by defendant No. 1 to defendant No. 2 was in fact recognised by the landlord, apart from any legal question arising from the payment of the landlord's fee. The lower Appellate Court, however, disbelieved the story of recognition and decreed the plaintiff's suit on the ground that as no landlord's fee was paid in respect of the first *three kabalas*, the sales were invalid and the defendants Nos. 1 and 2 got no title to the land, and the payment of landlord's fee in respect of the last transfer did not help the defendants. The defendants Nos. 1 and 2 appealed to the High Court.

Babu *D. L. Kastgir* (with him Babu *Tarakeswar Nath Mitter*), for the Appellants.—The finding of the Subordinate Judge that the first three transfers were invalid because no landlord's fee was paid, is clearly wrong. He overlooked the provision of section 1 of Act I (B. C.) of 1903. And as the landlord's fee was paid with respect to the last transfer, the landlord had clear notice of the title of the defendant No. 2 and he was bound to make the defendant No. 1 a party to the rent suit. The decree made in the suit against Munsur Ali alone was only a money-decree and the title of the defendant No. 2 did not pass by the sale in execution of that decree. Even if the findings of the Subordinate Judge are assumed to be correct, then as Munsur Ali parted with the disputed land in 1899, the defendants Nos. 1 and 2 should be held to have acquired title by adverse possession and as such title is an incumbrance within the meaning of section 161 of the Bengal Tanancy Act and as it has not been annulled by a notice under section 167 of the Act, the plaintiff is not entitled to succeed.—Referred to *Gokul Bagdi* v. *Debendra Nath Sen* (1).

Babu *Jitendra Kumar Sen Gupta*, for the Respondents.—On a proper construction of the *kabuliyat* by the original tenant to the landlord, it would appear that the holding is only *kaimi*, *i.e.*, permanent but not a *raiyati* at a fixed rent. *Kaimi* does not import fixity of rent. The landlord was not, therefore, bound to recognise the transferee of the holding.

(1) 11 Ind. Cas. 453; 14 C. L. J. 136.

[WALMSLEY, J.—It appears that this plea was not taken in the lower Court.]

The defendants do not say in their written statements that the holding was one at a fixed rent. They only say, it is a *kaimi raiyati* holding and their case was that they were recognised by the landlord. The first Court also does not find that the holding was one at fixed rent. In the lower Appellate Court, for the first time, it was said that the *raiyati* was one at fixed rent.

If, however, the *raiyati* is taken as one at fixed rent, the transfer not being of the whole but only of a part of the holding with a distribution of rent, the landlord was not bound to recognise the transferee. See section 3 of Bengal Act I of 1903.

Moreover, section 1 of Bengal Act I of 1903 says that the sales will not be invalid merely because no landlord's fee is paid. But it nowhere says that the landlord is bound to recognise the transferee, even if no landlord's fee is paid. The last transfer being by an unrecorded tenant, the landlord was not bound to recognise the transfer even if landlord's fee was paid.

As regards the question of title by adverse possession, the defendants should not be allowed to raise the plea in this Court, as the plea was not taken in the written statements nor in any of the Courts below, and no issue was raised upon that point.

Facts are to be investigated before a finding can be arrived at as regards the question of title by adverse possession. The mere fact that Munsur Ali sold the disputed land twelve years ago, would not be sufficient for the finding that he lost the title to it by adverse possession.

Adverse possession imports wrongful possession, but as the title of Asrab Ali, the original transferee, was acquired lawfully as against Munsur Ali, *viz.*, by purchase, the possession of the said Asrab Ali was not adverse to Munsur Ali. It is not the case of the plaintiff that Asrab Ali and his vendors acquired no title as against Munsur Ali, but his case is they acquired no title which the landlord was bound to recognise.

Babu *D. L. Kastgir*, in reply.

JUDGMENT.

WALMSLEY, J.—This appeal arises out of a suit for ejectment. One Jainuddi held a *kaimi raiyati* under defendant No. 3: on the

death of Jainuddi his son Munsur Ali held the *raiyati*. In 1912 defendant No. 3 sued Munsur Ali for rent of the holding and in execution of the decree granted to him he caused the holding to be sold and bought it himself. After his purchase he settled a portion of it with the plaintiffs who are his sons, and they have brought the suit to eject the defendants Nos. 1 and 2.

The defence is that Munsur Ali sold a part of the *jote*, the part in dispute, to Asrab Ali in 1899, that Asrab Ali sold it to Yakub Ali in 1904 and Yakub Ali to Fazar Ali defendant No. 1 in 1908, and Fazar Ali to Abdul Kabir defendant No. 2 in 1908 and that Fazar Ali has taken a *barga* lease of it from Abdul Kabir.

The learned Subordinate Judge found that the lease to the plaintiffs was made *bona fide*, that the *raiyati* was one at a fixed rate of rent, that defendant No. 3 did not recognize the transfer of the other defendants, that landlord's fees ought to have been paid but were not paid by Asrab Ali, Yakub Ali and Fazar Ali, that the transfers were in consequence invalid, that the payment of landlord's fees on the occasion of the last transfer did not confer any title upon Abdul Kabir, and that as the holding was sold in execution of a rent-decree obtained against the registered tenant the plaintiffs have acquired a good title by settlement from defendant No. 3. On these findings he decreed the plaintiffs' appeal and suit.

Defendants Nos. 1 and 2 appeal, and on their behalf it is argued that the learned Subordinate Judge has overlooked the provisions of Act I (B. C.) of 1903 in holding that the successive transfers were invalid, and that as against Munsur Ali the defendant Abdul has acquired a good title by adverse possession and this constitutes an incumbrance which can be annulled only under the provisions of section 167 of the Tenancy Act.

If the whole holding had been sold the first contention would be correct, but the 3rd section of the Act mentioned lays down that the provisions of section 88 are not affected. The transfer was of part of a holding, and constituted a division which the landlord was not bound to recognise, and, the lower Appellate Court finds, did not recognise.

The second argument, however, seems to be sound. Munsur Ali parted with his right and possession in 1899 or fifteen years before the date of suit, and since then the portion of the holding has been in the possession of Asrab Ali and the subsequent purchasers down to Abdul Kabir. As against Munsur Ali the latter has title by adverse possession, and this I think comes within the meaning of the word incumbrance as defined by section 161 of the Act. This view was taken in the case of *Gokul Bagdi* v. *Debendra Nath Sen* (1), where the facts are very similar.

On this ground the appeal must succeed.

The defendants' appeal is allowed and the plaintiffs' suit dismissed with costs in all Courts.

PANTON, J.—I agree.

Appeal allowed.

KUNDAN LAL *v.* BEGAM-UN-NISA.

PRIVY COUNCIL.

APPEALS FROM THE ALLAHABAD HIGH COURT.

March 5, 1918.

Present:—Viscount Haldane, Sir John Edge and Mr. Ameer Ali.

KUNDAN LAL—APPELLANT

versus

Musammat BEGAM-UN-NISA AND ANOTHER—RESPONDENTS.

Evidence Act (*I of* 1872), *s.* 114—*Presumption—Bond in possession of obligor—Discharge—Burden of proof—Evidence, consideration of—Trial Judge, view of, value of.*

When in a suit on a bond, the plea of discharge is set up and the document creating the obligation is produced by the defendant, the onus of rebutting the presumption of discharge lies in the first instance on the plaintiff, but this burden is one which will under the circumstances easily shift as the evidence is developed. [p. 339, col 1.]

Where the evidence, taken as a whole, is of such a character and so full of doubtful statements that it can only be weighed adequately by the Judge who has seen the witnesses, the conclusions arrived at by him should not be lightly interfered with. [p. 340, col. 1.]

Appeals from two judgments and decrees, dated the 16th December 1913, of the Allahabad High Court (Tudball and Rafique, JJ.), which reversed two judgments and decrees of the Additional Judge of Meerut.

Mr. *B. Dube*, for the Appellant.

Dr. *Abdul Majid*, for the Respondents.

JUDGMENT.

VISCOUNT HALDANE.—These are consolidated appeals from two decrees of the High Court of Judicature for the North-Western Provinces, Allahabad. The High Court reversed by these decrees two decisions of the Additional Judge of Meerut. The appellant, who was plaintiff in both suits, claimed payment or sale under two mortgage bonds executed by the respondents respectively. The question which arises in each case is much the same. It is one of fact, and is whether the debt had been truly discharged and the bond returned to the mortgagor.

It will be convenient to refer first to the suit against *Musammat* Begam-un Nisa. This suit was commenced in July 1910 to recover the balance of principal and interest said to remain due on a bond, dated the 30th December 1890, for Rs. 8,000, or for a sale. The bond was given by the lady to one Sant Lal to secure that sum with interest. It is common ground that five payments on account were actually made under the bond, amounting in all to Rs. 3,930. About these there is no dispute; the question relates to three subsequent payments alleged to have been made as follows:—

485 rupees on the 18th March 1894;
150 ,, ,, 20th June 1895;
5,200 ,, ,, 1st July 1896.

The last of these payments is expressed in the receipt relied on by the respondent to be in complete discharge of everything due on the bond, which is stated to be returned. The bond was written in Urdu and contains a stipulation that, whatever the mortgagor should pay, the payment should be endorsed on the bond, specifying how much was for principal and how much for interest. The receipts in question purport to be so endorsed. They are not signed, excepting that the receipt for Rs. 5,200 purports to have appended to it the name of Har Gulal. Har Gulal was a money-lender who carried on business jointly with his son, Sant Lal, at Budhana, in the Meerut district. The son predeceased the father in March 1898, and the father died in August of the same year. It was in favour of Sant Lal that the bond was granted, but it appears to have been held jointly and to have passed to the father on Sant Lal's death. The endorsements of the first five payments on account, which are not in dispute, were proved to have been written in Sant Lal's handwriting, although they bear no signature. As to the first of the three disputed endorsements, the handwriting is not identified. But as to the last two, including the acquittance in full on payment of Rs. 5,200, the handwriting was established on the balance of evidence as that of one Khalil, now dead, a peon. There is controversy as to whether Khalil was in the service either of Har Gulal or of his son Sant Lal. All these alleged payments, if they were made, were made during Sant Lal's lifetime.

Har Gulal left a Will, dated the 1st April 1898. By this Will he purported to leave his property, which included the bonds in question, to Sant Lal's widow, *Musammat* Sukhi, for life and afterwards in full ownership to the appellant, who was a minor and did not attain his majority until 1910. *Musammat* Sukhi died in April 1899. The relatives contested the validity of Har Gulal's Will and there were disputes as to her possession of the shops in Budhana, where the business of lending money was carried on. The

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Magistrate intervened, and a Tahsildar came and put fastenings on the doors of the shops, which contained deeds and account books, and other documents and also ornaments. In their Lordships' opinion, the evidence establishes that on the night of the 9th October 1899, some person or persons improperly broke the fastenings and abstracted much of what was in the shops, including a number of deeds and account books. A report of the occurrence was made to the Deputy Superintendent of Police. He, however, after investigating the occurrence, appears to have thought that it was the outcome of a dispute between the relatives as to the succession, and he did not proceed further.

As to the second suit, this was brought against the respondent Inayet Ali Khan, who is the son of the first respondent, to recover the balance due under a mortgage-bond, dated the 17th August 1894, and executed in favour of Sant Lal. This bond also belonged to the firm and it passed on Sant Lal's death to his father. The nature of the proceedings, the form of the bond and the main circumstances do not differ materially from those in the other case. It is not in dispute that under the bond of Inayet Ali Khan a first instalment of Rs. 300 was repaid on the 14th August 1895 and that a proper endorsement of payment was made in the handwriting of Sant Lal, although not signed by him. It was apparently not the practice to sign such endorsements. The controversy is as to four further instalments alleged by this respondent to have been paid by him to Sant Lal, and after his death to his father Har Gulal, and after the death of the latter to *Musammat* Sukhi, the widow of Sant Lal. These instalments are as follows:—

4,300	rupees	on the	15th February 1897.
298	,,	,,	13th April 1898.
800	,,	,,	3rd July 1898.
50	,,	,,	21st October 1898.

57 rupees are said to have been remitted by the widow.

The four instalments set out appear endorsed on the bond given by the second respondent. As to the first of the four disputed endorsements, that for Rs. 4,300, the evidence renders it uncertain who wrote it; but, in their Lordships' opinion, it was not written by Sant Lal. The second and third were found by the Courts below to have been written by Khalil already referred to, the peon as to whom it is in controversy whether he was ever employed by Har Gulal and Sant Lal or not. The fourth purports to have been made in October 1898 after Har Gulal's death. The endorsement is in the writing of one Lachman Das, a relative of *Musammat* Sukhi, Sant Lal's widow, from whom he held a power-of attorney. This endorsement is to the effect that Rs. 50 had been received by the widow, who, on the other hand, had remitted Rs. 57, with the consequence that the bond was returned to one Rahmat Khan as agent for the 2nd respondent, Inayet Ali Khan.

The case of the appellant as regards the two bonds is that the disputed instalments were never paid. He accounts for the possession of the bonds by the respondents respectively by saying that they were carried away from the shops of Har Gulal when these were raided on the night of the 9th October 1899, after the widow's death, and when the dispute as to the succession to Har Gulal's property arose. In this way they finally got into the hands of the respondents, who managed to acquire them and are then said to have made false endorsements. The signature of Har Gulal on the bond given by the 1st respondent is, according to the appellant, a forgery. On the other bond there is no signature by either Har Gulal or Sant Lal. The Additional Judge of Meerut, who tried the two suits, decided in favour of the appellant. After hearing the witnesses he arrived at conclusions as to their credibility. He was influenced in coming to a decision by the circumstance that in the first case he had before him the account books of Har Gulal and his son Sant Lal up to 1896, although those for the three years subsequently had, he concluded, been taken when the shops were raided in October 1899. The earlier books covered the period in which two of the instalments had been alleged to have been paid, on the 18th March 1894, and 20th June 1895, under the bond first referred to. These would naturally have been entered in the accounts, as had been the case with the earlier items not in dispute. But they were not so entered, although the practice of Har Gulal and Sant Lal was to make such entries. He was also impressed by the circumstance that the next endorsement on the first

bond, that of the payment of an alleged instalment of Rs. 5,200 on the 1st July 1896, was in Khalil's handwriting. He considered that there was no sufficient explanation offered why it should have been made by Khalil, and not by either Har Gulal or Sant Lal themselves. On a review of the evidence in each case, he came to the conclusion that the endorsements in dispute in the case of each bond were fictitious, and he decided in favour of the appellant.

The High Court expressed a different view in two elaborate and full judgments. They thought that there had been suspicious delay on the part of the appellant in bringing the suits; that the evidence as to the loss of the documents and account books was weak; that some of the oral testimony given on behalf of the appellant, and particularly that as to the position of Lachman Das, and that as to the various payments, was unsatisfactory. They held in the result that the appellant had failed to discharge the burden which rested on him of proving the case he sought to make and that the respondents were entitled to judgment.

It is no doubt true that the initial burden of proof rests on the appellant in such a case as this, both on general grounds and by reason of the provisions of section 114 of the Indian Evidence Act. But this burden is one which shifts easily as the evidence is developed, and their Lordships do not, after considering facts which appear to them to be sufficiently established in the two suits, attach much importance to the question on whom the initial onus lay. Nor are they impressed with the delay in bringing the suits. The appellant was a minor up till 1910, and it was only in that year that the disputes as to who was entitled to succeed to Har Gulal's estate were finally settled. The appellant's guardian, his uncle, Nawal Kishore, might well hesitate before that stage was passed about launching these cases on his ward's behalf. As to the raiding of the shops on the night of the 9th October 1899, their Lordships entertain no doubt that this raid took place, and that a large number of documents, including bonds and books, were abstracted. If so, some of these may well have got into the hands of the various debtors. The only evidence as to whether the documents taken comprised the bonds in question is that of Nawal Kishore, who says that he had seen them among the others just before the raid. It is far from unlikely that they were along with the other documents, but it would be unsafe to place reliance on Nawal Kishore's recollection after many years, if the conduct of the respondents did not in itself render it probable that they had got possession of the bonds and had dealt with them improperly. As to this, their Lordships are impressed by the unlikelihood that the endorsements were genuine. Khalil was only a peon, employed at a very small remuneration, if employed at all, by Har Gulal and Sant Lal. Why should these men of business have entrusted such a person with the making of endorsements on the bonds of vital importance? Why should Sant Lal, who knew Urdu and had been himself in the practice of making the endorsements on these bonds, have allowed Khalil to do it in at least one case which occurred during his own lifetime? How did it happen that in the instance of the endorsements on the first bond those that were disputed did not appear in the books which have been produced for the period in which they took place, and which record the earlier and undisputed endorsements? Again, on a scrutiny of the original of the first bond their Lordships are impressed by the obvious difficulty which anyone would experience in coming to a reliable conclusion as to the alleged signature by Har Gulal to the acknowledgment of the payment of Rs. 5,200, as well as by the fact that Sant Lal, the grantee of the bond, who was then alive and the only one of the two who knew the Urdu language, in which the bond was written, did not sign it himself, if it was to be signed at all. As to the story told by Lachman Das, who made the endorsement on the second bond of the receipt of the final instalment of Rs. 50, their Lordships think, with the learned Judge who tried the case and saw him in the witness-box, that his story is one that it is not safe to accept. He could not read his own endorsement and could barely write. His memory was defective. He had been *Musammat* Sukhi's attorney, but he was not clear as to the circumstances under which he ceased to be so. Their Lordships think that the trial Judge was warranted in attaching little value to his

evidence, given twelve years after the alleged transaction, as to the facts connected with this endorsement.

The considerations to which they have now referred make their Lordships think that on the balance of probability the bonds in question were among those improperly removed from the shops in October 1899, and that they got wrongly into the hands of the respondents and were by them fraudulently dealt with. They have arrived at this conclusion only after considering the circumstances of the case as a whole, in which no element can be adequately weighed without weighing it in relation to the other elements. The case is one in which it is far from easy to ascertain the truth, and there are points in it which have caused them anxiety. For instance, no witness was asked by the appellant's Advocate the specific question whether the signature of Har Gulal to the endorsement of receipt of Rs. 5,200 on the bond first referred to was genuine. The respondent's witnesses swore that it was. But it is evident that the trial Judge was satisfied that no part of this endorsement was genuine, and he may well have though that no evidence that could be offered was likely to be reliable, and also that no further evidence as to the signature was required when he had arrived at the conclusion that the whole group of endorsements in which this was included were fraudulent. The non appearance of certain of the disputed payments in the account books which were produced, the unsatisfactory reasons given for Khalil being allowed to make the endorsements, and the circumstances in which the bonds and the books were abstracted in 1899, formed grounds, when taken together, on which a Judge who tried this case might well reject the whole of the story told on behalf of the respondents.

In the same way, the circumstances render doubtful the evidence of Lachman Das as to the part he alleges that he played in returning Inayet Ali Khan's bond as satisfied on receiving Rs. 50 on behalf of *Musammat* Sukhi on the 21st October 1898. At that date disputes had arisen which rendered the lady's title to the bond doubtful, and it is not probable that Inayet Ali Khan would at that time have been content to recognise her as entitled to receive the instalment and hand over the bond discharged. It is more likely that Lachman Das was got hold of by the mortgagor at a much later date after *Musammat* Sukhi's death, when her title to have given her discharge at the time had become established. The evidence Lachman Das gave in the box was, on the face of it, not very reliable, and the trial Judge did not place reliance on the evidence of Qubul Singh, a witness who was brought before him to confirm the story told.

Their Lordships are of opinion that the evidence in this litigation, taken as a whole, is of such a character and so full of doubtful statements that it could only be weighed adequately by Judges who had seen the witnesses. The learned trial Judge formed an opinion, after seeing them, adverse to the respondents, and in their Lordships' view the balance of probabilities lies on the side of the conclusion to which he came. After weighing the elaborate and searching criticism to which his judgment was subjected by the learned Judges of the High Court, they have arrived at the conclusion that there was not sufficient reason for overruling that judgment. They will, therefore, humbly advise His Majesty that the appeals should be allowed, and that the decrees of the Additional Judge of Meerut should be restored. The respondents must pay the costs of the appeals to the High Court and to the Sovereign in Council.

Appeals allowed.

Solicitors for the Appellant : Messrs. *Fyke, Franklin* and *Gould.*

Solicitor for the Respondent : Mr. *J. Tucker.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 504 OF 1917.

June 27, 1918.

Present :—Mr. Justice Walsmley and Mr. Justice Panton.

INDRA NARAIN DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BADAN CHANDRA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Stipulation in conveyance

that on purchaser being dispossessed vendor would not be liable—Purchaser, failure of, to get possession—Refund of purchase-money, suit for.

Plaintiff made a speculative purchase of a piece of land from the defendant. The latter protected himself by inserting a clause in the conveyance to the effect that if the plaintiff was dispossessed by anybody other than the vendor defendant, the latter would not be liable to the purchaser:

Held, that on his failure to get possession of the land, the plaintiff was not entitled to a refund of the purchase-money.

Appeal against the decree of the Subordinate Judge, 5th Court, Midnapore, dated the 8th of November 1916, affirming that of the Munsif, 2nd Court at Tamluk, dated the 5th August 1914.

FACTS.—One Kailashi Dasi, defendant No. 3 in the present case, sold the disputed land to Haradhan Das, defendant No. 4, for legal necessity while her son, Issar, defendant No. 2, was a minor, and possession was delivered to him (defendant No. 4). Issur, on attaining majority, sold the same land to Badan Das, defendant No. 1, who again sold it to the plaintiffs, Indra Das and another. There was a clause in the *kobala* executed by Badan, defendant No. 1, in favour of the plaintiffs to the effect that the defendant No. 1 would be liable to refund the consideration money or to pay compensation only in the event of the plaintiffs' failure to get possession by reason of any act done by defendant No. 1 and not by any act of a third party. The plaintiffs brought this suit for possession of the disputed land and in the alternative for refund of the purchase-money. The suit was dismissed by both the Courts below. Hence this appeal.

Babu *Jyotish Chandra Hazra* (with him Babu *Mohini Mohan Bose*), for the Appellants, contended that the lower Appellate Court ought to have awarded them at least a decree for the refund of the purchase-money, as they were *bona fide* purchasers for value. Under section 55, sub-section 2 of the Transfer of Property Act, there is an implied covenant for title on the part of the vendor defendant No. 1 and the vendor is bound to refund the purchase-money, inasmuch as it has been found that he has no title to the property. The case reported as *Basaraddi Sheikh* v. *Enajaddi Maleah* (1) is not against me, since the clause mentioned in the *kobala* is not such a bar as to deprive me of the purchase-money. Referred to the case reported as *Digambar Das* v. *Nishibala Debi* (2).

Babu *Saroda Charan Maity* (with him Babu *Bhupendra Kumar Ghose*), for the Respondents, was not called upon.

JUDGMENT.

WALMSLEY, J.—The plaintiff-appellant made a speculative purchase of the land from the first defendant The latter protected himself by inserting a clause in the *kobala* to the effect that if the plaintiff-purchaser was dispossessed by anybody other than the vendor, the vendor would not be liable to the purchaser. The learned Subordinate Judge held that effect should be given to the saving clause, and I think he was correct. The appeal is dismissed with costs—one set to the defendant No. 1 and one set to the defendant No. 4, who appear by different Vakils.

PANTON, J.—I agree.

Appeal dismissed.

(1) 25 C. 298; 2 C. W. N. 222; 13 Ind. Dec. (N. S.) 200.

(2) 8 Ind. Cas. 91; 15 C. W. N. 655.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1868 OF 1916.

April 18, 1918.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

ANNAYA TANTRI—DEFENDANT No. 2—APPELLANT

versus

AMMAKA HENGSU AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Hindu Law—Archaka, succession to office and emoluments of—Widow, whether excluded from inheritance.

Held, per *Curiam* (*Sadasiva Aiyar, J.*, dissenting).—A Hindu widow is not disqualified by reason of her sex from inheriting the service and emoluments of an Archaka office held by her husband. [p. 349, col. 1; p. 351, col. 1.]

ANNAYA TANTRI v. AMMAKA HENGSU.

Sundarambal Ammal v. *Yogavanagurukkal*, 23 Ind. Cas. 72; 38 M. 850; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276, not followed.

Mohan Lalji v. *Tikait Sri Gordhan Lalji*, 19 Ind. Cas. 337; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 40 I. A. 97 (P. C.), explained and distinguished.

Per *Wallis, C. J.*—The succession to temple offices is governed by user, which is taken to represent the intentions of the founder, and in Southern India the user in the case of temple Archakas is that the office is hereditary and descends in the ordinary course of succession to women, who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy. [p. 348, col. 1.]

Per *Sadasiva Aiyar, J.*—There is no distinction in principle between the incompetency of a claimant to the office of Archaka by reason of sex and the incompetency due to any other cause. So long as a Hindu widow is held incompetent by reason of her sex from performing the duties of a priestly office, she is also incompetent to inherit the service and emoluments of the office. [p. 349, col. 2; p. 350, col. 1; p. 351, col. 1.]

Second appeal against the decree of the District Court of South Kanara, in Appeal Suit No. 445 of 1915, preferred against the decree of the Court of the District Munsif of Karkal, in Original Suit No. 314 of 1914.

This appeal coming on for hearing on the 30th November and the 3rd December 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Mr. *Sitarama Rao*, for the Appellant and of Mr. *K. P. Lakshmana Rao*, for Respondent No. 1, and Respondents Nos. 2 and 3 not appearing in person or by Pleader, and the case having stood over for consideration till the 14th December 1917, the Court (Seshagiri Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SESHAGIRI AIYAR, J.—The question for consideration in this second appeal is whether the plaintiff, a widow, is entitled to recover possession of the property which was enjoyed by her husband and his predecessors by doing Archaka service in a temple. The Courts below have given her a decree for possession. Mr. Sitarama Rao, relying on *Sundarambal Ammal* v. *Yogavanagurukkal* (1), has argued at some length that as the plaintiff is not competent to perform the Archaka service, she is not entitled to the property. Ayling and Hannay, JJ., in *Ramasundaram Pillai* v. *Savundaratha Ammal* (2) and Kumaraswami Sastri and Phillips, JJ., in *Rajeswari Ammal* v. *Subramania Archakar* (3) have dissented from *Sundarambal Ammal* v. *Yogavanagurukkal* (1).

In these circumstances, it becomes necessary to consider the question in some detail as to which of these conflicting views should be followed.

In *Sundarambal Ammal* v. *Yogavanagurukkal* (1) Sadasiva Aiyar, J., who delivered the leading judgment, lays stress upon the *duties* attaching to the Archaka office as opposed to *rights*, and says that the emoluments should go only to those who are competent to perform the services. It is true that from the point of view of the worshipper, it is the fitness of the Archaka for the discharge of his duties that has to be considered. From the point of view of the Archaka, the question of secular rights is more important. In considering the relative importance of the two functions and in endeavouring to reconcile these two conceptions, the historical aspect of the grant for service in temples may be considered.

It is often said that there is nothing in the Hindu Law Texts on the question. It may seem strange that in a country where religion plays such an important part in the daily concerns of the people, there should be so little about succession, etc., to religious institutions and offices in the writings of the Rishis or of their commentators. The reason is not far to seek.

In the Vedas and in the ancient Smritis, we do not hear of the founding of temples. It is to the Puranic age that we owe their existence. In Manu's days, the only religious teacher was the ascetic Sanyasi. He gave instructions to his disciples, who in their turn spread the light of wisdom among the lay people. There were no places of worship, and no images to worship. It was to Budha that India owes the introduction of fixed places of worship and of ordained orders of preachers.

(1) 23 Ind. Cas. 72; 38 M. 850; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276.

(2) 27 Ind. Cas. 440; 16 M. L. T. 423; 1 L. W. 900; (1914) M. W. N. 919.

(3) 32 Ind. Cas. 975; 30 M. L. J. 282; 40 M. 105.]

ANNAYA TANTRI *v.* AMMAKA HENGSU.

In Budhism there are three essentials: (*a*) Adoration of Budha, (*b*) observance of his laws and (*c*) the congregation. Budha instituted the order of monks and nuns with a view to religious instruction being imparted to the uninitiated. Places of shelter or refuge were founded in order that the world-weary may retire to them and receive religious consolation. From these simple beginnings a disciplined army of Bikshus came into existence, and edifices known as monasteries were erected to afford facilities for prayer, consultation and contemplation. It is to this period that we owe the founding of temples in Southern India. The followers of Budha pursued a policy which was resented by the orthodox. Temples for the worship of Siva and Vishnu were established mostly by non-Aryans at or about this time to circumvent the Budhistic influence.

The second period begins with the advent of Sankara. He found that the ancient worship of the elements was losing hold on the popular mind, and that the people were being led by the precepts of Budhism into the track of atheism. He had to fight blind orthodoxy behind him and materialism ahead of him. He adopted a compromise. He founded Mutts which took the place of monasteries. He founded various orders of Sanyasins who were enjoined to lead celibate lives and to impart religious instruction. He undoubtedly succeeded in driving Budhism from the land: and he laid the foundation for institutions which cannot be said to have fully served the purpose which he had in mind.

The successors of Sankara did not find it easy to console the religiously-inclined by the doctrines of Advaitic philosophy. Sankara was described as the pseudo-Budha. The common people hankered after something more real than is to be had in the severely logical philosophy of Sankara. Three philosophers, who gave prominence to the existence of a personal God, diverted public attention from Sankara's teachings. The Vaishnavaites, the Madhwas and the Saivites founded independent Mutts where the Dvaitic philosophy was taught. They had to proceed a step further. They accepted control over existing temples and encouraged the construction of new temples in honour of the particular deity they represented as the Supreme Being.

As this is a rough summary of events, I should not be understood as saying that all the temples in India came into existence only in the way I have described. There were apparently some independent institutions.

By this time, the Puranas had gained a hold on the popular mind, and the worship of the Avatars of Vishnu and of the manifestations of Siva came to be regarded as the essential features of religious life among the people. Rich endowments were made for the upkeep of the temples. But the priests capable of rendering services in these institutions had to be found. It has always been the belief in India that the nearer a man is to God, the farther is he from Him. The following Slokas from the writings of Vaidyanatha Dikshiter express the ultra-orthodox and conservative view of the office of an Archaka in a Hindu temple.

* * * * *

The above Slokas (verses) may be translated thus :—

"Saathathapa "says :

"A Vipra (Brahmin), though well versed in Vedas, who performs *poo*ja for the sake of money for a period of three years, is known as the Devalaka: such a person becomes incompetent to perform the usual Havya and Kavya rites enjoined on Brahmins."

Again it is said in the Samgraha :

"A Vipra, who, though he may be well-versed in the four Vedas, is desirous of getting money, and who performs the worship of the gods for the sake of another will be considered equal to a Chandala.

The Devalakas are classed under three heads: Some as Karmadevalakas ; others as Kalpadevalakas ; and the rest as Suddha-devalakas.

He who knows the precepts as ordained in the Aagamas and makes a living by performing worship to Rudra and Kali is called Sudhadevalaka, and is excluded from taking part in all.

A person performing *pooja* will not become a Devalaka if the worship is conducted in accordance with the sacred injunctions of the Rishis. Therefore with all care the *pooja* should be conducted according to the precepts of

the Vedas, or, done in the Vaidika fashion. He is called a Karmadevalaka who performs the worship of the gods always in a Kamya form (*i. e.*, for the sake of attaining some desired object) and is incompetent to perform the ordinary Karmas.

An Archaka even if he is an authority on the four Vedas and knows the rites prescribed in Pancharathra but is devoid of Deeksha or consecration, is known as Kalpadevalaka."

Then the propitiatory ceremonies for these sinful acts are prescribed:" "A Vipra who sells for another the Nitya Karmas, such as Snanam (bathing), Ishtapoortham (performance of pious or charitable deeds, performing sacrifices, and digging wells and doing other acts of charity), Uposhanam (fasting) and Vrathams (religious acts of devotion) as are ordained in the Shruthis and Smritis has to undergo, by way of Prayaschitam, Maghasnanam in the month of Maagha; and, after performing thrice the Chandrayanam at the full moon, should diminish his food by one mouthful every day during the dark fortnight till it is reduced to zero at the new Moon,* * * and so on, then he attains the highest purity".

* * *

The Archakas having been looked down upon in the above manner, naturally great inducements had to be offered, by liberal grants of land and by the promise of perquisites. That is how the Archaka office came to be founded.

I have thus far given a brief outline of the origin and spread of temples and of the manner in which the Archaka office was instituted. My survey shows that the founder of the temples looked to the due discharge of the services in the temple as his primary and sole object. The Archaka accepted his position as giving him primarily a means of livelihood and to his posterity, and as ultimately enabling him to minister to God. The existence of various Inams in the name of the Archakas is irrefutable evidence that rich endowments were granted to them to bind them to the service of the deity. These endowments were intended, and in most cases expressed to be, from generation to generation. It may be assumed that the donors were not over-anxious to make hereditary grants to the donee's family without regard to the latter's capacity to perform religious worship; but the law would not have permitted them to stipulate that the property shall be enjoyed only by those competent to minister in the temple. They must have trusted to chance to see that the descendants of the donees carried on the good work for which their predecessors were given grants.

Mr. Justice Sadasiva Aiyar asks why, if that must be presumed to have been the intention of the donor, should the inheritance go to persons who by themselves are incapable of discharging the duties. The answer is that Courts and even Legislatures must trust to the same chance which the founders calculated upon when they endowed the Archaka office. What reason have Courts for holding that a reversioner would be a more welcome minister of religion than the *gumastah* employed by a widow to perform the services? It would be an ideal to be sought after, if the community interested in temple worship were to be permitted to select on the death of an Archaka a person competent to fill his place. Even in this view, can we trust to society here or elsewhere to be guided in the selection of an Archaka solely by considerations of religious merit and fitness? There is no guarantee that a nominee of the community would be a fitter Archaka than the proxy of the widow. *Non constat*, he would be worse than a male reversioner of the last Archaka. Under such circumstances, there cannot be much room for doubt, that society would prefer that the secular rights with the obligations to do or to get done the spiritual duties should vest in the line of heirs to whom private property would descend. The confirmation of numerous grants in this Presidency by the Inam Commissioners in the name of the widows and daughters of the deceased Archakas indicates that the Government of the country have recognised the principle of heredity as the only safe guide in such matters. I see no reason why Courts should not be guided by the executive action of the Government in these matters.

I shall briefly refer to one other reason why the principle of heredity should not

be departed from in the case of these offices. It is common knowledge that the Archakas of a temple form a caste among themselves. They are a select people. In the case of the great temple at Chidambaram, they claim to have come down to earth with the deity. They do not intermarry with the other Brahmin sects. Among these people, the moment that a boy is married, he gets a share in the emoluments of the Archaka office. This testifies to the solicitude of this class of people for an early expansion of the sect. In the case of other Siva temples, the Archakas are known as Gurukkals. Unfortunately they are a diminishing race. They are not permitted to take brides from other Brahmin sects; and worship in a temple cannot be performed by a Brahmin who is not a Gurukkal. In the Vaishnava temples, there are two prominent classes of Archakas: the Pancharatras and the Vaiganasas. I do not believe even these intermarry. A temple whose services are performed according to Pancharatra rituals cannot be served by a Vaiganasa Archaka and *vice versa*. These limitations show that the field of choice for the Archaka service in Hindu temples is very limited. It would often lead to the application of the principle of escheat, if the grants made for their services are not continued in the line of the heirs of the last male Archaka.

I have referred to the above considerations out of deference to the views of my learned brother Sadasiva Aiyar, J. No one shows more anxiety than the learned Judge that the true intent of a grant should be strictly enforced. I respectfully share his anxiety, but as I have shown above, the change that he gives his sanction to, while upsetting fixity of tenure and disturbing long understood and enforced notions of rights of property, is not calculated to bring the Courts any the nearer to the administration of the golden rule that competency to minister and capacity to inherit should go hand in hand. I am, therefore, unable to hold that the widow is not entitled to inherit her husband's property granted for the performance of religious services.

I shall now examine the case-law on the point to see how far the learned Judge's conclusions are supported by decided cases.

I shall first deal with *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4), which apparently has not been considered in any of the three decisions of this Court, and on which Mr. Sitarama Rao naturally laid great stress. The facts of the case must be examined in some detail in order to show that while it does not lend support to the contention of the learned Vakil, it can be regarded as an authority for the proposition I have suggested. The temple in respect of which the office was claimed belonged to the Gossain sect of Vallabhachariars. The Vallabhachariars, as explained in the judgment of the High Court of Allahabad in *Mohan Lalaji* v. *Madhsudan Lala* (5), from which there was an appeal to the Judicial Committee in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4), are a Vaishnava sect of religious teachers who founded temples. The question before the Judicial Committee was whether the grandson by the daughter of the last male Archaka was entitled to succeed to the office and the emoluments in preference to the reversioner of the last male holder. It was found in that case that the Gossain sect of Vallabhachariars took daughters from a sect known as the Bhat in marriage. On the marriage of the Bhat daughter into the Gossain family she was initiated into the Mantram of the Gossain sect. The ritual in a Gossain temple was essentially different from the ritual observed by the Bhats in their temples. The Gossain daughters were similarly married by Bhats, and I take it, although it is not so mentioned in either the judgment of the High Court or in that of the Privy Council, that the Gossain daughter marrying a Bhat husband would be initiated into the Mantram of the Bhat sect. I must not omit to mention a statement in the judgment of the Right Honourable Mr. Ameer Ali that the daughters of a Gossain, although married into a Bhat family, remained in the Gossain house. In these circumstances the question was whether in a temple whose rituals were of the Gossain sect, a Bhat grandson of the

(4) 19 Ind. Cas. 337; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 40 I. A. 97 (P. C.).

(5) 6 Ind. Cas. 77; 32 A. 461; 7 A. L. J. 430.

last male Gossain could inherit the office and the emoluments. The Judicial Committee held that he could not. It is stated in the judgment of the Board that after the death of the last male holder his widow and his daughter were in enjoyment of the office and emoluments. Mr. Sitarama Rao suggested that the widow and the daughter were competent to perform the religious worship in the Gossain temple. There is no express mention of their having officiated in the temples. From my experience of South India I cannot believe that where a large congregation of males assemble for worship, a female would be allowed to perform religious service within the temple. In the north the Gosha system is prevalent and the seclusion of women is more pronouced than in the south; and I would require very strong evidence to hold that the widow and the daughter of the deceased male Gossain were as a matter of fact officiating as priestesses in the temple. I must take it that they employed deputies to perform their duties If my surmise is correct, it lends great support to the proposition that so long as the service can be done by a proxy, there can be no objection to women inherting the office and emoluments of an Archaka.

Then it was argued, if a proxy was held competent to perform the duties, why should not a Bhat grandson have been allowed to inherit the office and the emoluments, on the understanding that he should employ a Gossain priest to officiate in the temple. The position of a widow or daughter and a grandson are not in *pari materia*. In the case of a grandson, he starts a new line of descendants, and to countenance the employment of a perpetual *gumastah* in the case of males would not be right; therefore, the Judicial Committee held that as a grandson *suo moto* is entitled to minister in the temple and as the grandson was of Bhat origin and incompetent to perform religious worship in a Gossain temple, he should be discarded in favour of a Gossain reversioner who was competent to perform religious worship by himself. In that judgment, however, it is pointed out that ordinarily the descent of *debutter* property vesting in an officiating priest would go to the ordinary heirs of the last holder, unless there was some usage or course of devolution or some other circumstance to indicate a different mode of devolution. The conclusion of the Judicial Committee was that in the particular case, the circumstances and the usage pointed to a mode of devolution different from that of the ordinary descent of property. In my opinion, this decision is no authority for the proposition that competency to officiate is a *sine qua non* of capacity to inherit. On the other hand the fact that the widow and the daughter were allowed to inherit the office and the emoluments is a strong indication that service in a temple can be rendered by a proxy so long as the essential nature of the worship is not departed from.

Now, I shall deal with the other cases bearing on the question. In *Tangirala Chiranjivi* v. *Raja Manikya Rao* (6) Benson and Sundara Aiyar, JJ., said: "The District Judge has assumed that a minor, a female and a person unlearned in the Vedas would lose the right to the service in the temple. There is no basis for the assumption."

My experience of life in this Presidency is that in innumerable cases services in a temple are performed by proxies employed by women. In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (7) referring to the competency of a Mahomedan lady to perform the duties of Majavar of a *durga* which was not of a secular nature, Turner, C. J., and Kindersley, J., stated that it was not proved "that the plaintiff had ever participated in the profits or *performed the duties by proxy*," thereby indicating that if she had got the service done by a proxy she would have been entitled to the office. In *Sheshu Ammal* v. *Soundaraja Aiyar* (8) the learned Judges state: "They further explain that an Archaka Meerassee, which is the species of Meerassee involved in Suit No. 111 of 1846, on the file of the Hindu Sudder Ameen referred to by the Civil Judge, and a Poorohita Meerassee, also instanced by the Civil Judge, may descend to a female and the functions thereof be performed by deputy."

(6) 25 Ind. Cas. 283; 27 M. L. J. 179.
(7) 3 M. 95; 5 Ind. Jur. 190; 1 Ind. Dec. (N. S.) 623.
(8) (1853) M. S. D. A. 261.

These are all the Madras decisions, and Mr. Ganapati Aiyar in his book on Religious Endowments after reviewing these authorities has come to the conclusion that it has been the uniform practice in Madras to allow females to inherit the Archaka service and the emoluments. In Bombay the same view has been held. In *Keshavbhat* v. *Bhagirathibai* (9) the learned Judges state the law thus: "Finally, with respect to the objection, that a Hindu female cannot perform the duties which attach to the office for the maintenance of which the allowance was granted, it may be observed that the defendant has not proved the existence of any usage in conformity with his allegation." So the burden was cast upon the objector to show that the usage was different. At the end of the judgment the learned Judges reserved liberty to the reversioner to bring a separate suit to support his position that a widow was not competent to inherit the office and the emoluments of Archaka. In *Sitarambhat* v. *Sitaram Ganesh* (10) the learned Judges of whom Couch, C. J., was one, proceeded on the assumption that the priestly office would descend in the ordinary line of succession through daughter to her son. The decision in *Dhuncooverbai* v. *Advocate-General* (11) may be explained away, as Sadasiva Aiyar, J., suggests, on the ground that the office inherited by the widow was not a purely religious one.

The decisions of the Calcutta High Court also support this proposition. In *Poorun Narain Dutt* v. *Kasheessuree Dosee* (12) the learned Judges say: "It has been held in the Court that a woman can be a *mutwalli*, and that the profits of a *debutter* can be received by a female." They held in that case that a woman can succeed to the office. In *Joy Deb Surmah* v. *Huroputty Surmah* (13) an issue was sent down to ascertain whether a female can succeed to a priestly office. The report does not say what the result of the finding was. In *Mitta Kanth Audhikaree* v. *Nirunjun Audhikaree* (14) Sir Richard Couch says that the right of performing worship of an idol follows the same line of succession as that of private property. In *Mahamaya Debi* v. *Haridas Haldar* (15) Mr. Justice Mookerjee says at page 475:* "There is no question that a Pala in the Kalighat Temple is heritable, and it is immaterial whether the heir is a male or female; the custom in this respect is established beyond doubt." These are all the authorities available on the question. None earlier than 38 Madras [*Sundarambal Ammal* v. *Yogavanagurukkal* (1)] has been cited in which it has been laid down that a female is not entitled to inherit a priestly office and the emoluments. The decisions are practically uniform and it would lead to an unnecessary disturbance of rights of property, if we introduce the innovation that a female is not entitled to succeed to an Archaka office or emoluments. As regards the quotation from Jagannatha's Digest which Mr. Justice Sadasiva Aiyar has extracted in his judgment, I may say that I have read it very carefully and there is no expression in it of any decided view one way or the other. The author quotes the contentions of both sides and leaves the reader to draw his own inference from the two statements. I am rather inclined to think that the weight of argument, if any, is in favour of giving females their right to hold religious office.

Although I have come to this conclusion, having regard to the strong view held by Sadasiva Aiyar, J., and having also regard to the fact that it is necessary that a uniform principle should be enunciated in this matter to guide the Courts below, I think it desirable that the following question should be referred for the opinion of the Full Bench, namely, "whether a Hindu widow is incompetent by reason of her sex from inheriting the service and emoluments of a priestly office held by her husband."

NAPIER, J.—I agree that this question should be referred to a Full Bench in the terms suggested by my learned brother.

(9) 3 B. H. C. R. A. C. J. 75.
(10) 6 B. H. C. R. A. C. J. 250.
(11) 1 Bom. L. R. 743.
(12) 3 W. R. 179.
(13) 16 W. R. 282.
(14) 14 B. L. R. 166; 22 W. R. 437.
(15) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 203; 20 C. L. J. 183.

* Page of 42 C.—*Ed.*

ANNAYA TANTRI *v.* AMMAKA HENGSU.

This second appeal came on for hearing in pursuance of the Order of Reference to a Full Bench, dated the 14th December 1917.

Mr. *B. Sitarama Rao*, for the Appellant.—Succession to a priestly office is based on the competency of the claimant to perform the duties of the office. *Sundarambal Ammal* v. *Yogavanagurukkal* (1). Even hereditary succession is subject to that rule. A woman can only discharge functions of a priestly office by proxy.

[WALLIS, C. J.—Is it not a question of usage and of the founder's intentions?]

The general rule is that incompetency to perform the duties of the office bars inheritance and women, being disqualified, cannot succeed to the office or its emoluments. Any special usage may be set up as an exception to the rule. *Mitta Kanth Audhikaree* v. *Nirunjun Audhikaree* (14), *Bishen Chand Basawat* v. *Nadir Hossein* (16), *Kasim Saiba* v. *Sudhindra Thirtha Swami* (17) and *Mahamaya Debi* v. *Haridas Haldar* (15).

Mr. *K. P. Lakshmana Rao*, for the Respondent.—The trend of judicial decisions in Southern India has been in favour of upholding a woman's right to an Archaka office. The circumstances of the case reported as *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4) are different. *Tangirala Chiranjivi* v. *Raja Manikya Rao* (6), *Subraya Kakramaya* v. *Subraya Padayya* (18), *Pankajammal* v. *Secretary of State* (19), *Ramasundaram Pillai* v. *Savundaratha Ammal* (2) and *Rajeshwari Ammal* v. *Subramania Archakar* (3).

OPINION.

WALLIS, C. J.—It is well settled that the succession to temple offices is governed by user which is taken to represent the intentions of the founder, and it is not disputed that in this part of India the user in the case of temple Archakas is that the office is hereditary and descends in the ordinary course of succession to women, who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy. The opinion of the Pandits in *Sheshu Ammal* v. *Soundaraja Aiyar* (8) shows that this was then the recognised usage. The question appears to have first come before the Court in 1910, but since that time there have been numerous decisions where the user has been recognised and enforced, and all the Hindu members of the Court with one exception have been parties to these decisions, which also are conformable with the decisions of other High Courts. The only authority the other way is the judgment of Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Yogavanagurukkal* (1), who considered that on principle a personally disqualified heir could not inherit the office and delegate the duties to others. In the argument before us it was again contended that the decision of the Privy Council in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4) was in accordance with this view and must be taken to have overruled the other cases. In that case the office of Archaka had descended to the widow and daughter of the last male Archaka, and the question was whether the daughter was to be succeeded by her son or by the reversioner of the last male holder. The Archakas were Gossains and there was a usage among them that females continued to belong to their father's *kul* or family after marriage. On this ground apparently the daughter had been allowed to fill the office even though married to a member of the Bhat community who was incapable of filling it. No question arose in that case as to the right of the widow and her daughter after her to fill the office; and it does not appear whether, while they held it, they performed the duties in person or by deputy. What their Lordships had to consider was, whether on the daughter's death the office should go to her son and her descendants, a line of heirs who as Bhats would be incapable of performing its duties, or should revert to the male heirs of the last male holder. Their Lordships at page 288* observe that the rule as to the Shebaitship being vested in the heirs of the founder "must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship", and they say later on that "to allow the plaintiff's claim to

(16) 15 C. 329; 15 I. A. 1; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113; 7 Ind. Dec. (N. S.) 803 (P. C.).

(17) 18 M. 359; 6 Ind. Dec. (N. S.) 599.

(18) 7 Ind. Cas. 715; 8 M. L. T. 325; (1910) M. W. N. 445.

(19) 40 Ind. Cas 516; 40 M. 1108; 5 L. W. 346; 32 M. L. J. 237; 21 M. L. T. 411.

* Page of 35 A.—*Ed.*

an admittedly Ballav temple, where the rights are performed according to Ballav ritual, which, it is clearly established, they cannot perform, would, in their Lordships' judgment, defeat the purpose for which the worship was established." A contrary decision would have involved the devolution of the office to a line of heirs incompetent to perform its duties. Moreover, the plaintiff's claim in that case was not shown to be in accordance with any well-recognised user, which is the best evidence of the founder's intentions. I do not consider that this decision of their Lordships warrants us in overruling the numerous decisions of this Court in conformity with the decisions of other Courts, by which the widow and daughter of the last male Archaka are held entitled in accordance with the established user to succeed to the office of Archaka discharging its duties by deputy and to transmit it to their heirs, who, as male heirs are preferred to female, will generally be competent to perform the duties in person. Sadasiva Aiyar, J., for whose opinion I have a great respect, considers, if I rightly understand him, that the established custom of female succession to this office is of so mischievous and objectionable a character that it cannot have been intended by the founder. That view is not shared by Seshagiri Aiyar, J., who has considered this aspect of the case in the Order of Reference, or by the other Hindu members of the Court who have considered the question. We should not, in my opinion, be justified in overruling on this ground the numerous decisions of this Court in which the usage has been recognised and enforced, unless its mischievous character had been established beyond all doubt or controversy. This has not been done and I feel bound to answer the question in the negative.

SADASIVA AIYAR, J.—I have carefully re-considered my decision in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) in the light of the later decisions of this Court quoted by my learned brother Mr. Justice Seshagiri Aiyar in his Order of Reference, also of his own keen and yet considerate criticisms (if I may be permitted to say so) of my said decision and also of the opinions of my Lord and of Mr. Justice Spencer on this reference. I am, notwithstanding, unable to convince myself that my opinion was erroneous. On the other hand, the decision of their Lordships of the Privy Council in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4) lends, in my opinion, strong support to my conclusion. With respect, I am unable to agree with Mr. Justice Seshagiri Aiyar that the widow and daughter of the last male Shebait of the Ballavacharya Gossain sect in the Privy Council case must have been not competent to perform the duties of the office and must have "employed deputies to perform the duty", and that their enjoyment of the emoluments of the office during their lifetime must be due to their having performed the duties through such deputies and not directly. On the contrary, it seems to me clear from the report that the out-of-date unshastraic custom obtaining in the south by which Dharmapathnies (who are Sahadharmacharinees of their husbands) are considered incompetent to pronounce Mantrams and do religious duties along with (and even solely in the absence of) their husbands does not obtain among the Ballavacharya Gossains, one of the Vaishnavite sects which are in several respects much more liberal in the treatment of women and birth Sudras than other sects, though many Vaishnavite sects might have become very degenerate in other respects.

I am further unable to see that my conclusion as to Jagannatha's opinion and the weight of the authority of the texts quoted by him being in my favour is wrong.

A general rule has been laid down by their Lordships of the Privy Council that where a person is incompetent to perform the rites of a religious office, it would defeat the very purpose for which the worship was established, if he (including of course "she") is allowed to inherit the office. Any usage inconsistent with such purpose is clearly invalid in law. [See *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (20).]

I am unable to appreciate any distinction in principle between the incompetency of the claimant to the office by reason of sex and the incompetency due to any

(20) 39 Ind. Cas. 722; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153 40 M 709; 6 L. W. 222 P C.).

other cause. I do not think that the pronouncement of their Lordships of the Privy Council can be got round through any such distinction.

Though "law" is not always logical and though the narrow point referred to us relates to inheritance by a person incompetent by reason of sex alone for performing the duties of a religious office, I do not think that the considerations of the difficulties which are aggressively prominent when we take the four analogous cases (1) of a male heir *being* incompetent by reason of conversion to another faith when the inheritance opens, (2) of his *becoming* incompetent after the inheritance opens, (3) of a female heir *being* incompetent by reason of conversion before the inheritance opens and (4) *becoming* incompetent after the inheritance opens, can be kept out of mind in deciding the present reference, especially having regard to the provisions of Act XXI of 1850.

Coming to the weight to be given to practice and usage, many pernicious and unshastraic usages have crept into the Hindu religious and social systems during dark medieval days and through elflux of time. Most of them entered gradually and insidiously through the tendency of that subtle materialism which sometimes parades as strict orthodox spirituality. The letter is exalted over the spirit, the so-called hereditary rights are given more importance than the performance of the religious duties, instead of the rights being kept as a very subordinate adjunct and appurtenance of the duties, and religious offices, and caste status are looked upon more as intended for the means of livelihood and for the enjoyment of worldly power and material possessions than as things bestowed upon one for helping all humanity in its evolutionary progress towards the common goal.

I respectfully agree with my Lord that the law as at present settled by the decisions of the Privy Council is that unless the usages in connection with religious institutions and offices are manifestly immoral or opposed to public policy or opposed to the intentions of the founders of a religious trust or manifestly injurious to the trust, the Courts are not entitled to go back for the law to the purer, more liberal and more ancient Shastraic fountain heads. The question, therefore, narrows itself to this: Whether the usage relied on by the respondents is manifestly injurious (both in its material and moral aspects) to the religious institution, and whether it could have been in conformity with the intention of the founder of the trust. It is on this question that I feel that there is real and substantial difference of opinion between myself and the learned Judges who have considered this question in this Court since 1910. My angle of vision in respect of these questions might have been affected by my long-standing interest and sensitiveness in the cause of Hindu religious and social reform on Shastraic lines. I find, however, that after making sincere attempts to allow as much discount as possible to the above factor, my view of the seriousness of the evils of usage in question has not been materially affected. While the incumbent of a religious office must be allowed to employ a temporary deputy when a temporary disqualification or inability occurs, such as birth and death pollutions, absence from home owing to urgent private affairs, etc., I am clear in my mind that a usage permitting a permanently disqualified claimant to receive the emoluments of a religious office and to appoint his or her own deputy to do the duties is of such a seriously mischievous character that it ought not to be recognised. I regret I am unable to agree with Mr. Justice Seshagiri Aiyar that the performance of the duties through the deputy of a female disqualified heir is not less beneficial to the religious institution than the performance of the next qualified male heir. It is notorious that the deputy is usually chosen on the principle of a Dutch auction. The man who agrees to allow the widow to retain the largest portion of the emoluments of the office and to receive the least as his own remuneration is given the place of deputy. Thus when the usually small remuneration in rice and cash attached to the Archaka office does not go to the deputy who does the duties, the deputy cannot be expected to perform the duties at all satisfactorily. I do not see why a religious office should be considered less important than any other kind of office. To allow even the office

of a peon to be held by a permanently disqualified man because he undertakes to appoint a deputy out of the remuneration of the office is, in my opinion, entirely mischievous and it ought not to be allowed even if it is sanctioned by usage.

In the result, my answer to the question referred is that so long as a Hindu widow is held incompetent by reason of her sex from doing the duty of a priestly office, she is also incompetent to inherit the service and emoluments of the office.

SPENCER, J.—Without laying down any rule as to particular institutions, in which there may be a special custom that females cannot succeed to the office and emoluments, the trend of decisions in this Court has certainly been to treat females as competent to succeed to the Archakaship of Hindu temples in this Presidency. See *Subraya Kakramaya* v. *Subraya Padayya* (18), *Tangirala Chiranjivi* v. *Raja Manikya Rao* (6), *Ramasundaram Pillai* v. *Savundaratha Ammal* (2), *Rajeswari Ammal* v. *Subramania Archakar* (3) and Second Appeal No. 2078 of 1915.

The judgment of Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) was an exception to the course of decided cases and was not adopted by Tyabji, J., who sat with him. I do not think it contains reasons of such weight as to justify a departure from the principle of *stare decisis*. I would answer the question referred to us in the negative.

Answered in the negative.

M.C.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1117 OF 1918.

July 25, 1918.

Present:—Mr. Justice Broadway.

MANGIA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GANESH DAS—PLAINTIFF—RESPONDENT.

Construction of document—Question of law—Appeal, second—Mortgage with possession—Mortgagor taking mortgaged property on lease—Intention—Righ of mortgagee to evict mortgagor.

Defendants executed a deed of mortgage in favour of the plaintiff on the 17th March 1913. The mortgage was declared to be with possession and redemption was to take place after two years. On the same date a rent deed was executed under which the mortgagors agreed to take the mortgaged house on lease at Rs. 3 per mensem, it being definitely stated that the mortgagee was in possession and that he was entitled to evict the mortgagors at any time by giving them one month's notice. It was, however, agreed that the rent was to be credited to the interest due under the mortgage-deed. Both these documents were registered on the 20th March 1913. On the 4th October 1915, the mortgagee instituted the present suit for the eviction of the mortgagors and recovery of Rs. 91-15-0 due as rent. It was contended that the two documents evidenced a single transaction and that, therefore, the suit for eviction was not maintainable:

Held, (1) that the question involved in the suit being one related to the construction to be placed on the two documents concerned, a second appeal was competent; [p. 352, col. 1.]

(2) that the fact that there was no reference to the lease in the mortgage-deed was a strong indication of the separate nature of the two transactions and all that was intended by the lease was that such moneys as were payable thereunder were to be given credit for; [p. 352, col. 2.]

(3) that at the time of the execution of the rent-deed, the parties clearly intended to establish the relation of landlord and tenant between themselves and, therefore, the mortgagees were at liberty to evict the mortgagors at any time. [p. 352, col. 2.]

Second appeal from the decree of the District Judge, Multan, dated the 7th January 1918, reversing that of the Munsif, 1st class, Multan, dated the 17th February 1917, dismissing the claim with costs.

Bakhsbi *Tek Chand*, for the Appellants.

Lala *Durga Das*, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal has arisen are briefly as follows :—On the 17th March 1913 Mangia Ram and others, defendants-appellants, executed a deed of mortgage in favour of Ganesh Das, plaintiff-respondent. The mortgaged property consisted of a house. The consideration was Rs. 2,000, which included the first year's interest in advance amounting to Rs. 240, the rate of interest being 1 per cent. per mensem, or Rs. 20 a month; the actual cash paid to the mortgagors would, therefore, be Rs. 1,760. The mortgage was declared to be with possession and redemption was to take place any time after two years. On the same date a rent deed was executed, under which the mortgagors agreed to take the mortgaged house on lease at Rs. 3 per mensem, it being de-

finitely stated that the mortgagee was mortgagee in possession and that he was entitled to evict the mortgagors at any time he wished by giving them one month's notice. It was, however, agreed that Rs. 3 per mensem was to be credited to the interest due under the mortgage-deed. Both these documents were registered on the 20th March 1913.

On the 4th October 1915, Ganesh Das instituted the present suit asking for the eviction of Mangia Ram and his co-mortgagors and for a decree for Rs. 91-15-0 due as rent under the rent deed. The defendants-mortgagors pleaded that these two documents evidenced a single transaction, and that, therefore, the suit for eviction was not maintainable ; and the primary Court dismissed the suit. Ganesh Das appealed to the District Judge, who accepted his appeal and granted him a decree for eviction and for the amount claimed as arrears of rent. Against this decree the defendants-mortgagors preferred this second appeal through Mr. Tek Chand ; and I have heard Mr. Durga Das for Ganesh Das, plaintiff-respondent. It was contended by Mr. Durga Das that inasmuch as the District Judge had held that the two deeds evidenced two separate and distinct transactions, this finding amounted to a finding on a question of fact which could not be re-opened in second appeal. With this contention I am unable to agree, as the question involved is undoubtedly one relating to the construction to be placed on the two documents concerned. On behalf of the appellants, Mr. Tek Chand referred me to *Nathan Singh* v. *Mina Mal* (1) and the Allahabad rulings referred to therein, as also to *Madhwa Sidhanta Onahini Nidhi* v. *Ven-Katuramanjulu Naidu* (2). Mr. Durga Das has endeavoured to distinguish these rulings and has referred me to *Chimman Lal* v. *Bahadur Singh* (3), *Venkata Chetty* v. *Aiyanna Gounden* (4), *Pindi Das* v. *Lal Chand* (5) and *Budha Shah* v. *Suleman* (6).

(1) 17 P. W. R. 1908.
(2) 26 M. 662.
(3) 23 A. 338; A. W. N. (1901) 95.
(4) 36 Ind. Cas. 817; 31 M. L. J. 712; 20 M. L. T. 457; (1917) M. W. N. 55; 5 L. W. 304; 40 M. 561
(5) 36 Ind. Cas 209; 102 P. L. R. 1916; 177 P. W. R. 1916.
(6) 41 Ind. Cas. 576; 71 P. W. R. 1917.

The cases cited at the Bar proceeded on their own peculiar sets of facts and do not really afford much assistance in deciding the present case, though they are of value as indicating the principles governing the question before me. Turning to the documents in the case, it appears that the mortgage-deed clearly and definitely recites the fact that possession had actually been made over to the mortgagee. No provision is made for obtaining possession in default of any payment, such a provision being obviously unnecessary if, as a matter of fact, possession, constructive or otherwise, had actually passed. The interest payable was Rs. 20 a month ; and redemption could only take place after two years. The rent-deed clearly and unmistakably recites that the mortgagee is a mortgagee in possession with full rights to lease the property to any one he pleases. The rent was apparently the actual rental value of the property (although of this fact there is really no evidence on the record). The mortgagee clearly intended to be regarded as a landlord under this rent-deed, and I see no reason for thinking that on the date of the execution of the deed the mortgagors had any other intention than that they should be regarded as his tenants. The mortgagee was at liberty at any time to evict the mortgagors by giving them a month's notice (with this provision he has complied and the suit was instituted after the issuing of the necessary notice). It is clear that so long as the mortgagee was in possession, he would be liable to account for such rents and profits as accrued from the property mortgaged and would be bound to give credit for such rents and profits in the first instance, no doubt, to the interest payable under the mortgage and then subsequently towards the principal. The mortgage-deed itself makes no reference to the lease and the rent was payable from the 17th March 1913. This fact, Mr. Durga Das claims, is a strong indication of the separate nature of the two transactions ; whereas Mr. Tek Chand contends that it proves that the transactions were one and the same. In my opinion Mr. Durga Das's view is a correct one ; and all that was intended by the lease was that such moneys as were payable thereunder as the produce of the mortgaged property were to be given

credit for and credited to the interest due under the mortgage. In these circumstances, I am of opinion that the decision of the lower Appellate Court is correct and that the defendants-appellants are liable to eviction.

It was next urged that the amount claimed as arrears of rent was incorrect. According to the only accounts of the mortgagee with the mortgagors that are on the record, there is a sum of Rs. 240 still due as interest by the mortgagors. The amount decreed, when recovered, would, in any case, be credited to such sums as may be due under the mortgage; and I can see no reason for thinking that the plaintiff's claim is wrong.

I accordingly dismiss this appeal with costs. The *ad interim* order staying execution passed by me on the 15th July 1918 is set aside.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3047 OF 1916.

January 17, 1918.

Present:—Mr. Justice Chevis.

SHIB LAL—DEFENDANT—APPELLANT

versus

SHAM DAS—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 29, 30—Sale by guardian without permission of Court, validity of—Sale for benefit of minor—Suit to set aside sale, maintainability of.

A natural guardian, who has also been appointed guardian under the Guardians and Wards Act, cannot claim to be free from the limitations imposed by section 29 of the Act.

Section 30 of the Guardians and Wards Act gives a minor the right to avoid a sale of his property made by his guardian without the sanction of the Court; so that even if the whole of the sale price was spent in benefiting the minor, he is still entitled to get back his property.

Second appeal from the decree of the Additional District Judge, Amritsar at Gurdaspur, dated the 26th July 1916.

Bakhshi *Tek Chand* and Mr. *Mehr Chand*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—This is a suit by Sham Das to recover possession of 6 *kanals* 4 *marlas*, which his mother sold during his minority to Shib Lal for Rs. 874-8-0. His mother was a certificated guardian under Act VIII of 1890. She sold without previous permission of Court, as required by section 29 of the Act, and so under section 30 the sale is voidable at the instance of the minor.

The lower Courts hold that plaintiff benefited to the extent of Rs. 824-8-0 and have given him a decree for possession on payment of that sum.

Defendant appeals. It is urged, on the strength of *Tejpal* v. *Ganga* (1) that the natural guardian, even though she be also the certificated guardian, is not bound by section 29 as she still has all the powers of a natural guardian. A later ruling of the Allahabad Court, *Ram Chandar* v. *Chheda Lal* (2), seems to take a different view. Section 29 applies to every one except the Collector and a guardian appointed by Will or other instrument, and I cannot see that a natural guardian can, after having been appointed a guardian under the Act, claim to be free from the limitations imposed by section 29.

As to ground 3 of this appeal it is pointed out that the minor, on coming of age, applied for his mother's removal from guardianship and said he had fully understood the accounts. But one may understand accounts and acknowledge their arithmetical correctness without ratifying sales or other transactions to which the accounts relate.

As to ground 3, the deed says the mother was to pay half expenses. The stamp on sale-deed cost only Rs. 9. Allowing another Rs. 9 for extra expenses, the mother would only have to pay Rs. 9 which may have come out of her own pocket.

As to the argument that when the sale was in the main at least for the minor's benefit, it should not be set aside, I remark that section 30 gives the minor the right to avoid the sale, so even if the whole of the sale price was spent in benefiting the minor still the minor is entitled to get back his land.

As to ground 4, no doubt Rs. 824-8-0 went to reducing a mortgage-debt created

(1) 25 A. 59; A. W. N. (1902) 192.
(2) A. W. N. (1905) 122; 2 A. L. J. 460.

by the minor's father and that debt carried interest, so the minor was relieved of paying interest. On the other hand he lost possession of land worth Rs. 874-8 0. So I see no good cause for holding that he should now be made to pay interest to the defendant.

This appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 2, 1918.

Present:—Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Sri Rajah RAO VENKATA MAHIPATHI GANGADHARA RAMA RAO BAHADUR—PLAINTIFF—APPELLANT

versus

Sri Rajah VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR GARU, RAJAH OF PITTAPUR—DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara—Maintenance of junior members—Basis of right—Impartible zemindari, *whether subject of co-parcenary—Custom—Maintenance out of impartible* zemindari.

The right to maintenance of the junior members of a Mitakshara joint family, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases. [p. 358, col. 1]

Two other categories of persons have by special texts a right to maintenance under the Mitakshara Law, *viz.*, (1) Those who are debarred from inheriting by personal disqualifications *e.g.*, the idiot, the blind from birth, the insane, etc. (2) Certain near relations, *viz* , the widow, the parent and the infant child. But these categories are exhaustive. [p. 358, col. 1.]

In impartible properties there is no co-parcenary, hence in such properties no one can claim maintenance on the ground that but for the custom of impartibility he could sue for partition. [p. 358, col. 1.]

Custom may and does affirm a right to maintenance out of an impartible Raj in certain members of the family. In the case of sons this custom is so well recognised that proof of it in individual cases is unnecessary. But there is no invariable or certain custom that any one below the first generation from the late Raja can claim maintenance as of right: any special custom to that effect must be pleaded and proved. [p. 358, col. 2.]

The grandson of the late Rajah of Pittapur, an impartible Raj, sued the devisee of the Raj for maintenance on the ground that by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party:

Held, that there was no legal basis for any such claim. [p. 358, col. 2.]

Appeal from a decree of the Madras High Court (Mr. Justice Sankaran Nair and Mr. Justice Oldfield), dated March 19, 1915, reported as 29 Ind. Cas. 356, reversing a decree of the Subordinate Judge, Rajahmundry.

FACTS of the case are sufficiently stated in their Lordships' judgment and in the judgment of the Madras High Court (Sankaran Nair and Oldfield, JJ ,) reported as 39 Madras 396; 29 Ind. Cas. 356. The plaintiff's suit was decreed by the Subordinate Judge, but dismissed on appeal by the High Court. Plaintiff appealed to the Privy Council.

Mr. *Upjohn, J. C.* (with him Mr. *Dunne, K. C.*), for the Appellant, submitted that any devise made by the holder of an impartible Raj must be subject to the right of maintenance given by the Mitakshara to the junior members of the holder's family. The present holder of the Pittapur Raj has taken by devise from the late holder: he can only take subject to the obligation to maintain the members of the family.

[LORD DUNEDIN.—Could he devise to a stranger?]

Apparently he is not confined to the members of the family, but here it so happens that he has devised to the next person entitled to succeed.

An impartible estate is family property only in a limited sense, and the holder has in general the right of alienation: *Sartaj Kuari* v. *Deoraj Kuari* (1), but it is not self-acquired property, and the junior members of the holder's family have a right to be maintained out of it. Such right exists notwithstanding the power of alienation: the maintenance is a charge on the impartible estate: *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (2), *Rama Krishna Rao* v. *Court of Wards* [*The Pittapur case*] (3),

(1) 15 I. A 51 at pp. 64, 65; 10 A. 272; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.)

(2) 12 M. I. A 203; 11 W. R. P. C. 6; 2 B. L. R. P. C. 15; 2 Suth. P. C. J. 175; 2 Sar. P. C. J. 395; 20 E. R. 317.

(3) 26 I. A 83; 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind Dec. (N. S.) 276 (P. C.).

Mallikarjuna Prasada Nayadu v. *Durga Prasada Nayadu* (4), *Kaliyanna* v. *Rengoppa* [*The Udayarpalayam case*] (5), *Sivagnana Tevar* v. *Periasami* (6), *Doorga Persad Singh* v. *Doorga Konwari* (7), *Naraguntu Lutchmeedavamah* v. *Vengama Naidoo* (8), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (9).

In none of these decisions has it been doubted that maintenance is chargeable on an impartible estate.

The next question is whether the right to maintenance can be defeated by the holder of the impartible estate by alienation. We submit not. The Transfer of Property Act, 1882 (Act IV of 1882), section 39, assumes that the right to maintenance is a real right: it lays down that the right may be enforced against a voluntary transferee or transferee with notice. The Hindu Wills Act, 1870 (Act XXI of 1870), section 3, provides that a Hindu testator cannot by his Will defeat the right to maintenance.

To the same effect is the Probate and Administration Act, 1881 (Act V of 1881), section 149 (*c*).

Mr. *Dunne* followed: The High Court seems to have concluded that the right to maintenance is dependent on there being co-parcenary. That this is not so is apparent from the case of the widow. In Bombay it has even been held that if a co-parcener could sue for partition he could not sue for maintenance: *Note* to *Himmatsing Becharsing* v. *Ganpatsing* (10). The right to maintenance continues even in case of forfeiture: *Musammat Golab Koonwur* v. *Collector of Benares* (11), cited in Mayne's Hindu Law, para. 458 (8th Edition, page 634).

The right is attached to the property, and is not affected by the decision in *Sartaj Kuari Deoraj Kuari* (1).

In the case of the widow, it has been held that her right to maintenance, even when against her husband's father it was only a moral right, became a legal right against his property in the hands of his son: *Janki* v. *Nand Ram* (12).

Here the defendant is a gratuitous taker, and whether or not he is the Aurasa son, the last holder has given him the Zemindari on the footing of his being the Aurasa son: he is bound to maintain plaintiff out of the income of the Zemindari so obtained.

Mr. *DeGruyther*, *K. C.* (with him Mr. *Kenworthy Brown*), for the Respondent.—There is no text of the Mitakshara which supports the present claim. Impartible property is not the property of the joint familly to which the holder belongs: it is not the subject of co-parcenary. The effect of property being partible is discussed in Mayne's Hindu Law, para. 275: the principal incidents are that—

1. In co-parcenary property no member can alienate.

2. The manager can alienate for necessity only.

3. Every person who has acquired an interest by birth can claim partition.

4. On the death of a co-parcener his interest passes by survivorship and not by inheritance.

5. Every member of the co-parcenary has a right to be maintained from it.

The right to maintenance arises by reason of co-ownership. Mayne's Hindu Law, para. 450. The right of the widow to maintenance is provided for by special texts which do not apply to a male member. At paragraph 450 Mayne refers to sundry special texts which give rights to maintenance to various persons. The case of *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (2) turned on one of these texts relating to the illegitimate son, which will be found in Stokes' Hindu Law Books, page 426 (Chapter I, XII-3).

The son has no right to be maintained from his father's self-acquired property: Mayne's Hindu Law, para. 454.

(4) 27 I. A. 151 at p. 157; 2 Bom. L. R. 945; 24 M. 147; 5 C. W. N. 74; 10 M. L. J. 294; 7 Sar. P. C. J. 761 (P. C.).

(5) 32 I. A. 261; 2 C. L. J. 231; 10 C. W. N. 95; 15 M. L. J. 312; 2 A. L. J. 845; 7 Bom. L. R. 907; 1 M. L. T. 12; 28 M. 508; 8 Sar. P. C. J. 855 (P. C.).

(6) 5 I. A. 61 at p. 70; 1 M. 312; 2 C. L. R. 81; 3 Sar. P. C. J. 795; 3 Suth. P. C. J. 508; 1 Ind. Dec. (N. S.) 208 (P. C.).

(7) 5 I. A. 149; 4 C. 190; 3 C. L. R. 31; 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21; 2 Ind. Dec. (N. S.) 121 (P. C.).

(8) 9 M. I. A. 66 at pp. 85, 86; 1 W. R. P. C. 30; 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 826; 19 E. R. 666.

(9) 12 M. I. A. 1; 9 W. R. (P. C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

(10) 12 B. H. C. R. 94 at p. 96.

(11) 4 M. I. A. 246; 7 W. R. (P. C.) 47; 1 Suth. P. C. J. 186; 1 Sar. P. C. J. 34[illegible]; 18 E. R. 693.

(12) 11 A. 194; A. W. N. (1889) 30; 13 Ind. Jur. 347; 6 Ind. Dec. (N. S.) 552 (F. B.).

In the case of an impartible estate the son is entitled to maintenance as against his father by custom: this custom does not extend to grandsons. The cases relied on are cases of son against father or brother against brother, but there is no case extending the right to a grandson or nephew.

The existence of such rights depends upon custom: *Ekradeshvar Singh* v. *Janeshwari Bahuasin* (13).

In the case of the Pachete Raj it was held that the right to maintenance only extended to the sons and daughters of the Raja: *Nilmony Singh* v. *Hingoo Lall Singh De* (14).

The cases prior to *Sartaj Kuari* v. *Deoraj Kuari* (1) all proceeded on the basis that the impartible Raj was joint family property, and that, therefore, the right to maintenance attached to it as a matter of course: it is now, however, clearly settled that in an impartible estate there is no interest acquired by birth and no co-parcenary: *Sartaj Kuari* v. *Deoraj Kuari* (1), *Sri Raja Rao Venkata Mahipat Rama Krishna Rao Bahadur* v. *The Court of Wards* (3).

There is no survivorship in impartible estate, for the reason that there is no right to claim partition: the two are correlative: *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkataramanayyamma* (15).

Plaintiff here does not come as a relative, but claims that he is entitled to a portion of the income because defendant is a gratuitous taker. Plaintiff had no claim against the devisor, much less against defendant. Even his father was not a co-parcener: he has not lost any right to partition, and is not entitled to any maintenance as a consequence of any such loss. There is no authority in Hindu Law in support of his claim.

(13) 25 Ind. Cas. 417; 42 I. A. 275; 18 C. W. N. 1249; 27 M. L. J. 373; 16 M. L. T. 282; 1 L. W. 863; (1914) M. W. N. 807; 12 A. L. J. 1217; 21 C. L. J. 9; 17 Bom. L. R. 18; 42 C. 582 (P. C.).

(14) 5 C. 256 at p. 259; 2 Ind. Dec. (N. S.) 773.

(15) 29 I. A. 156, at p. 164, 165; 25 M. 678; 7 C. W. N. 1; 12 M. L. J. 299; 4 Bom. L. R. 657; 8 Sar. P. C. J. 286 (P. C.).

Mr. *Kenworthy Brown*, followed: There is no general custom in an impartible Raj that any below the first generation from the last Raja are entitled to maintenance: *Nilmony Singh* v. *Hingoo Lall Singh De* (14).

Mr. *Upjohn*, in reply.—Plaintiff's right to maintenance accrued on his birth. The right to maintenance is irrespective of the right to partition. When the family property is impartible an adult son is entitled to maintenance, since that is the only mode in which he can obtain any benefit from the ancestral estate: Mayne's Hindu Law, para. 454 (5th Edition, page 626).

"Son" and "issue" include three direct descents in the male line: (*idem* para. 108, page 133, and para. 540, page 754), so that what is said of the son extends to the grandson also.

JUDGMENT.

LORD DUNEDIN.—The plaintiff is the son of an adopted son of the late Rajah of Pittapur, and he sues the defendant, the present Rajah of Pittapur, for maintenance. At the time that the suit was raised the father of the plaintiff was alive, but pending the suit he died. The Raj of Pittapur is an impartible Zemindari, and was devised by Will to the defendant, who was described in the Will as the Aurasa son of the late Rajah born of one of his wives, three years after the adoption of the plaintiff's father. The plaintiff's father contested the right of the defendant to the Raj, and alleged that he was not the legitimate son of the late Rajah. In that suit the Subordinate Judge decided that the defendant was not legitimate and that the Raj was inalienable. The judgment was reversed and the case decided in favour of the defendant by the Court of Appeal and by this Board, who, without deciding as to the legitimacy of the defendant, held that in accordance with what had been laid down by this Board in the case of *Sartaj Kuari* v. *Deoraj Kuari* (1), the Zemindari of Pittapur being impartible, there was no right in the plaintiff to quarrel with the alienation made by the Will of the late Rajah.

The defendant in the present case resists the claim on the ground that no legal basis for the claim is alleged. The plaintiff did not attempt to prove that there was any custom affecting this particular Zamindari which enjoined the making of grants of maintenance to any persons, nor did he put his case on any claim resting on relationship, a relationship which, following his father's allegation, he did not allow existed, but he rested his case on what he alleged was the general law, *viz.*, that by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party. The learned Judge of the Subordinate Court gave judgment in favour of the plaintiff for maintenance and arrears. This judgment was reversed by the Court of Appeal, who dismissed the case. The ground on which the learned Subordinate Judge proceeded was shortly this: He considered that the Zamindari was joint family property, only with the peculiar quality that it was impartible. Being joint family property, the right which accrues to every junior member (and a grandson is such a junior member) in the case of the ordinary joint family under the Mitakshara Law exists also in this case. The learned Judges of the Court of Appeal held that after the decisions in *Sartaj Kuari* v. *Deoraj Kuari* (1) and *Rama Krishna Rao* v. *Court of Wards* (3), it was impossible to base the plaintiff's right to maintenance on any right of co-parcenary accruing by birth, and that the case as put was based on no other ground.

It is beyond doubt that the decisions in the Madras Courts prior to the case of *Sartaj Kuari* v. *Deoraj Kuari* (1) embodied the theory that there was joint property in an impartible Zamindari which only fell short of co-parcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself:—

"It must be conceded that the complete rights of ordinary co-parcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perahps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co ownership."

But the decision of the Board which binds their Lordships made that view no longer tenable. It settled that in an impartible Zamindari there is no co-parcenary, and consequently no person existed who as co parcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very Raj in the Pittapur case [*Rama Krishna Rao* v. *Court of Wards* (3).] The import of these decisions was, in their Lordships' view, correctly stated by Sir Lawrence Jenkins in the case of *Bachoo* v. *Mankorebai* (16):—"It has now been definitely decided that in impartible properties there is no co-parcenary."

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara Law the junior members, down to three generations from the head of the family, have a co-parcenary interest accruing by birth in the ancestral property; that this co-parcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of co-parcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right, till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work:—"Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income." It follows that

(16) 29 B. 51 at p. 58; 6 Bom. L. R. 26

the right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the madman, etc. Such persons are debarred from the rights of co-parcenary, but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within the allowed degrees and not themselves stigmatised with the personal defect, get by their birth the full status of co-parcenary.

There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship, but is limited to the widow, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara Law.

Their Lordships will now revert to the position of an impartible Zemindari as it has been fixed by the decisions before referred to. An impartible Zemindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the Zemindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible Zemindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this Zemindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible Zemindari has been so often recognised that it would not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent to the decision in the case of *Sartaj Kuari* v. *Deoraj Kuari* (1). For example, in the case of *Mallikarjuna Prasada Nayadu* v. *Durga Prasada Nayadu* (4) the judgment says:—

"As to the Zemindari estate, the Board held that it was impartible, and the consequence is that the plaintiffs as the younger brothers of the Zamindar retain such right and interest in respect of maintenance as belong to the junior members of a Raj or other impartible estate descendible to a single heir."

But their Lordships may agree here with what was said by the Court in the case of *Nilmony Singh* v. *Hingoo Lall Singh Deo* (14):—

"We can find no invariable or certain custom that any below the first generation from the last Raja can claim maintenance as of right."

Apart from custom, what is left? The matter is tersely put by Sankaran Nair, J., in the Court of Appeal:—

"The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship...As there was no community of interest the property is not burdened with his claim in the hands of a donee."

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the Appellant : Mr. *John Josselyn.*

Solicitor for the Respondent : Mr. *Douglas Grant.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 396 OF 1917.

February 4, 1918.

Present :—Mr. Justice Scott-Smith.

LEHNA SINGH—PLAINTIFF—APPELLANT

versus

BHAGAT SINGH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 10—Punjab Pre-emption Act (I of 1913), s. 30, applicability of—Sale including specific plots and share in shamilat *—Limitation.*

Section 30 of the Punjab Pre-emption Act only comes into operation in cases not provided for by Article 10 of Schedule I of the Limitation Act.

A suit for pre-emption in respect of property consisting of certain specific plots of land together with a share in the village *shamilat* is governed by Article 10 of Schedule I of the Limitation Act, inasmuch as the share in the *shamilat* does not admit of physical possession.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 27th November 1916.

Mr. *Lal Chand*, for the Appellant.

The Hon'ble Bakhshi *Sohan Lal*, for the Respondent.

JUDGMENT.—This is a second appeal from the order of the District Judge of Gurdaspur, dismissing the plaintiff's suit for pre-emption on the ground that it is barred by limitation under section 30 of the Punjab Pre-emption Act. It appears to me that the plaintiff's suit has been rightly dismissed, though section 30 of the Pre-mption Act is not applicable. In my opinion, Article 10 of the First Schedule of the Limitation Act applies and the plaintiff's suit, not having been brought within one year from the date of the registration of the deed of sale, is barred by time. The property sold was certain specific plots of land together with a share in the village *shamilat*.

The specific plots sold no doubt admitted of physical possession but the share in the *shamilat* did not. In *Maluk Singh* v. *Muhammad* (1) it was held, following the previous decisions of this Court, that where the sale in question included a share in the *shamilat*, even though the greater part of the property sold consisted of a separate holding, the whole subject-matter of the sale was not capable of physical possession within the meaning of Act XV, Second Schedule of the Limitation Act, Article 10, and the period of limitation in such a case is one year from the date of registration of the deed of sale. Counsel urges that no doubt that was the law at that time, but that under the Punjab Pre-emption Act of 1913 the present suit is governed by section 30. Section 30, however, only comes into operation in cases not provided for by Article 10 of the First Schedule of the Indian Limitation Act. Article 10 lays down that where the subject of the sale does not admit of physical possession, the limitation for a suit is one year from the date of the registration of the deed of sale. When any part of the property sold does not admit of physical possession, then it is clear that the subject-matter of the sale as a whole does not admit of physical possession and Article 10 clearly applies in accordance with the ruling above quoted.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 65 P. R. 1889.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1654 AND 2180 TO 2196 OF 1916.

June 20, 1918.

Present :—Mr. Justice Teunon and Mr. Justice Richardson.

ABHOY SANKAR MOZUMDAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJANI MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B.C. of 1885), s. 50—Land.

ABHOY SANKAR MOZUMDAR *v.* RAJANI MANDAL,

land and tenant—Presumption of fixity of rent—Instrument stating rent to be variable, whether rebuts presumption—Purchaser of non-transferable holding, recognised, rights of—Sub-division or amalgamation of raiyati *holding—"Hajat", meaning of.*

Although the purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right, yet when he obtains recognition from the landlord, whether by payment or otherwise, then in the absence of special circumstances he is admitted into the original tenancy with all its incidents and becomes the successor-in-interest of his vendor. [p. 360, col. 2.]

"Hajat" is a well-known expression for a sum which though, described as rent but never having been part of the rent, is held *in terrorem* over the *raiyat* and is recorded as held in suspense for the time being. [p. 361, col. 1.]

Per *Richardson, J*.—The language of clause (1) of section 50 of the Bengal Tenancy Act is elliptical and the words which must be supplied after "have held at a rent or rate of rent" are "a tenure or holding or land constituting a tenure or holding." [p. 362, col. 1.]

Both the principal rule enacted in clause (1) and the subsidiary, but in practice extremely important, presumption created by clause (2) of section 50 of the Bengal Tenancy Act assume the continuity and identity of the tenure or holding throughout the whole period from the Permanent Settlement onwards. They are applicable to land which at the time when the question arises may form part only of the *raiyat's* holding. Thus they apply to the several parcels of land of which the holding of a *raiyat* consists when the question arises. Part of the holding may be inherited land. Part may have been acquired by purchase from another *raiyat*. In either case the *raiyat* may tack on his own occupation of the land at an unvaried rent to the occupation at an unvaried rent of his predecessor-in-interest, who as regards lands acquired by purchase from another *raiyat* will include his vendor and his vendor's predecessors. [p. 362, col. 2.]

Section 50 is not affected by the variability of the rent at the inception of a tenancy. If the rent of a tenancy created prior to the Permanent Settlement, under an agreement which provided that the rent should be variable, has not in fact been "changed from the time of the Permanent Settlement", then it "shall not be liable to be increased". If an instrument is executed forty or fifty years later, the mere fact that the rent is expressed to be variable will by itself make no difference, as the provision for variability of rent may be merely a repetition of one of the original incidents of the holding. The true question in such cases would be whether the instrument created a new tenancy or whether it was merely confirmatory of a pre-existing interest or tenancy. [p. 364, col. 1.]

Appeals against the decrees of the Special Judge, Faridpore, dated the 14th of April 1916, affirming those of the Assistant Settlement Officer, Rajbari, dated the 28th of April 1915.

Babus *Sarat Chandra Roy Choudhury, Priya Sankar Mojumdar, Baranashibasi Mukerjee* and *Phenindra Lal Moitra*, for the Appellants.

Babus *Narendra Kumar Bose* and *Biraj Mohan Mozumdar*, for the Respondents.

JUDGMENT.

TEUNON, J.—These 18 appeals arise out of as many proceedings taken on the application of the landlord for the settlement of fair rents, in other words, for the enhancement of rent, under section 105 of the Bengal Tenancy Act. Under section 105-A the tenants contended that they held at fixed rents. In 16 cases the tenants succeeded in both Courts below, and in two they succeeded in the 2nd Court. Hence these 18 appeals by the landlord.

In all the cases it has been established that the tenants and their predecessors have held at a rent which has not been changed during the 20 years immediately preceding suit and they are, therefore, *prima facie* entitled to the benefit of the presumption arising under section 50, sub-section (2) of the Bengal Tenancy Act.

In all the cases but one (Appeal No. 2181) Kabuliyats were executed by the tenants in the years 1295, 1296, 1297, or 1299. In eleven cases (Appeals Nos. 2180, 2184-88, 2190-92, 2194, 2196), these Kabuliyats show that the holdings as now constituted were formed by the amalgamation of inherited holdings with holdings otherwise acquired. The holdings are non-transferable.

The contentions of the landlords-appellants before us then are, *firstly*, that in the eleven cases just referred to the presumption is rebutted inasmuch as the acquisition of a non-transferable holding represents the creation of a new tenancy, and, *secondly*, that in these eleven cases and in six others (that is, in all except Appeal No. 2181) the presumption is rebutted by the further terms of the Kabuliyat.

I am unable to accede to either of these contentions. No doubt the purchaser of a non-transferable holding cannot claim recognition by the landlord as a matter of right, but if he obtains recognition from the landlord, whether by payment or otherwise, then in the absence of special circumstances, which do not here appear, he is admitted into the original tenancy with all its incidents and becomes the successor-in-interest of his vendor.

Even if the opposite view were to be taken, still under section 50 (3) the presumption would not be rebutted as regards the portion or portions of the amalgamated holding representing the inherited holding. This point not having been taken in the Courts below the facts have not been investigated.

The 2nd contention is based on two portions of the Kabuliyats, one (the Kabuliyat in 1654) has been translated and we have been asked to take this as typical of all. The Kabuliyat begins thus: "*Kismat nij Pushamlar madhye nowaji* 1 *Khada*, 11 *Pakhis*, 22 *Kanis jamir kat kami beshi sutre hajat asall bade* Rs. 11-8-17 *gondar jamar...Je ekkhani jote mahasoy diger jamidari sherestai lejha jai....*

Of this passage we have had placed before us translations made or examined by four different translators. One version runs: "Within Kismat Nij Pushamla there is recorded in your Zemindari Sherista a *jote* of 1 *Khada*, 11 *Pakhis*, 22 *Kanis* bearing an annual rent of Rs. 11-8-17 exclusive of all contingencies owing to variations."

The second runs thus: "In Kismat Nij Pushamla there is a *jote* of 1 *Khada*, 11 *Pakhis*, 22 *Kanis* of land bearing a variable rent of Rs. 11-8-17 exclusive of the amount payment whereof is kept in suspense by way of relief."

Neither of these translations can, in my opinion, be accepted as correct. 'Hajat' is a well-known expression for a sum which never having been part of the rent is held *in terrorem* over the Raiyat and recorded as held in suspense for the time being.

The difficulty experienced by the translators is caused by the words "*kami beshi sutre*", but these words in reality convey nothing more than the expression "less or more", and whether read with the figure of area or with the figure of rent contain no admission that the rent has ever varied or is liable to variation.

The later portion of the Kabuliyat on which reliance is placed is as follows:— "Hereafter when you will cause the lands of my said *jote* (or *jotes*) to be measured, I, remaining present at all times with the measurement Amin, shall without concealment have all the lands in my possession measured: Furthermore, on the occasion of such measurement, on taking into consideration the quantity and quality of the land of the said *jote*, the nature and price of the crop and other local conditions; whatever rent you will (may) assess in a just and proper manner, I, bringing into force (abiding by) all the terms of this Kabuliyat, will pay the rent so assessed without demur (excuse)."

The learned Subordinate Judge was in doubt whether the clause above translated referred merely to excess lands, if any, or to all the lands comprised within the holding, but though the language is somewhat obscure and was possibly not intended to be plain to the Raiyat, the clause is, I think, to be read as providing not merely for additional rent on excess land but also for enhancement of rent, roughly on the grounds set out in section 30 of the Act.

But no variation has ever in fact taken place. The Raiyats have held at a rent which has not varied for the 20 years immediately preceding suit. They are, therefore, entitled to the presumption that they have held at the same rent from the time of the Permanent Settlement. The agreements, whether intended or not intended to have effect at some uncertain date after the years 1295 to 1299, certainly do not show that the holdings were created at sometime later than the Permanent Settlement or that between the time of the Permanent Settlement and the years 1295, 1296, 1297 or 1299 (as the case may be) the rent had been changed or had varied.

At the hearing on this point, we have been referred by the appellant to the case of *Upendra Nath Ghose* v. *Dwarkanath Biswas* (1) and by the respondent to the case of *Bisseswar Ray Chowdhry* v. *Rajendra Kumar Singha* (2). The first mentioned case appears to support the contention of the appellant and the second to support the view I take, but the reports do not set out the terms of the Kabuliyat there under consideration and neither case, therefore, can be regarded as an authority on the question before us. In the first mentioned case, moreover, the learned Judges appear to have found the creation of a new tenancy on admissions as to the state of things prior to the execution of the Kabuliyat there in question.

(1) 44 Ind. Cas. 593; 22 C. W. N. 322.
(2) 25 Ind. Cas. 228; 18 C. W. N. 949.

In the Kabuliyat before us I find neither of these things.

On behalf of the appellants it has also been faintly suggested that the Subordinate Judge should have held that the tenants were in possession of excess lands. It is sufficient to say that I agree with the Subordinate Judge's decision on this point.

In Appeal No. 2181, it has also been faintly suggested that the Subordinate Judge has come to his finding as regards the rent for the 20 years preceding suit on insufficient materials. He has proceeded on receipts or *dakhilas* from the years 1297 to 1308 on the oral evidence of the tenant, and on the non-production of the landlord's papers. In so doing he has fallen into no error of law. In this case there is no Kabuliyat and, therefore, nothing on which the appellant can rely as rebutting the presumption arising under section 50 of the Act.

For these reasons I should dismiss all these appeals.

In 16 of these appeals respondents have not appeared. These appeals will be dismissed without costs. In the remaining two the respondents have appeared and these appeals will be dismissed with costs.

RICHARDSON, J.—The language of clause (1) of section 50 is elliptical. "When a tenure-holder or Raiyat and his predecessor-in-interest have held at a rent or rate of rent, etc." To complete the sense something must be understood after the word "held." If we insert merely the word "land", then the rule laid down might apply to land which only forms part of a tenure or holding when the question arises. It is true that in clause (3) which relates back to clause (1), the expression used is 'land held by a Raiyat', but the exception at the end of clause ( ) which speaks of "the tenure or holding" militates against such a construction of that and it would seem that the words which must be supplied are 'a tenure or holding' or 'land constituting a tenure or holding.' This is also consistent with the words 'alteration' in the exception. Alteration implies comparison. The area of the tenure or holding, when the question arises, must under this clause, be compared with the area of the tenure or holding at the time of the Permanent Settlement.

The word 'held' is similarly used in clause (2) and grammar requires that the same words should be supplied after it as in clause (1).

In this view both the principal rule enacted in clause (1) and the subsidiary, but in practice extremely important, presumption created by clause (2) assume the continuity and identity of the tenure or holding throughout the whole period from the Permanent Settlement onwards. The result so arrived at is, I think, in accord with reported cases decided under the Bengal Tenancy Act.

The question of continuity may sometimes give rise to difficulty. In the case of Ryoti holdings, clauses (1) and (2) must be read subject to clause (3), which lays down that "the operation of this section, so far as it relates to land held by a Raiyat shall not be affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding." In this clause "land held by a Raiyat" obviously refers to land which either constituted or formed part of the original holding and the word "affected" means adversely affected, adversely, that is, to the Raiyat. The result seems to be that the main rule and the presumption are made applicable to land which at the time, when the question arises, may form part only of the Raiyat's holding. The Raiyat must, of course, show in the first instance that he has held the land at the same rent at least for the twenty years before suit.

The rule and the presumption may thus be applicable to the several parcels of land of which the holding consists when the question arises. Part of the holding may be inherited land. Part may have been acquired by purchase from another Raiyat. In either case the Raiyat may tack on his own occupation of the land at an unvaried rent to the occupation at an unvaried rent of his predecessors-in-interest, who, as regards land acquired by purchase from another Raiyat will include his vendor and his vendor's predecessors.

In the present case we are dealing with Raiyati holdings. The holdings, it may be

taken, are of composite character, consisting partly of land belonging to the Raiyat's original inherited holdings and partly, it may be, of land acquired by purchase or exchange. The first contention of the appellant landlords is that the Court below was wrong in applying the presumption created by clause (2) of section 50 to holdings of this character or at any rate to the whole of the lands comprised in them, The point turns on clause (3) of the section and I agree with my learned brother that on the materials before us the contention must be rejected.

The second point presents more difficulty and it may be put in this way. If the tenant proves that he has held at the same rent or rate of rent from the time of the Permanent Settlement or for the twenty years before suit, is it a sufficient answer on the part of the landlord to say that while the rent has not in fact been changed, the tenant has held under an agreement, express or implied, according to which the rent would be a variable rent? If we are to be guided by the plain language of clause (1) of section 50, the mere fact that variability of rent is one of the original incidents of the tenancy affords the landlord no protection. When an occupancy Raiyat pays his rent in money, the rent is, generally speaking, subject to enhancement within the limits prescribed by the Act. That is to say, variability of rent is, generally speaking, an original incident of the holding. If it be sufficient for the landlord to advert to that fact, then section 50 would be of little avail to occupancy Raiyats. The section, however, does not provide a method of proving that the rent was originally fixed in perpetuity. It lays down that if the rent has not been changed for a certain time, it shall not be subject to enhancement.

This appears to have been the view taken in *Bisseswar Ray Chowdhry* v. *Rajendra Kumar Singha* (2). That case was referred to and distinguished in *Upendra Nath Ghose* v. *Gopi Charan Saha* (3). There, however, the question related to a tenure and the ground of the decision seems to have been that the agreement by which four tenures were amalgamated into one at a variable rent created a new tenancy. If the agreement created a new tenancy as from its date, it would not signify whether the rent was or was not subsequently varied so as to exceed the total of the rent previously payable for the four tenures. The case of *Upendra Nath Ghose* v. *Dwarkanath Biswas* (1) decided by the same learned Judges while it also related to a tenure is not so easy to distinguish. There a tenure appears to have been held for about 37 years at an unvaried rent but the landlord produced a Kabuliyat of the year 1840, by which the tenure-holder's predecessor-in-interest had expressly agreed to pay "enhanced rent according to the Pergana rate." It does not appear that the rent had ever in fact been enhanced. The learned Judges say: "The Kabuliyat may be considered either as a new contract under which the tenants agreed to pay enhanced rent or as a contract containing recitals of the incidents of the tenancy which was in existence from before. In either view of the matter it shows that the rent was enhanceable." It cannot be denied that if these observations were intended as an expression of general opinion on the construction and effect of section 50 they would apply as well to a Raiyati holding as to a tenure. But the learned Judges did not refer to the language of section 50 or to *Bisseswar's case* (2). Moreover, the terms of the Kabuliyat are not stated and if the Kabuliyat created a new tenancy, there was an end of the matter.

In the present case the transactions by which the landlord agreed to receive a lump sum as rent for all the lands comprised in each holding were, no doubt, accompanied by the execution of Kabuliyats importing that the rent so fixed was variable. But the lump sum was in each case merly the total of the rents previously payable for the separate parcels of land then amalgamated. Regard being had to clause (3), the mere amalgamation of the land, as we have already decided, would not have affected the operation of section 50 in favour of the Raiyat. Does the inclusion in the Kabuliyats of the condition relating to variability of rent make by itself any difference? Does it entitle the landlord to say offhand that here are new tenancies dating from the amalgamation?

(3) 44 Ind. Cas. 595; 22 C. W. N. 321.

In my opinion, when the questions I have put are fairly faced, they must be answered in the negative. Section 50 is not affected by the variability of the rent at the inception of a tenancy. Assume the creation of the tenancy prior to the Permanent Settlement under an agreement, which, whether in writing or not, must be understood to have provided that the rent should be variable. Nevertheless, under clause (1) of section 50 if the rent has not in fact been "changed from the time of the Permanent Settlement," then it "shall not be liable to be increased." If an instrument is subsequently executed forty or fifty years later, the mere fact that the rent is expressed to be variable will by itself make no difference. The provision for variability of rent may be merely a repetition of one of the original incidents of the holding, an incident which does not exclude the operation of section 50. The true question in such cases would seem to be whether the instrument on which the landlord relies is merely confirmatory of the pre-existing interest or tenancy or whether it creates a new tenancy, and in the case of Raiyati holdings this question must be considered with reference to the provision contained in clause (3).

In these appeals, I agree with my learned brother that the landlord has not succeeded in rebutting the presumption created by clause (2) by showing the contrary within the meaning of that clause.

I agree, therefore, that the appeals should be dismissed.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 525 OF 1914.

February 9, 1918.

Present:—Mr. Justice Shah Din and Mr. Justice Wilberforce.

NATHA SINGH—PLAINTIFF—APPELLANT

versus

CHUNI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage—Suit for interest—Subsequent suit for principal, maintainability of—Construction of document.

Where under a mortgage-deed both principal and interest become due, the mortgagee must sue for both together, otherwise he is debarred under Order II, rule 2, of the Civil Procedure Code, from claiming in a subsequent suit what was not claimed in the prior suit. [p. 365, col. 1.]

In a mortgage-deed executed by the defendant in favour of the plaintiff in 1909, interest was fixed nominally at Rs. 6 per mensem and a reference was made to an agreement between the parties to draw up a deed of lease of the mortgaged property. The lease was drawn up on the same day and provided that the mortgagor should pay rent at Rs. 6 per mensem. Plaintiff sued for the rent due to him in 1911 and obtained a decree. Subsequently he brought a suit for the recovery of the principal and interest due after 1911:

Held, that the mortgage and lease constituted one transaction and that the subsequent suit was barred by Order II, rule 2 of the Civil Procedure Code. [p. 365, col. 1.]

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 2nd February 1914.

Dr. *G. C. Narang*, for the Appellant.

Mr. *Govind Das*, for the Respondents.

JUDGMENT.—Plaintiff obtained a mortgage on two houses in July 1909 for Rs. 1,000. Interest was fixed nominally at Rs. 6 per mensem and in the mortgage-deed a reference was made to an agreement between the parties to draw up a deed of lease of the mortgaged houses. This lease was drawn up on the same day and provided that the mortgagor should pay rent at Rs. 6. The deed also provided that the mortgaged property must be redeemed within one year. Plaintiff sued for the rent due to him in 1911 in the Small Cause Court, Amritsar, and obtained a decree. At this time the principal mortgage debt had also become due. He now sues for the recovery of the principal and interest due since 1911. His case was decreed by the Subordinate Judge, but the Divisional Judge has held that it is barred by Order II, rule 2, Civil Procedure Code, under the authority of *Ganga Ram* v. *Abdul Rahman* (1).

Counsel for the appellant argues before us that the deed of lease constituted an entirely separate transaction from the mortgage-deed, and he has referred to *Pindi Das* v. *Lal Chand* (2) in support of his argument. In that case, however, we

(1) 28 P. R. 1907; 93 P. L. R. 1908.

(2) 36 Ind. Cas. 209; 102 P. L. R. 1916; 177 P. W. R. 1916.

notice that the lease was executed some weeks after the mortgage and that in the deed itself there was no agreement that the property should be leased. In the present case the lease and the mortgage-deed were executed on one and the same day and the mortgage-deed itself provided for the execution of a deed of lease. In our opinion the lease was granted simply to provide a mode for realizing interest payable on the mortgage amount, and we must hold that the parties stood in the relation of the mortgagee and mortgagor, and that as this relation is not altered by reason of the execution of the lease it cannot be in any way considered that there were divisible transactions. Similar cases have been discussed in *Baghelin* v. *Mathura Prasad* (3), *Altaf Ali Khan* v. *Lulta Prasad* (4) and *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (5) In none of these cases, however, was there such strong intrinsic evidence that two nominally distinct agreements formed one covenant. In both the Allahabad cases the deed of lease was drawn up subsequently to the deed of mortgage. We consider, therefore, that the learned Divisional Judge was amply justified in considering that there was only one covenant between the parties. In these circumstances *Ganga Ram* v. *Abdul Rahman* (1) is a clear authority that when under a mortgage-deed both principal and interest have become due, the mortgagee must sue for both together and that otherwise he is debarred under Order II, rule 2, Civil Procedure Code, from claiming in the subsequent suit what was not claimed in the prior suit.

We, therefore, agree with the decision of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

(3) 4 A. 430; A. W. N. (1882) 71; 2 Ind. Dec. (N. S.) 992.

(4) 19 A. 496; A. W. N. (1897) 128; 9 Ind. Dec. (N. S.) 320.

(5) 26 M. 662.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1544, 2084, 2085, 2086, 2087 AND 2088 OF 1916.

July 1, 1918.

Present :—Mr. Justice Walmsley and Mr. Justice Panton.

FELU SARKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Rani HEMANTA KUMARI DEBYA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, doctrine of, applicability of—Landlord and tenant—Lease by ijaradar, *after expiry of* ijara *and during pendency of ejectment suit, validity of.*

W., who was the owner of a 12-annas share and an *ijaradar* of the remaining four-annas share of certain lands, made a settlement of the lands on the expiry of the *ijara*, while a suit by the proprietors for his ejectment from the four-annas share covered by the *ijara* was pending:

Held, that the *raiyats* with whom *W.* had settled the lands were liable to be ejected from the four-annas share covered by the *ijara* by the proprietors thereof, as *W.* did not act in good faith in making the settlement. [p. 367, col. 1.]

Appeals against the decrees of the Additional Subordinate Judge, Rajshahye, dated the 30th of March 1916, reversing those of the Munsif, Boalia, dated the 22nd of March 1915.

FACTS will appear from the judgment.

Mr. *U. N. Sen Gupta* (with him Babus *Biraj Mohan Majumdar* and *Probodh Kumar Das*), for the Appellants.—The defendants obtained settlement from Messrs. Watson and Co. in 1305, while they were in possession under the *ijara* lease, therefore, the settlement is valid. The defendants have acquired a right of occupancy, and, therefore, the plaintiff has no right to eject the defendants. Referred to *Binad Lal Pakrashi* v. *Kalu Pramanik* (1).

If the defendants are not tenants, they are trespassers from 1305. In order to eject the defendants, the plaintiff must show that he was in possession within 12 years before suit. The suit was brought 16 years after the defendants obtained settlement and entered into possession.

[Babus *Bepin Behari Ghose*.—There is nothing in the written statement.]

(1) 20 C. 708; 10 Ind. Dec. (N. S.) 477 (F. B.).

The tenants were not made parties to the suit of 190[illegible], though the tenants were in actual physical possession, therefore, the present suit is barred by Order II, rule 2 of the Civil Procedure Code.

The lower Appellate Court is wrong in assuming that the lands are *nij jote* lands, though there is nothing in the plaint and no evidence was adduced on that point

The defendants took settlement from a co-proprietor in 1305 and paid rent, therefore, they have acquired a right of occupancy. Referred to *Mookta Keshee Dossee* v. *Koylash Chunder Mitter* (2).

Babu *Bepin Behari Ghose, II* (with him Babu *Debendra Nath Bagchi*), for the Respondent.—The appeals are concluded by findings of fact. The plaintiff obtained a decree for *khas* possession against the *pro forma* defendants who are alleged to have made settlement of the entire interest with the present appellants. The question is, when did they obtain this settlement.

We say that the tenants obtained the settlement during the pendency of the suit. In the written statement, defendants nowhere state that settlement was made by *pro forma* defendants during the continuance of the *ijara*. *Binad Lal Pakrashi's case* (1) does not apply here. Referred to *Madan Mohan Singh* v. *Raj Kishori Kumari* (3).

The doctrine in *Binad Lal Pakrashi's case* (1), cannot override the doctrine of *lis pendens*.

Latest case in which *Binad Lal Pakrashi's case* (1) is referred is *Krishna Nath* v. *Muhammad Wafiz* (4).

The case reported as *Binad Lal Pakrashi* v. *Kalu Pramanik* (1) is not applicable here, as the absence of good faith has been found on both sides. The question of *khamar* land would arise if the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (1) were applicable. Assuming it is *khamar*, the tenants cannot acquire either the right of occupancy or non-occupancy, as the settlement was made by one co-sharer. Referred to *Radha Prashad Wasti* v. *Esuf* (5).

Mr. *U. N. Sen Gupta*, in reply.—When a co-proprietor settles land with a tenant the other co-proprietors are not bound to recognise him but if he remains on the land for 12 years, the other co-proprietors cannot eject him upon the principle of the decision in *Binad Lal Pakrashi* v. *Kalu Pramanik* (1).

JUDGMENT.—These appeals are preferred by the principal defendants, the tenants. The plaintiff brought the suit from which they arise to recover *khas* possession of her share, approximately four annas, in certain land, by ejecting the principal defendants, and she made the Midnapore Zemindary Company, owners of the remaining interest, *pro forma* defendants. Her case was that she granted an *ijara* of her share to Messrs. Watson & Co., predecessors of the Midnapore Zemindary Company, and that at the expiry of the *ijara* she brought a suit against them in 190[illegible], and obtained a decree, and that the tenant defendants obtained settlement of the lands during the pendency of that suit. The suits were dismissed by the first Court, but they were decreed on appeal.

The defence was that the defendants obtained settlement from Messrs. Watson & Co. in 1305 while the latter were in possession under their *ijara* lease.

The contentions pressed by the appellants-defendants are based mainly on the assertion that they obtained settlement in 1305, and I think it will be convenient to state them before turning to the findings recorded by the learned Subordinate Judge.

They are as follows:—

(1) The settlements were taken from Messrs Watson & Co. who were owners to the extent of about 12 annas and *ijaradars* of the balance, and, therefore, it cannot be said that the defendants came upon the land other than in good faith.

(2) Even if it be held that the *ijara* lease came to an end before 1305, the suits are barred by limitation.

(3) If Messrs. Watson & Co. were not *ijaradars* in 1305, they were at any rate proprietors to the extent of about 12 annas; the defendants obtained settlement from them and after being in possession for twelve years, they acquired rights of occupancy which cannot be assailed.

(2) 7 W. R. 493 at p. 495.

(3) 17 Ind. Cas. 1; 17 C. L. J. 384.

(4) 31 Ind. Cas. 789; 21 C. W. N. 93; 23 C. L. J. 563.

(5) 7 C. 414; 9 C. L. R. 76; 3 Ind. Dec. (N. S.) 816.

GHULAM DASTGIR *v.* TEJA SINGH.

(4) The tenants were not made parties to the suit of 1908, although the plaintiff could not get *khas* possession without obtaining a decree against them and, therefore, the present suit is barred by Order II, rule 2.

(5) As to the finding that the lands are proprietor's *nij jote*, this claim was not made in the plaint, it was not advanced in the first Court, and no evidence was adduced in regard to it.

The propositions embodied in the first four arguments are elementary, and it is conceded on the one hand that if the defendants obtained settlement in 1305, the arguments are unanswerable, and on the other that they have no foundation if the defendants did not obtain settlement until several years later.

The learned Subordinate Judge begins his judgment by an unfortunate misstatement: he says that the *ijara* expired before 1305, whereas it is admitted that there is no evidence to show when it expired. The mistake, however, does not vitiate his judgment, he goes on to record clear findings which are not affected by his belief that the *ijara* had undoubtedly come to an end before 1305. He points out that there are no *kabuliyats* in respect of the settlements said to have been made in 1305 and 1310: that the *kabuliyats* of 1317 were executed while the title suit was pending: and that the explanation offered for the absence of Dakhilas during the period 1305 to 1310 is not satisfactory; he then holds that the settlements cannot be placed earlier than 1317 and points out that at least some of the defendants knew of the litigation that was is progress, and that at any rate the *pro forma* defendants who granted settlement cannot have been acting *bona fide*.

These findings of fact dispose of four of the arguments advanced by the appellants, and it is unnecessary to say anything about the question whether the land is the proprietor's *nij jote* or not.

The appeals are dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1613 OF 1916.

February 19, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

GHULAM DASTGIR—DEFENDANT—APPELLANT

versus

TEJA SINGH—PLAINTIFF—

RANDHIR SINGH—DEFENDANT—RESPONDENTS.

Benami *transaction—Purchase made by father in name of son—Presumption—Burden of proof—Estoppel—Purchaser from ostensible owner, position of—Notice of title of true owner, effect of.*

Where a purchase of real estate is made by a father in the name of his son, the presumption is in favour of its being a *benami* purchase and the burden of proof lies on the party in whose name the estate is purchased to prove that he is solely entitled to the legal and beneficial interest in such purchased estate. [p. 369, col. 1.]

The mere fact that a man has built a house and put his son's name on a tablet in it does not signify that the house belongs to the son. [p. 369, col. 1.]

Where a vendee from an ostensible owner is aware that he is purchasing a doubtful title and also receives direct notice of the true owner's claim before registration of the deed the true owner is not estopped from setting up his title as against the purchaser. [p. 371, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 22nd May 1916.

The Hon'ble Mr. *Fazl i-Hussain*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi* and Mr. *Hari Chand*, for the Respondents.

JUDGMENT.—On the 9th of March 1914, Randhir Singh, defendant No. 2, sold a house situate in Gawal Mandi, Lahore, to Ghulam Dastgir, defendant No. 1. Plaintiff Sardar Teja Singh, who is the father of Randhir Singh, brought the suit out of which the present appeal arises for a declaration to the effect that the house in question was his sole property and that the defendants had no title thereto. The site upon which the house is built was purchased from one Kanhaya Lal in the name of Randhir Singh by a sale deed, dated 29th of June 1908, but plaintiff contends that the deed was executed *benami* in his son's name, he himself being the real purchaser. He also contends that the house was built with funds supplied by him and that it was not built for his son. The vendee, on the other hand, contends that the

plaintiff bought the site and built the house on it as a gift to Randhir Singh and that the latter made a valid sale to him. On the pleadings of the parties nine issues were framed, which will be found in the judgment at page 232 of the paper book. The lower Court has discussed all these issues, but it is not necessary for us to refer to all of them. It will be sufficient to note that the Court found that the plaintiff was in possession of the house at the time of the institution of the suit, that the site was purchased by the plaintiff and the house was built by him, and that the name of defendant No. 2 was entered *benami* in the sale-deed of 1908; that the plaintiff never made a gift of the site and the house to his son and that he is not estopped from alleging that the sale was *benami*. It further held that defendant is not entitled to any equitable relief in consideration of the sum paid by him to Randhir Singh. On these findings plaintiff's suit was decreed, and Ghulam Dastgir has appealed to this Court.

The first point taken up by Mr. Fazl-i-Hussain, Advocate, on behalf of the appellant, was that the plaintiff had given no satisfactory explanation as to why he had got Randhir Singh's name entered in the sale-deed of 1908, if he did not intend him to be the owner of the property sold thereby. It is true that plaintiff has not satisfactorily explained this. At the time of the sale in 1908 he was an Inspector of Police serving in the Ferozepore District, and the reason which he gives for not getting his own name entered in the sale-deed is that he was absent in another district and could not conveniently appear at the time of registration and, therefore, sent Randhir Singh to appear instead of him. This is not very satisfactory, because at the time of registration there is no necessity for the vendee to be present before the Sub-Registrar. It is further pointed out that in the notice which plaintiff had inserted in the *Paisa Akhbar* on the 13th of March 1914 (see page 23 of the paper book) he stated that the deed was registered in his son's name through a mistake or owing to some other reason. In other words, he did not then give the reason which he now assigns. At the time of registration Janmeja Singh, the brother of the plaintiff, appeared as guardian of Randhir Singh, who was a minor, and Counsel for the appellant has commented on the fact that Janmeja Singh has not been examined as a witness in order to ascertain what was the real reason why Randhir Singh's name was entered in the deed. For plaintiff it is explained that he is not on good terms with his brother and this is borne out by the evidence of Khalifa Hakumat Rai, see page 274, line 18, of the paper-book. In our opinion this question as to why plaintiff got Randhir Singh's name entered in the deed instead of his own is not of very much importance. It is a practice in this country for a man buying property to get the name of his wife or of his son entered in the deed instead of his own. Plaintiff may have had no particular reason for getting his son's name entered, or he may have had various reasons which he did not wish to state in Court. On the other hand, it is urged on behalf of the respondents that the defendant-appellant has not explained why Sardar Teja Singh should have treated his son Randhir Singh in such a very liberal fashion. He has got four other sons, and to none of them has he made a gift of this sort. The only explanation suggested is that Randhir Singh has got a defect in one of his legs or is clubfooted, and that on this account Teja Singh wished to provide for him. We do not, however, think that this was any sufficient reason for such a provision being made for him. Randhir Singh has appeared before us and told us that he is at present employed as a clerk in the Municipal Office on a salary of Rs. 22 a month. It is, therefore, clear that he has been educated and is fit to earn his own living, and we do not consider that the fact that plaintiff has not given a very satisfactory explanation as to why he caused Randhir Singh's name to be entered in the deed of sale of the site is very material to show that the plaintiff intended the property purchased to belong to his son.

Another part of defendant-appellant's case was that there was a stone tablet let into the house, on which was engraved

the name of Randhir Singh, the contention being that this shows that the house belonged to him. The evidence on this point has been discussed in detail by the lower Court. It did not consider it to be very strong, some of the witnesses—for instance Dr. Amir Shah (D. W. No. 18)—appear to be men of position and respectability and we hardly think there are sufficient reasons for rejecting their evidence. At the same time, Dr. Amir Shah has stated that he himself has built a house which bears a tablet with his son's name upon it, but that the house belongs to himself and not to his son. This shows that the mere fact that a man has built a house and put his son's name on a tablet in it does not signify that the house belongs to the son. Our conclusion then is that there may have been a tablet bearing Randhir Singh's name in the house in dispute, but even if there was it would not necessarily show that the house was his property.

Now we have it clearly shown that the site was bought with the plaintiff's money and that the house thereon was constructed out of funds supplied by him. Moreover, all the correspondence relating to the house with the Lahore Municipal Committee was conducted by or on behalf of the plaintiff himself. Mr. Shafi on behalf of the respondents argues that these facts having been proved there is no presumption that the site and house belonged to Randhir Singh. He referred *inter alia* to the following authorities:—*Gopeekrist Gosain* v. *Gungapersaud Gosain* (1), wherein it was held by the Privy Council that where a purchase of real estate is made by a Hindu in the name of one of his sons, the presumption of the Hindu Law is in favour of its being a *benami* purchase and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.

Moulvie Sayyud Uzhur Ali v. *Musammat Bebee Ultaf Fatima* (2), in which the Privy Council held that the principle with respect to *benami* purchases between Hindus laid down in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1) is equally applicable to similar transactions between Muhammadans.

In *Moulvie Sayyud Uzhur Ali* v. *Musammat Bebee Ultaf Fatima* (2) it was held that the real criterion in such a case as the present is to consider from what source the purchase money comes; that the presumption is that a purchase made with the money of *A*, in the name of *B*, is for the benefit of *A*; and it cannot be presumed from the purchase by the father, whether a Muhammadan or Hindu, in the name of his son that there was an advancement in favour of that son.

Counsel not only relies strongly upon the above rulings, but also upon the following facts, which according to him conclusively prove that the plaintiff is the owner of the property in dispute:—

(1) Plaintiff supplied the purchase money of the site.

(2) He is in possession of the title-deed and has produced it.

(3) He is in possession of the property.

(4) He erected the building at his own expense.

(5) He has received rent from the Police authorities for part of the building rented to Khan Bahadur Safaid Ullah Khan, Inspector of Police.

The receipts for rent have been signed either by or on behalf of Sardar Teja Singh. There is some oral evidence that plaintiff stated to certain persons that he had given the house to Randhir Singh, but in our opinion this oral evidence is not of much value and certainly does not outweigh all the other evidence which goes to show that plaintiff is himself the owner of the property. Beyond the fact that the deed of sale of the site is in the name of Randhir Singh, there is very little evidence to show that he is really the owner. No doubt, he sometimes realised rent of the house but his father, the plaintiff, may very easily have allowed him to do this either as his agent or that he might be able to maintain himself.

The next point urged by Mr. Fazl i. Hussain on behalf of the appellant was that even if plaintiff was the owner of the house, he had allowed it to be considered

(1) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20.

(2) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538.

that Randhir Singh was the owner and he was, therefore, now estopped from denying the fact. He referred to *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (3), where the following passage taken from a former judgment of the Privy Council occurs: —

"It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it".

Mr. Shafi on behalf of the respondents also relies upon the concluding portion of this passage, for he urges that Ghulam Dastgir had notice of plaintiff's title, or, at all events, that circumstances existed which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it. In this connection he has referred to the agreement dated 4th of March 1914 entered into between Randhir Singh and Ghulam Dastgir, which is marked as Exhibit D-10 and printed at page 217 of the paper-book. This was an agreement for sale entered into a few days before Randhir Singh sold the house in dispute to defendant appellant. It shows that the purchaser was to retain Rs. 8,000 out of the purchase money, in case anybody set up a dispute in regard to the house, the said sum to be paid after the settlement of such dispute, and after the deduction of any debt which might be proved to be a charge on the house sold. Counsel also refers to a corresponding clause in the sale-deed itself, which will be found at the top of page 219 of the paper-book, which is as follows :—

"If anybody sets up any dispute with regard to ownership of the house and the site sold, I, the vendor, shall be responsible and answerable to defend that dispute".

He draws special attention to the fact that the house and the site were separately mentioned. He also refers to the letter (Exhibit D-4) dated 15th February 1914 (page 211 of the paper book) written by Randhir Singh to Ghulam Dastgir. The portion to which he draws attention is as follows : —

"As regards the conversation regarding sale of the house which took place between you and me through Sheikh Hussain Bakhsh, from whom I came to know that you want to enquire about my age and the original owner of the house, I can assure you that I am 22 years old and that the house is my property, I purchased the site of that house, filed a plan thereof, and got it constructed."

Counsel urges strongly that these documents show that Ghulam Dastgir knew that he was purchasing a doubtful title and anticipated some dispute. Also that he was not sure whether Randhir Singh was of full age and competent to contract. It is urged that he should have made some enquiries from the vendor's father Sardar Teja Singh. We are inclined to agree with Counsel that the above facts show that Ghulam Dastgir was not quite certain of Randhir Singh's title and of his competency to make a valid contract, and we think defendant certainly should have made further enquiries and specially should have enquired from Sardar Teja Singh who could have given him all information on the point. In addition to the above Counsel refers to the petition which Sardar Teja Singh presented to the Sub-Registrar, Lahore, on the 11th of December 1913, which is marked as Exhibit P-15 and is printed at page 16 of the paper-book. In this Sardar Teja Singh states :—

"I, being a Government employee, purchased a plot of land in the name of my son, Randhir Singh, I have constructed a building thereon by spending a great deal of money. Now my son, Randhir, has fallen under the clutches of certain Sahukars of Lahore, whose profession is to secure deeds for considerable amounts on payment of only small sums. He intends to sell or mortgage the *kothi* at the instance of Sahukars, brokers and

(3) 22 C. 909 at p. 919; 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602 (P. C.).

immoral persons, but he has no power to mortgage or sell it. I want that he should not be able to take such action without my knowledge I, therefore, pray that at the time of presentation of any deed executed by Randhir Singh, my son, in respect of the said *kothi* intimation in this respect may be given to me."

Acting upon this petition the Sub-Registrar Lala Amar Nath warned the defendants at the time when they presented the deed for registration (see his evidence in this respect printed at page 248 of the paper-book). This gentleman's evidence has not been questioned by Counsel for the appellant, and we see absolutely no reason for not accepting it. It shows that Ghulam Dastgir had direct notice of Teja Singh's claim to the house which he, therefor, purchased with his eyes open. Under the circumstances, we consider that plaintiff is not estopped from denying Randhir Singh's title to the house and that no equities arise in favour of Ghulam Dastgir. Mr. Fazl-i-Hussain says that his client has paid large sums of money to Randhir Singh out of the purchase money, namely,

Rs. 2,000 earnest money ;

Rs. 1,000 before the Sub-Registrar on the 19th of March 1914 ;

Rs. 1,900 in cash paid on the 1st of April 1914 ;

Rs. 5,137 paid to Ramun Shah, a creditor of Randhir Singh, on the 1st May 1914 ;

Rs. 100 paid to the vendor on the 11th May 1914; and

Rs. 1,762 paid to him on the 17th of June 1914.

Now the summons in the present case was served upon Ghulam Dastgir on the 29th April 1914 and we think it extremely improbable that he was so imprudent as to pay nearly Rs. 7,000 thereafter either to the vendor or to the vendor's creditor. If, however, he did so, he did it with his eyes open and in full knowlege of the vendor's defective title, and he is not entitled to compensation from Sardar Teja Singh, the real owner of the property.

We, therefore, hold that the plaintiff's claim has been rightly decreed by the lower Court and we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 299 OF 1917.

June 24, 1918.

Present :—Mr. Justice Walmsley and Mr. Justice Panton.

Raja SASI SEKHARESWAR ROY BAHADUR—PLAINTIFF—APPELLANT

versus

HAJIRANNESSA BIBI AND OTHERS —DEFENDANTS—RESPONDENTS.

Accounts, suit for—Death of agent—Legal representatives of agent, liability of—Procedure.

The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representatives from all liability to the principal. After the death of the agent the proper procedure in the suit would be that the statement of claim put in by the plaintiff should be investigated, preferably by a Commissioner in the presence of the representatives of the deceased agent. The onus would be on the plaintiff to prove each item in the sum which he claims, *i. e.*, to prove that each item was actually realised by the agent and further that it was not paid to his credit. The representatives of the deceased agent would be at liberty to adduce such evidence as they please to show either that the money was not realised by the agent or that after realisation it was paid to the plaintiff. The amount actually due being thus ascertained, the Court would pass a decree against the assets of the deceased agent in the hands of the representatives. [p. 373, col. 1.]

Kumeda Charan Bala v. *Asutosh Chattopadhya*, 16 Ind. Cas. 742; 17 C. W. N. 5; 16 C. L. J. 282, not followed.

Appeal against the decree of the District Judge, Rajshahi, dated the 7th November 1916, affirming that of the Subordinate Judge of that District, dated the 26th January 1916.

FACTS appear from the judgment.

Babu *Gunada Charan Sen*, for the Appellant.

—The learned Judge in the lower Appellate Court made a distinction between guardian and agent. As a matter of fact this suit cannot be governed by the case reported as *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1), for that was a suit against the legal representatives of the agent but was instituted against the agent himself. This case is governed by *Maharaj Bahadur Singh* v. *Bisanta Kumar Roy* (2). This is a suit brought against the agent for accounts and, therefore, after his death his legal representatives are liable to the extent of

(1) 16 Ind. Cas. 742; 17 C. W. N. 5; 16 C. L. J. 282.
(2) 18 Ind. Cas. 876; 17 C. W. N. 695.

the assets which have come into their hands from the agent. I must have my remedy in some way. If the defendant Baharulla acted as my agent, if he realised rents from my tenants and did not pay me anything if he did leaving some properties why should not my dues be paid out of that estate?

The case of *Maharaj Bahadur Singh* v. *Basanta Kumar Roy* (2) clearly supports my position and the case of *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1) does not go against me, as there the suit was brought against the legal representatives.

Mr. *Wahed Hossein*, for the Respondents.—The question is whether the suit was framed rightly. So far as the case of *Maharaj Bahadur Singh* v. *Basanta Kumar Roy* (2) is concerned, that case is no authority for the proposition that such a suit may be maintained against the legal representatives of the deceased defendant, for that case was brought against the minors under certain sections of the Guardians and Wards Act. Hence the case reported as *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1) is the first case to be applied.

Moreover, here minors are involved as the representatives of Baharulla, and they do not know the terms of contract between their father Baharulla and the plaintiff and the proper person who could render accounts was Baharulla. If the case of *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1) is an authority in this case, then this suit should be withdrawn. So far as minors are concerned, there is another case, *Manmothonath Bose Mullick* v. *Basanto Kumar Bose Mullick* (3).

JUDGMENT.

WALMSLEY, J.—This appeal is preferred by the plaintiff. The case has had a long history. The deceased defendant Baharulla executed a Kabuliyat in favour of the plaintiff, by which he undertook to pay to the plaintiff a sum of Rs. 1,375 per annum and in return to collect the rents of a Mahal belonging to the plaintiff. He failed to carry out the conditions of the Kabuliyat and the plaintiff instituted this suit in April 1908 as a rent suit. Baharulla filed a written statement in which he objected that the sum to be paid by him could not be treated as rent, and a few months later the plaintiff amended his plaint and converted the suit to a suit for money instead of a suit for rent. The amendment was allowed. The first Court then decreed the suit in respect of the claim for damages for non-delivery of papers but dismissed it so far as the claim for money due under the Kabuliyat was concerned, as not being maintainable in the form in which it was brought. The learned District Judge on appeal upheld that decision. Then the case was brought to this Court and it was ordered by this Court that the suit should be treated as a suit for account and it was remitted to the first Court.

Before the case could be taken up by the learned Subordinate Judge Baharulla died. The plaintiff then brought his representatives on the record in his place. They objected that the suit could not be maintained as against them and both the lower Courts have upheld that contention. The learned District Judge purports to base his views upon the case of *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1).

It has been urged before us on behalf of the plaintiff-appellant that, inspite of the death of the agent, he is at liberty to continue the suit against the representatives and that if the representatives cannot be asked to explain the papers kept by the deceased agent, at any rate, he, the plaintiff, is entitled to have his statement of claim against them investigated. It appears to me rather an extraordinary contention made on behalf of the defendants that the death of Baharulla should at once exonerate them from all further liability to the plaintiff. If the agent collected money belonging to the plaintiff which he ought to have made over to the plaintiff and failed to do so and died while such money was still due to the plaintiff, it is hard to believe that the agent's representatives are free from all liability, and the case of *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1), to which I have just referred, appears to me to be an authority for taking this view. In fact, the present case is a stronger one, because the suit was brought and the order of this Court in appeal was made against the agent him-

(3) 22 A. 332; A. W. N. (1900) 98; 9 Ind. Dec. (N. S.) 1254.

self, whereas the case to which I have referred was brought after the agent's death against the representatives.

It appears to me that the proper order to pass in this case now is that the case should go back to the first Court and that the statement of claim which the plaintiff put in after the death of Baharulla should be investigated, preferably by a Commissioner, in the presence of the representatives of the deceased agent. The onus will be on the plaintiff to prove each item in the sum which he claims, that is, to prove that each item was actually realized by the agent and further that it was not paid to his credit. The defendants will be at liberty to adduce such evidence as they please, to show either that the money was not realised by the agent or that after realization it was paid to the plaintiff. The amount actually due will be ascertained and the Court will pass a decree against the assets of the deceased agent Baharulla in the hands of the representatives, that is to say, if any sum is found due to the plaintiff. The decree of the first Court with regard to the sum of Rs. 50 for damages will stand. The order of the first Court making the plaintiff liable for proportionate costs to the defendants is set aside. The plaintiff will get his costs in this Court and in the lower Appellate Court from the contesting defendants.

The learned Vakil on behalf of the defendants asks that the plaintiff should be required to issue fresh processes against the minor defendants who have not entered appearance. This may be unnecessary but the plaintiff is directed to do so.

PANTON, J.—I agree.

Suit remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 866 OF 1914.

March 7, 1918,

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

TANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

TARA CHAND—PLAINTIFF—RESPONDENT.

Res judicata—*Custom, erroneous decision on point of, whether operates as* res judicata—*Question not necessary to be decided*

The question of the existence of a custom is one of fact and an erroneous decision on a question of custom between the same parties operates as *res judicata* in a subsequent suit, even though the subsequent suit relates to other property than that concerned in the former suit. [p. 374, col. 1.]

Where, however, it is not necessary to decide a question of custom as against a party to a suit, a decision on the question does not operate as *res judicata* against that party in a subsequent suit. [p. 374, col. 1.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 31st March 1914.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Dharam Das Suri*, for the Respondent.

JUDGMENT.—The facts of the case out of which the present appeal arises are as follows:

Before the first Settlement, Keora and Chatra (see the pedigree table at page 7 of the paper book) gifted the land in dispute and other land to their sister's son Bisakhi. On the death of Bisakhi his widow, *Musammat* Chando, was in possession. She made a gift of that part of Bisakhi's land which is not now in suit to her daughter's son, Tara Chand, the present plaintiff. The present defendants, the agnates of Keora and Chatra, the original donors, brought a suit for declaration that the gift should not affect their reversionary rights. During the pendency of the suit *Musammat* Chando died, so the suit was changed into one for possession. It was held in that suit up to the Chief Court that upon the donee dying sonless the property gifted would revert to the collaterals of the donors. It was however, held that as the reversioners, with the exception of Babu, one of the defendants in the present suit, had acquiesced in the gift, their suit should be dismissed; Babu was given a decree for his 1/6th share. The rest of the land which was not the subject of the gift by *Musammat* Chando to Tara Chand is now in dispute and the question is whether Tara Chand, daughter's son of the original donee, is to get it or the defendants who are reversioners of the original donors. In *Gurdit Singh* v. *Prem Kuar* (1) and *Lachhman* v. *Bhagwan Sahai* (2) it is

(1) 3 Ind. Cas. 604; 84 P. R. 1909; 76 P. L. R. 1909; 118 P. W. R. 1909.

(2) 10 Ind. Cas. 277; 68 P. R. 1911; 160 P. L. R. 1911; 208 P. W. R. 1911.

laid down that there is no reversion to the collaterals so long as descendants of the donee, whether in the male or female line, are existing. According to these rulings Tara Chand, daughter's son of the original donee, is entitled to the land and not the defendants who are reversioners. But the question is whether the decision in the previous case operates as *res judicata*. The lower Courts have held that it does not. The lower Appellate Court was of opinion that the question was purely one of custom, but there is a sound proposition of case-law that an erroneous decision operates for the subject-matter then in suit but no further. It was further of opinion that as the land in suit was not in suit in the former case, the erroneous decision as to custom in that suit was not a bar to the trial of a similar issue of custom in the present suit. As regards the defendants other than Babu we have no difficulty in holding that the question is not *res judicata*. It was found in the former suit that they had acquiesced in the gift to Tara Chand and, therefore, their suit failed on that ground alone and it was not necessary to come to any decision on the question of custom so far as they were concerned. As regards Babu, however, we hold that the decision on the question of custom is *res judicata*. The point was directly and substantially in issue in the former suit between him and Tara Chand and was heard and finally decided by the Court in that suit, and it cannot, in our opinion, be re-opened. The question of the existence of a custom is one of fact, and there is no authority in support of the proposition that an erroneous decision on a question of custom between the same parties does not operate as *res judicata* in a subsequent suit even though the subsequent suit relates to other property than that concerned in the former suit.

We, therefore, accept the appeal, and in modification of the orders of the lower Courts give plaintiff a decree for possession of 5/6ths of the land, but the claim to the remaining 1/6th share which is that of Babu is dismissed. In the peculiar circumstances of the case we direct that the parties should bear their own costs in all the Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 125 OF 1916.

May 27, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

BINDU BASINI DASSYA AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

SRIMANTA SIL—OBJECTOR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Mortgage suit—Purchaser of portion of equity of redemption, whether can object to sale in execution—Independent title, whether can be enforced in execution—Civil Procedure Code (Act V of 1908), s. 47.

A purchaser of a portion of the mortgaged property who is joined as a defendant in the mortgage suit, cannot, under section 47, Civil Procedure Code, object to the sale of the mortgaged property under the final decree in the mortgage suit on the ground that he has acquired a new and independent interest in that portion of the property. [p 375, col 2.]

Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. [p. 375, col. 2.]

Appeal against the order of the Subordinate Judge, 1st Court, Pabna, dated the 22nd February 1916.

FACTS appear from the judgment.

Babu *Dwarkanath Chuckerbutty* (with him Babus *Mohini Mohan Chuckerbutty* and *Madhab Govinda Roy*), for the Appellants.—Assuming that defendant No. 8 has a new title, what right has he to come under section 47 of the Civil Procedure Code, as a party to the suit as judgment-debtor. If he is a stranger, he cannot prefer a claim in a sale in execution of a mortgage decree, because the sale was at the instance of the Court. Section 47 applies only to adjust the rights of parties to a suit as judgment-debtors or decree-holders, but the claim section does not. If he assumes a new character he cannot come as a party to the suit. If the defendant No. 8 cannot come as a representative of the judgment debtor, by taking a new lease from the landlord he cannot divest me of my right of a decree-holder. It has been held by this High Court that if an application is made by one as an outsider and not as a mortgagor under section 47, such application is not sustainable and must be dismissed.

[FLETCHER, J.—This seems to be right. The other side can bring a separate suit on his new title but he cannot come under section 47.]

Babu *Bepin Behari Ghose* (with him Babu *Harish Chandra Roy*), for the Respondents,—

Mortgagor's right, title and interest was purchased by Kamini Sundari Debi, in execution of a money-decree before. She then sold it by a Kobala to me. Then the landlord after the sale took possession of the land on the ground that it was a non-transferable occupancy holding and there was abandonment. Then I took a settlement from the landlord subsequent to the suit by paying *selami*. The question is whether I claimed under that mortgage. The property now being sold is in my possession. When I was sued, I was sued in my capacity as a representative of the judgment-debtor, *i.e.*, as a purchaser, as an assignee. Therefore I was estopped as a purchaser from raising my claim. But when I set up my new claim I could come under section 47. I would ask your Lordships to refer to sub-section (2) of section 47. As an assignee from the mortgagor I admit I was estopped from coming under section 47.

[FLETCHER, J.—What is sold is the right, title and interest of the judgment-debtor and if his property is gone, your right is gone.]

[SHAMSUL HUDA, J.—You cannot re-open the question so far as you are a purchaser from the judgment-debtor.]

The result of what your Lordships say would be to drive me to a different proceeding.

JUDGMENT.

FLETCHER, J.—This is an appeal by the decree-holders against an order of the learned First Subordinate Judge of Pabna, dated the 23rd February 1916. The decree-holders obtained a mortgage decree in a simple mortgage. One of the properties that was apparently subject of the mortgage decree was a Raiyati holding. Whether it is transferable or non-transferable is a matter we do not know and we are not concerned with in the present litigation. The present objector, who was the defendant No. 8, was sued on the ground that he had purchased a portion of the mortgaged property from the mortgagor. The ordinary preliminary decree was made on the 25th February 1914, and there being failure to pay the amount found due on the mortgage, the final decree was passed on the 29th September 1915, and the property was then directed to be brought to sale. The defendant No. 8 then applied under the provisions of section 47, Civil Procedure Code, and objected that the property in question could not be brought to sale on the following ground: The defendant No. 8 had purchased a portion of the mortgaged property originally from a lady named Kamini Sundari who had acquired it at a sale in execution of a money-decree; and as regards that interest, it is quite clear that the defendant No. 8 was bound by the final decree in the mortgage suit directing that the property should be brought to sale. But the defendant No. 8 also in these proceedings which he purported to originate under section 47 of the Code of Civil Procedure set up a fresh and independent title, namely, that he had acquired from the landlord, who alleged that he was not bound by the transfer made by the mortgagor, a new and independent interest in this portion of the property. That is the matter the decree-holders object to being enquired into in the present proceedings. I think that is right. That interest, if the defendant No. 8 has in fact acquired it, is a matter wholly independent of the interest of the mortgagor that was comprised in and made subject to the mortgage which was being enforced in the present suit. Any right that the defendant No. 8 has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the present suit. I think it is quite clear that that new and independent interest is not a matter relating to the execution, discharge or satisfaction of the decree passed in the mortgage suit. That being so, the present appeal should be allowed. We make no order as to costs.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 3 OF 1918.

June 19, 1918.

Present:—Mr. Justice Maung Kin and Mr. Justice Rigg.

KATHLEEN MAUD KERWICK—

APPELLANT

versus

FRED. JAMES RUPERT KERWICK—

RESPONDENT.

Trusts Act (II of 1882), ss. 81, 82—Property purchased by husband in name of wife—Advancement—Presumption—English Law.

The rule of English Law that when a husband buys property in the name of his wife he should be presumed to have done so for the benefit of the wife, applies to persons of British nationality resident in India, and the mere fact that after the purchase the husband continues to manage the property and collect rents is not sufficient to rebut the presumption. [p. 377, cols. 1 & 2; p. 382, col. 1.]

Mr. *Giles*, for the Appellant.

Mr. *Higinbotham*, for the Respondent.

JUDGMENT.

RIGG, J.—The parties in this case were married in 1901. They have two children, Dagmar aged about 14 and Terence aged about 10. The husband is an Assistant Engineer in the Public Works Department, whose pay with allowances does not now exceed Rs. 500 a month. In 1907 he bought a piece of land from Dr. Pedley for Rs. 10,000, and built a house, which he called Kildare, on it at a cost of about Rs. 16,000. He made out a cheque for Rs. 9,000 to his wife who endorsed it over to the vendor. The deed of sale of the land was registered in her name. In 1908, he again bought another piece of land, and built Kerry on it. This land was similarly registered in his wife's name. In 1915, the parties separated after a quarrel. The question for decision in this suit is whether these two houses and pieces of land were intended as a gift to the wife, or whether there is a resulting trust in favour of the husband on the ground that they were merely placed in her name *benami* in order to evade a supposed rule prohibiting Government servants from speculating in landed property. The learned Judge on the Original Side found that there was no advancement and decreed the plaintiff's suit for a declaration that the properties were his and should be transferred to his name. The first point for consideration is whether the English Law relating to the presumption to be made from the investment of property by a husband in his wife's name is to be applied to the parties or not. The trial Judge describes the parties as English, but thought that because they had spent most of their lives in India, the presumption that would be made by an English Court should not be drawn in view of the fact that the husband paid for the property, managed it and took the receipts. He treated the case on the same footing as a purchase by a Hindu or Mohammadan, and presumed that the transaction in the circumstances was a *benami* one. Mr. Higinbotham states that he is not prepared either to affirm or deny that the parties are English, but I am of opinion that there is not the slightest reason for supposing that they are not of British nationality. It is inconceivable that if they were not, plaintiff would not have said so and thereby cut away at once one of the main foundations of the defendant's case. By virtue of section 13 (2) of the Burma Laws Act, the law to be administered on the Original Side of this Court is the same as would be administered by the Calcutta High Court, and in the present case that would be the common law of England. Mr. Higinbotham contends that sections 81 and 82 of the Trusts Act, 1882 (which is in force in Rangoon), governs the case. He admits that the burden of proof lay on his client in the first instance, as the tenor of the documents was adverse to his claim. But he contends that as soon as he proved the source of the funds for the purchase of the property, and his client's receipt of the rents, the burden shifts. Section 81 of the Trusts Act is as follows: "Where the owner of property transfers or bequeaths it and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative". Illustration (*d*) to that section deals with the case of a gift from a husband to a wife, and says that the presumption in such a case is that she takes the beneficial interest. The presumption is an inference from the relationship of the parties. I do not think that the enactment of this section was intended to abolish any presumption arising from the personal

law of the parties. The question still remains whether the attendant or surrounding circumstances of the case are inconsistent with such a presumption.

In *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1) their Lordships of the Privy Council declined to import the presumption that a purchase of property by a Hindu father in favour of his son was an advancement; but they did not do so on the ground that such a presumption could in no case be made in India, but that it was one that could not properly be applied to Hindus, and that its incorporation would be foreign to and objectionable in a system of law that recognizes the purchase by one man in the name of another, to be for the benefit of the real purchaser. For similar reasons, their Lordships have declined to import the English presumption in the case of gifts by Mohammadans. On the other hand, the English doctrine of advancement was recognised in *Kishen Koomar Moitro* v. *Mrs. M. S. Stevenson* (2). The learned Judges said: "As between the father and daughter, both of English extraction, and living under the English Law, why should the doctrine of advancement not be considered applicable? If by English Law certain rights are secured to a child by the doctrine of advancement, why should the child by living with its parents in this country be deprived of that right? Had litigation arisen between French and his daughter that would have been governed by English Law and the doctrine of advancement might have been effectually pleaded by the daughter." The doctrine was assumed to apply in the case of *McGregor* v. *McGregor* (3), which was decided by the Recorder of Rangoon in 1898. In section 39 of the Transfer of Property Act there is a reference to a provision for advancement and such an expression could only apply to persons of British nationality. The mere fact that the parties have been educated or have chiefly resided in India cannot affect their personal law, and in my opinion the burden of proving that the registration of the land on which Kerry and Kildare are built in the name of Mrs. Kerwick was not intended as an advancement lies upon the plaintiff.

The parties lived happily together until January 1915. With the exception of the evidence of the parties themselves, there is very little evidence of facts antecedent to or contemporaneous with the purchase to show whether the intention of the plaintiff was to create a trust or an advancement. Mrs. Kerwick says that she and her husband were on very good terms and that he told her he intended to make provision for her. In paragraph 5 of the plaint Kerwick states that he purchased the properties with the object of making provision for his children. In cross-examination he said that he wished the property to benefit his children not after their death, but to help in their education and that he intended to give them to them when they reached a reasonable age. He took out 3 insurance policies one of which was intended for Terence, and in 1912 he bought Kenmare which he admits was intended for Dagmar. Apart, therefore, from Kildare and Kerry, he did make provision for his children, which makes it the less unlikely that he made some provision for his wife, and the more probable that the property in her name was intended for that purpose.

It is argued that if Kerwick's intention was to benefit his wife, he would not have entered into so wild a speculation as house building on borrowed capital. But the same argument would apply with reference to his intention to benefit his children, and it is clear from his own statements that he did not make the purchases as a speculation but as provision for his family.

It is also urged that it is improbable that he would borrow money from his sister to benefit his wife.

There is, however, no more improbability in his borrowing from a wealthy sister to benefit his wife, than to benefit his children who were very young at the time. On any view of the case Kerwick's financial proceedings are somewhat remarkable. The learned Judge, after reviewing the financial resources of Kerwick, says that it is very unlikely that a man possessed of Rs. 8,000 would borrow Rs. 50,000 to make a present to his wife. He remarks that it is significant that between 1907 and 1912 Kerwick could

(1) 6 M. I. A. 53 at p. 75; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20.
(2) 2 W. R. 141.
(3) 4 Bur. L. R. 88.

or at any rate did only repay Balthazar and Son Rs. 4,500, and that at the time of separation his wife did not contend that he had any other sources of income except his salary. I do not think that this passage correctly represents the financial position and dealings of Kerwick. Kerwick admits that he had a banking account with Messrs. Thos. Cook and Son only. In his letter to his wife, Exhibit 6, dealing with his financial position and the burden of debts, he says that his salary (inclusive of profits from the houses) is Rs. 515 and that after making certain payments, he will only have Rs. 185 on which to live. He continues: "The other source from which I sometimes derived a little is at an end, after your and Lindsay's bloodthirsty plans and threats at Father Colombo's house." Such is his own account of his financial position, but his pass-book exhibits a most extraordinary situation. Credits to the amount of Rs. 1,87,000 odd were placed to his account from 1907—15 and vary from Rs. 5,000 in 1909 to Rs. 42,000 odd in 1914. The loans from Balthazar will not account for much of this money. In 1905, the credits are only about Rs. 1,800; the next year they are Rs. 3,200 but when building begins in 1907, they leap up to Rs. 18,000. His banking account does not show that he had Rs. 8,000 in 1907. The money may have been elsewhere but if so, there was no necessity for him to borrow Rs. 8,000 from a sister, or Rs. 12,000 from Balthazar. It is not necessary to enter into Kerwick's financial dealings generally, as they are not really relevant to the case, nor are there the materials on the record for such an examination; but I think it may be said that Kerwick must have thought it possible to raise considerable sums of money, before he commenced building, or he would not have undertaken the ventures. Before he paid off what was due on Kildare and Kerry, Kerwick bought Kenmare in November 1912 for Rs. 17,000 for his daughter, and in the same month he writes to his wife in England and suggests that she should send him a power-of-attorney to enable him to deposit the title deeds of Kerry to help her father. In March 1913, he borrowed Rs. 12,000 for his father-in-law and appears to have taken no security from him for the loan. Mrs. Kerwick admits that her husband treated her generously, and the loan to the father-in-law was certainly a very generous proceeding on the part of a man with such small ostensible means. This loan and the character of his financial proceedings generally are, I think, a sufficient answer to the contention that a man of his means would not buy two houses for his wife. The parties were on very good terms at the time, and there was no idea that they were likely to separate. So long as they lived together, the rents from the property were their mutual benefit. In these circumstances, it is no more unlikely that Kerwick intended an advancement for his wife when he purchased Kildare and Kerry, than that he would lend her father Rs. 12,000.

It is common ground that Kerwick managed the properties, collected the rents and paid them into his own banking account. This, however, may have been merely an arrangement to suit the convenience of the parties. Mrs. Kerwick was in England much longer periods than her husband, who remitted her £ 20 a month for the expenses of herself, the two children and a niece. In *Grey* v. *Grey* (4) the fact that a father received the profits of an estate for his adult son for twenty years, built much and provided materials for buildings, and treated for the sale of an estate, was not held sufficient to rebut the presumption of an advancement arising from the purchase of the property in the son's name. In the case of English people resident in India, the arrangement made would probably be determined to some extent by considerations of convenience, and I do not think the management of the estate by Kerwick is conclusive evidence that the registration of it in his wife's name was a trust only. The houses were in the name of Kerwick in the Municipal Office at the time of the filing of the suit, but how long they had stood in his name is not clear. Kerwick says that so far as he knew of recent years the tax bills have been made out in his name, and explains that he means for the last two or three years. It would have been

(4) (1677) 2 Swans. 594 at p. 599; Finch 338; 1 Ch. Ca. 296; 19 R. R. 150, 36 E. R. 742.

easy for him to produce evidence to show that they had always stood in his name. The same considerations as to convenience would apply, if the arrangement was that he should manage them on behalf of his wife. Kerwick explains that the reason why the land was registered in the Registration Office in his wife's name was his belief that he was not allowed to speculate in land, but that in 1912 he found out that there was no rule forbidding officers to buy a house for themselves to live in but they were only prohibited from buying from natives of India. Clause 9 of the Government Servants Conduct Rules, 1904 (as corrected up to 1912), allows any Government servant to buy immoveable property for residential purposes, and allows members of the Provincial or Subordinate Civil Services to acquire immoveable property by purchase with the sanction of the Local Government or the Head of a Department specially empowered to grant such sanction. Kerwick is a member of the Provincial Service. There is no absolute prohibition in the rules against a purchase of house property from a native of India; report of the intention of the officer making the purchase must be made to the Commissioner for his orders. Had Kerwick really consulted the rules (1912), he would have found that he could not purchase Kenmare without permission. Moreover, if his intention was to conceal his operations from his superior officials, why were not the houses also put in his wife's name in the Municipal Office? Until he came into Court, Kerwick never suggested that the houses had been registered *benami* in order to evade the rules. On the 18th November 1912 he wrote to his wife as follows: "Now, dear, Pa to get on with his business wants some security in the bank and I let him have the house papers of Kerry house, which are now free from debt, to deposit in the Chartered Bank... Well as the house is in your name the Bank have refused Pa. I wanted to draw up a stamped paper for a power-of-attorney...giving me full power to sell, borrow money on or to register any transfer of your property..." Further on in the same letter he tells her that he is buying Kenmare and says: "I cannot put this house in your name as you are not here, so see what you have lost". He explains that he was merely joking. The pleasantry is very weak and does not explain the use of the expression "your property". In reply to this letter she sent him a power-of-attorney. Now at the time this letter was written, Kerwick had found out that he was not prohibited from holding property, if his story is to be believed. It is difficult to understand why instead of asking for a power-of-attorney to sell her or borrow on property, he did not ask her for once to retransfer the houses to his name, which would have saved much trouble. He did not make any attempt to have the houses transferred back to his name, but suggested that if she had been in India the new purchase would have been put in her name also. If the old transactions were *benami*, the expression "see what you have lost" is meaningless. On receiving the power-of-attorney, he seems first of all to have borrowed Rs. 12,000 on the security of life insurances and then to have repaid the sum by a loan from Balthazar (see Exhibits C and Z). The promissory note, Exhibit C, was signed by him, "Mrs. K. M. Kerwick by her attorney." He says that he borrowed the money from Balthazar on the security of Kerry. The way in which the promissory note, Exhibit C, was signed appears to indicate an intention of holding his wife responsible, which is not a very intelligible proceeding if she had no property to meet the debt. In my opinion, Kerwick's contention that he put Kildare and Kerry into his wife's name *benami* is not even plausible.

In January 1915 the parties quarrelled but decline to disclose the reasons for the estrangement. Mrs. Kerwick's parents had been staying with them at Kerry in 1911 and left the house owing to a quarrel with Kerwick. It is urged that Mrs. Kerwick would not have permitted her husband to send them away if the house had been her own. This, however, depends on whether she decided to side with her husband or not—either they or her husband had to leave Kerry, and unless she intended to break with him, the natural course of events was for the parents to quit. I am unable to see in what way this incident tends to show that she was not the owner of Kerry. Mrs. Kerwick says that when she quarrelled with her husband in January, she

threatened to go home and asked him how the house stood. He then gave her Exhibit 7, which is a statement of the debt on Kildare and Kerry, the taxes due, insurances, the names of the tenants and the rents. Apparently he is also alleged to have given her Exhibit 8, a statement of her father's debt. Kerwick states that he does not remember giving these two papers to her, and with reference to the former, he is unable to suggest any reason why he drew it up if it was not for his wife. He thinks he drew up Exhibit 8 to assist his memory. If Exhibit 7 was intended as a mere aid to his memory, it is difficult to understand why it commences with the information that the papers are with Balthazar (a fact he could not have forgotten) or why there is no mention of Kenmare. Exhibit 8 begins, "Pa's loan from Gasper Rs. 6,000." Gasper was the insurance agent. On the Ist April Kerwick repaid Balthazar Rs. 12,000, which was made up of Rs. 6,000 repaid by "Pa" and another Rs. 6,000 borrowed from Gasper. It is argued that the words at the end of Exhibit 8 "Pa paid Kathleen £ 20" indicate that the note was one for his private information, as, if it was intended for her, the expression would have been "Pa paid you." There is some force in this contention, but it is not conclusive, as he may have made out the account in the more formal manner of inserting the name of the recipient. On the whole, I think the balance of probability is in favour of Mrs. Kerwick's version.

The parties were unable to come to an understanding and on the first March 1911, a deed of separation was drawn up by a priest. It provides that Kerwick shall pay his wife £ 8 monthly out of his income, and also more if possible, that the father is to keep Terence at school and have him with him during the vacations, a similar arrangement, *mutatis mutandis*, being made for Dagmar. Mrs. Kerwick was to leave for England at once and her husband was to pay her passage. The defendant contends that she accepted so small a sum of £ 8 because it was understood that she was the owner of Kildare and Kerry. She is supported in her contention by Father Colombo, whose evidence, however, has been rejected by the learned trial Judge on the ground that it is probable that Father Colombo's memory is at fault. This conclusion is reached by the learned Judge after consideration of the subsequent conduct of the parties. This portion of the case has been argued very elaborately at the Bar. Both parties admit that something was said about the houses. Kerwick's version of the conversation is that nothing was said about his wife receiving the income from the Rangoon houses, but that Father Colombo did say that £ 8 was too small an allowance, and that when she called attention to the income from the houses he explained that they were heavily mortgaged and brought in very little. There is no mention about the income from the houses in the deed itself, and the omission is noteworthy. The argument to be drawn from it would have been still more forcible if the deed had been drawn up by a conveyancer instead of by a young Italian priest. There is no evidence to show whether the expression "and more if possible" had any allusion to the houses which Kerwick said were heavily mortgaged. Father Colombo says he thinks Kerwick said the property belonged to his wife and that this was the idea he gave him. In answer to interrogatory No. 10, which was as follows: "Is it not a fact that at the said interview the plaintiff proposed to make the defendant an allowance of £ 8...that you suggested an allowance of £ 12; that the defendant then remarked that the plaintiff had properties in Rangoon which brought the plaintiff an additional income; that the plaintiff then said that after paying taxes and rates and interest on mortgages he got about Rs. 50 a month only out of his properties and that he was keeping those properties for the benefit of his children and that if the income from the properties was to be further discussed the plaintiff would break off the discussion?" Father Colombo replied, "in this particular meeting of which mention is made there was no discussion about any house property. It was only at a subsequent meeting when the deed was signed that a mention was made of the property and it is referred to in answer to No. 11, examination-in-chief."

In answer to the 12th and 13th interrogatories by plaintiff the witness would not swear that there was any claim by de-

fendant to the property or admission by the plaintiff on the subject, but in answer to the 14th question he again said Mrs. Kerwick laid claim to the property. Turning now to Exhibit H, written by plaintiff on the 15th November, I find the following passage: "I have remitted to you monthly the sum of Rs. 120 as stipulated in the priestly agreement, and I am remitting Rs. 50 a month as interest on your father's loan of Rs. 6,000 to the money-lender in Rangoon, which ordinarily should go to you to make your monthly allowance, *i. e.*, Rs. 170 (120 *plus* 50)." Kerwick explains that this statement means that if he had not had to send the money to the money-lender he would have sent it to her, if she had not claimed the house and her father had paid the debt; and in cross-examination he says that he had promised to give her more than £ 8 if possible and intended to carry this out. I do not think on this evidence that the passage in Exhibit H read with the 10th interrogatory can be construed into an admission on the part of Kerwick that he was bound to pay her Rs. 50 out of the income from the houses. Father Colombo's memory as to the details of the conversation seems defective. It seems to me most probable that Mrs. Kerwick was dissatisfied with the allowance, and pointed to the house property income and made some claim to it, whereupon Kerwick said they were very heavily mortgaged and the payments on them absorbed nearly the whole of the income, but that if possible he would pay her more than the £ 8. Father Colombo's evidence does not amount to much more than that he carried away the impression that Kerwick had settled the property on his wife, an impression that might arise from Kerwick undertaking to allow her more if the interest on her father's loan was paid him, and the houses were let, but Colombo will not swear positively that there was any definite admission or claim as to the ownership. Objection has been taken to the admission of oral evidence at the trial as to the contents of certain letters sent by Kerwick, but not asked for by him, to be produced at the trial. The Judge ruled that Mrs. Kerwick could be asked her recollection as to the contents of the letters. We are of opinion that the evidence on page 49 of the record about the contents of these letters is inadmissible, sections 22, 65 and 66, Evidence Act, and ruled accordingly at the hearing. In enacting section 22, the Indian Legislature followed the rule laid down in *Lawless* v. *Queale* (5) in preference to that in *Slatterie* v. *Pooley* (6). This portion of the evidence was used by the trial Judge to discredit Father Colombo, the trustworthiless of whose evidence I have already discussed.

When the deed of separation was drawn up, Dagmar was in England and Terence was sent to school at Mussoorie where he fell ill. Mrs. Kerwick promptly cancelled her power-of-attorney and informed Balthazar of her action. In August Kerwick agreed to Terence being taken to England but refused to allow him to see his mother's parents. Negotiations broke down owing to this restriction, which Mrs. Kerwick regarded as ridiculous. According to the deed of separation Mrs. Kerwick was to go home at once, but her husband seems to have been unable to meet the necessary expenditure (see Exhibit 6). In September he wrote to her detailing his difficulties and asking her to leave him a free hand in respect to the houses. In October (Exhibit G) she replied and asked him to sell Kildare and transfer Kerry to her free of debt. In his reply (Exhibit H) he did not repudiate her claim to the houses, although in his cross-examination he stated that he considered the claim an impudent one. He discussed the debts due on the houses and said that Rs. 12,000 had been raised on the mortgage of Kerry for her father. He did not mention the fact that Balthazar had been repaid. Kerry is apparently free from debt to Balthazar. It is clear that whether Kerwick denied his wife's claim subsequently to the separation or not she did not abandon it. It is suggested that she used it merely as a means for bringing pressure to bear on him to let her have Terence. She admits that the real contest was over the boy, and even after the suit had been filed she wrote to her husband and said that "the houses never troubled her". But the argument is a

(5) 8 Ir. L. R. 385.

(6) (1840) 6 M. & W. 664; 1 H. & W. 16; 10 L. J. Ex. 8; 4 Jur. 1038; 55 R. R. 760; 151 E. R. 579.

two edged weapon. It is equally. open to the defendant to argue that the plaintiff used his right of custody of the boy, to induce her to abandon her claim to the houses. They had been represented to her as being heavily mortgaged and as bringing in a very small income. Her father owed Kerwick money. In these circumstances she was probably willing to waive her rights in the Rangoon property, if an arrangement satisfactory to her was reached about Terence. I do not think the argument from pressure gives real assistance to either party in this case. No arrangement was reached and in December Mrs. Kerwick's Advocates wrote to Kerwick. The subsequent correspondence between the parties' Advocates throws no light on Kerwick's intention when he bought the property in 1907 and 1908.

The evidence relating to Kerwick's intention is somewhat meagre, but the onus of proof lay upon him and in my judgment he failed to discharge it. I think that the probability is that he intended to make provision for Mrs. Kerwick, just as he was making provision for his children. The letter, Exhibit I, from which the most reasonable inference would be that it was written to the owner of the property, cannot be explained away as a mere *jeu d'esprit*. It is not until the deed of separation has been signed that Kerwick suggested that the property was not Mrs. Kerwick's and then so far as admissible evidence on the record goes, not until the suit is about to be filed. I have already stated my reasons for believing that Kerwick's explanation that the property was transferred to his wife *benami* is untrue. There is practically nothing left in plaintiff's favour, except his management of the property, and this is inconclusive evidence of ownership in a case such as this. I would allow the appeal and dismiss the plaintiff's suit with costs in both Courts.

MAUNG KIN, J.—I concur in holding that the onus is on the plaintiff of rebutting the presumption that the purchases were by way of advancement in favour of his wife, the defendant.

The Indian Law on the subject of advancement is contained in section 82 of the Indian Trusts Act, which has been made applicable to Rangoon. The section provides :—"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

It will be seen that on the subject of any presumption arising in the case of the transferee being the wife or the child of the person paying the consideration, nothing is stated in the section. The question of advancement or no advancement is left as one of intention, which will have to be proved according to the law of evidence. The same is the case in English Law.

So, in this case the question would be, "Did the husband intend that his wife should hold the property purchased as trustee for him or that she was to have the beneficial interest therein?"

On whom, then, does the onus lie as to the intention of the husband ?

In England it is easy to answer the question, because a presumption in favour of an advancement to the wife is allowed.

In India there is at first sight some difficulty, for we have decisions between Hindus as well as between Mahomedans to the effect that the English presumption of advancement cannot be recognised. The reason assigned in the case of Hindus is their inveterate practice of holding land in the name of another. The principle of the decisions in Hindu cases has been extended to those of Mahomedans, because as observed by their Lordships of the Privy Council in *Moulvie Sayyud Uzhur Ali* v. *Musammat Bebee Ultaf Fatima* (7), though "we cannot apply to the decision of a case between Mahomedans...any reasons...drawn exclusively from the Hindu Law. ... it is perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among the Mahomedans as among the Hindus." And as regards the Burmans we have the case of

(7) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538.

Meeyappa Chetty v. *Maung Ba Bu* (8), where the principle was extended by a Bench composed of Sir Charles Fox, C. J., and Parlett, J. The learned Chief Judge observed in his judgment: "Neither Court had in mind the long line of decisions referred to at pages 531 and 627 of Ameer Ali and Woodroffe's Evidence Act as to the presumption to be made in India when a person purchases property and takes a conveyance in the name of a relation. As far back as 1854 it was decided by the Privy Council that the presumption made in English Law that the purchase in such a case was for the benefit and advancement of the person to whom the conveyance is made, does not apply in India, and that the presumption in India is that the purchase is *benami* and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property." It does not appear that the learned Chief Judge grounds his decision on the same reason as did the Privy Council in the Mahomedan case above cited.

It has now come to be stated in text books and judicial decisions that in India a purchase by a husband in his wife's name creates no presumption of gift to her or of advancement for her benefit. I venture to think that the proposition stated in this form is far too wide and embraces cases of persons who were not in view, when the judicial decisions against the presumption of advancement were given. The case of persons of British nationality was clearly never under consideration. The presumption allowed by English Law is not a presumption *juris et de jure* but is one of fact and I consider that this presumption is made in English Law, not only because the wife is found to be invested with one of the principal incidents of ownership, but also because the husband in putting the property in her name must have had some intention regarding the transaction and the probabilities are that the intention is to confer a benefit upon the wife. I am unable to see why such a presumption cannot be drawn in the present case. Under section 114 of the Indian Evidence Act Courts may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. There can be no doubt that in the case of persons of British nationality residing in India it cannot be said that they have the inveterate habit of holding property in the name of others. I would, therefore, hold that the English presumption of advancement should in this case be drawn in favour of the defendant.

As regards the facts also I am entirely of the same opinion as my learned colleague.

Appeal allowed.

(8) 8 Ind. Cas. 450; 3 Bur. L. T. 62.

CALCUTTA HIGH COURT.

CIVIL APPEAL No. 29 OF 1918.

July 1, 1918.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

JOSEPH HENRY JONES AND ANOTHER —APPELLANTS

versus

THE ADMINISTRATOR-GENERAL OF BENGAL—RESPONDENT.

Succession Act (X of 1865), ss. 101, 105—Remoteness—Charitable bequest, whether subject to rule against perpetuities—English rule, whether applicable to Indian bequests.

Section 101 of the Succession Act applies to all bequests, whether they are of a charitable nature or not. [p. 391, col. 1.]

The question whether a bequest is invalid for remoteness, does not depend upon what did in fact happen but upon whether under the terms of the Will the bequest might be delayed beyond the time specified in section 101 of the Succession Act. [p. 391, cosl. 1 & 2.]

The positive language of the Succession Act as contained in the provisions of section 101 is sufficient to preclude the application of English Law. [p. 390, col. 1.]

A testator, after bequeathing certain properties to a church subject to certain conditions, directed that should the conditions be ever broken or in any way infringed, then the properties shall be made over to another church:

Held, that the gift over was invalid for remoteness. [p. 391, col. 2.]

JONES, J. H. *v.* ADMINISTRATOR-GENERAL OF BENGAL.

Appeal against the decision of Mr. Justice Chaudhuri, dated the 4th March 1915.

FACTS appear from the following judgment of

CHAUDHURI, J.—This suit was instituted on the 17th February 1911 for the construction of the Will and Codicils of one Henry Wilkin Jones for ascertainment of the rights of the parties interested in his estate and for administration of that estate; and for the purpose also of a scheme being framed for an account and for other reliefs. It came on before me and I delivered my judgment on 16th July 1912, which is to be found in I. L. R. 40 C. 192*. At that time Eliza Humphreys was alive. She died on 10th April 1917 and upon her death certain questions have arisen, and this is an application for further construction of the Will having regard to her death.

At the hearing of this suit the Administrator-General submitted certain questions for the decision of this Court which are to be found on pages 198, 199 *et seq* in 40 Cal. These questions were dealt with but the following question was left undecided, *viz.*, where the corpus was to go. The testator had merely devised the income and there was no special provision about the corpus. Although I allowed the matter to stand over at that time having regard to the fact that Eliza Humphreys was then alive, yet I stated that section 59 of the Succession Act provided that where the interest or produce of a fund was bequeathed to any person and the Will afforded no indication of an intention that the enjoyment of the bequest should be of limited duration, the principle as well as the interest should belong to the legatee and that that section, although it spoke only of the interest or produce of a fund, applied equally to immoveable property. I gave my opinion that a gift of income without more was a gift of the corpus, even though the gift was to the separate use or through the medium of a trust. I take the same view now. Here the income having been given and nothing being said about the corpus, the corpus follows it.

The next-of-kin who were very strongly represented at the hearing of the suit have again appeared before me on this occasion and contend that the decision in the case was not correct and that having regard to the death of Eliza it is open to them now to question the decision. I do not think it is so open. In addition to the many points which were then discussed, a further point has been raised by learned Counsel appearing for them that under the Succession Act, section 101 applies to charitable bequests. In placing his arguments before me he has put forward various contentions. With regard to some of them there can be no doubt whatsoever. He says first of all that having regard to section 2 of the Succession Act, the Court must look to that Act and that alone for the law of British India applicable to all cases of testamentary and intestate succession. We also say quite correctly that where an Indian Statute deals with a matter, the positive language of the Statute precludes the application in India of the principles of English Law. It is undoubtedly correct that the Indian Succession Act is a positive enactment and must be followed wherever it is applicable. Section 101 of the Succession Act provides against perpetuity. He says that although the ruling against perpetuity does not apply to charitable gifts under the English Law, still under the Succession Act it must be held that it is applicable. He says that the Legislature considered the question of charitable bequests in connection with the Succession Act and he relies upon section 105 as an instance where express provision is made with regard to charitable gifts. I do not consider that the argument is sound. It means this that under the Succession Act no bequest of any kind can be made to a charity, because it is likely to last beyond the time provided for under section 101. Now section 101 of the Succession Act embodies restrictions upon the power conferred by section 99 and it has to be read in connection with the sections relating to void bequests with which that Chapter deals. It is difficult to read section 101 as contemplating institutions. Charitable institutions need not be persons, the term person being defined by section 3 of the Succession Act. The definition of person in the Succession Act is that a person includes a company or association or a body of persons whether incorporated or not. The language of section 101 seems to be particularly inapplicable to the case of charities. It is

*See *Administrator-General of Bengal* v. *Hughes*, 21 Ind. Cas. 183—*Ed.*

quite correct to say that where there is an Indian Statute reference to English Statutes is not permissible in considering it, but the rule against perpetuity which has been recognised as existing in the Law of England independently of any Statute is founded upon considerations of public policy which are as applicable to places outside England as to England. This has been laid down by the Privy Council [*Yeap Cheach Neo* v. *Ong Cheng Neo* (1)]. Learned Counsel appearing for the next-of-kin has not been able to place any authority before me in support of his contention. The Succession Act was enacted in 1865, more than 80 years ago, and although questions of this character have frequently come up before the Law Courts in India and also in England, I do not find any reference to any case in which a similar view was put forward for consideration. As an instance of a gift for general public purposes I may refer to, amongst others, the case of *Mitford* v. *Reynolds* (2). I may also refer to *Rev. Joseph Colgan* v. *Administrator-General of Madras* (3), where it is laid down quite distinctly (pages 443-444): "The general rule is that all gifts, whether of real or personal property, which purport to appropriate property to a certain purpose in perpetuity are void as contrary to public policy, unless the purpose be a charitable one." A charitable use to come within the application of that principle must possess three characteristics, indefiniteness, meritoriousness and prepetuity. It seems to me that section 101 is so worded that it excludes the case of charitable bequests. If it was intended by the Legislature that the rule of perpetuity would also apply so far as charitable uses or charitable trusts are concerned, nothing could have been easier than to have put in one simple sentence in the same manner as section 105 create a limitation. I, therefore, decide against the contention of the next-of-kin. I do not think it was open to the next of-kin who have appeared and raised this question now to raise it.

The sixth question before me at the original trial runs as follows:—

"What, in the event of the provision in favour of the Circular Road Baptist Church being validly forfeited for breach and infringement of the conditions, would be the destination of the funds that had been applicable for such provision? Would in such case the gift over contained in the 8th clause of the Second Codicil take effect or would there be an intestacy as to such funds or what otherwise would be the effect or result of such forfeiture?" I dealt with that question in page 209* of my judgment. On that occasion the next-of-kin strenuously contended that the whole of the gift to the Baptist Church and other charities failed on the ground that the gift over might not operate within perpetuity limits. This contention was based upon *In re Bowen Lloyd Phillips* v. *Davis* (4). I held against the contention. I held that there was no intestacy not even as regards the surplus income, and I do not think that the same question can now be agitated before me in a different form. Having regard, however, to the nature of the Will and the Codicils and the questions involved in them I think all the parties should get their costs out of the estate, the costs of the Administrator-General being as between attorney and client. Costs to be taxed as of a hearing. The Administrator General will hand over the moieties to the Howrah Baptist Church and the Circular Road Baptist Church.

Mr. *C. O. Remfry*, instructed by Messrs. *Orr, Dignam & Co.*, for the Appellants.—The gift over from one charity to another is governed by the rule against perpetuities as laid down in section 101 of the Indian Succession Act, because there was no knowing when the conditions laid down in the Will would be broken by the Baptist Church to which the properties were bequeathed in the first instance. The language of section 101 is free from ambiguity and should be given effect to, whatever might be the English Law on the point. If the Legislature intended that the English Law about bequests to charity should not come within the purview of section 101 of the Indian Succession Act, they would have clearly expressed that intention by adding an exception or proviso to the section. The question as to whether

(1) (1874) 6 P. C. 381.
(2) (1842) 1 Ph. 185; 41 E. R. 602; 65 R. R. 372; 12 L. J. Ch. 40; 7 Jur. 3.
(3) 15 M. 424; 5 Ind. Dec. (N. S.) 648.
(4) (1893) 2 Ch. 491; 62 L. J. Ch. 681; 3 R. 529; 61 L. T. 789; 41 W. R. 535.

*Page of 40 C.—*Ed.*

the bequest is valid is not *res judicata* as against my client, because by the decree based on the previous judgment this question was expressly left over for a future decision after the death of the annuitant, Eliza Humphreys.

Mr. *A. A. Avetoom*, instructed by Messrs. *Watkins & Co.*, for the Lall Bazar and Howrah Baptist Churches respectively, based his arguments on an interpretation of section 2 of the Indian Succession Act and relied upon the decision of the Judicial Committee, reported as *Lee* v. *Fagg* (5), in support of his contention that the rule against perpetuities was the same in England as in any other country under the British Empire; the rule being based on public policy and being independent of Statutes.

Mr. *Camell*, on the same side, urged that the application of section 101 of the Indian Succession Act to charities would result in placing charitable bequests in a less advantageous position than bequests to individuals. The very terms of that section indicate that it was not intended that it should have any application to charities. The section concludes by laying down "the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong." These words clearly indicate that the section applies to individuals and not to charities, which could neither be a "minor" nor could attain "full age", as the section lays down. Properties owned by a church are generally inalienable, therefore, there would arise no mischief if gifts or bequests to a church or to a charity became inalienable by reason of the gift over to another charity, the object of the rule against perpetuity being to prevent properties being inalienable beyond a certain time.

Messrs. *Walter Gregory* and *R. K. Chatterjee*, instructed by Messrs. *Leslie* and *Hinds*, for the Administrator-General.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Joseph Henry Jones and Emma Adelaide Jones, the Executor and Executrix of the late Thomas Gill Jones, claiming as the next-of kin of Henry Wilkin Jones, late of Calcutta, against the judgment of my learned brother Mr. Justice Chaudhuri delivered in 1918.

The parties to the suit were as follows:—The Administrator-General of Bengal, and as such the executor and trustee of Henry Wilkin Jones, was the plaintiff. The first defendants were the Pastor and Deacon of the Circular Road Baptist Church, Calcutta; and they were sued as representing the Baptist Church. The next defendant was the Pastor of the Howrah Baptist Church, sued as representing that Church. The third defendant was the Pastor of the Lall Bazar Baptist Church, sued as representing that Church: and, the 4th defendant was Thomas Gill Jones, whose name I have already mentioned and whose representatives are the appellants in this appeal.

Now, in the suit several matters were raised by the Administrator-General upon which the directions of the Court were asked; but this appeal relates to one matter and one matter only, namely, whether the bequests to the Howrah Church and the Lall Bazar Church were good and valid b quests.

The material portion of the Will is clause 17, which runs as follows: "On the death of the last survivor of them, the said Eliza Humphreys, Anne Elizabeth Moffat Humphreys and Helen Winifred Ledlie, then I direct my said trustee to sell and convert into money all my real property and to invest the same in the securities of the Government of India, and out of the said Trust Funds to hold securities of the Government of India for the full sum of Rs. 30,000 if the said Trust Funds shall amount to so much or shall exceed that sum, but not otherwise, and if the said Trust Funds shall not amount to so much, then to hold the whole thereof upon trust to pay the income thereof quarterly to two of the Deacons for the time being of the Circular Road Baptist Church, to be by them applied in manner following, namely, as to a moiety thereof for the poor's funds in connection with the said Church for the sustenance and support of the poor belonging to the said Church or the congregation usually worshipping in the said Baptist Chapel, and as to the other moiety for the General Fund in connection with the said Church for the following purposes." Then he sets out certain purposes.

(5) (1874) 6 P. C. 38, 43 L. J. Ecc. 1; 30 L. T. 801; 22 W. R. 902.

From the terms of this clause it is obvious that this was a trust both for charitable and for religious purposes. There were no less than four Codicils to this Will. The one which is material to this appeal is the second Codicil. By clause 7 of that Codicil the testator directed as follows:—"I direct that the provision made in my said Will and Codicil in favour of the Baptist Church worshipping in the Lower Circular Baptist Chapel, shall be subject to the following further conditions:

"(*a*) That no ordained Minister of the Gospel or Missionary or Member of the Baptist Missionary Society be ever elected as a Deacon of the said Church or be allowed to canvass for votes to secure his election as a Deacon of the said Church.

"(*b*) That at each of the communion services, commonly called the Lord's Supper, celebrated in the Chapel or elsewhere there shall be two cups used, one of alcoholic or fermented wine and one of unfermented wine, and each person communicating shall be permitted to partake of whichever cup he or she pleases without having his conscience overridden.

"(*c*) That the said Deacons do not introduce any innovation into the practice of the said Church but adhere to the old practices which have always been observed in Baptist Open Communion Churches.

"(*d*) That before any money is paid by my executors or trustees quarterly to Deacons for the time being of the said Church, there shall be given to the said executors or trustees every quarter a certificate signed by the Pastor and two of the Day Deacons, testifying that the conditions of this and of the other Codicil and of my Will have been carefully, conscientiously and strictly observed."

Then in clause 8 the testator directed as follows:—"I further direct that should the conditions laid down in the last clause hereof, or in the previous Codicil, or in my said Will, be broken or in anywise infringed, then and in that case one-half of the interest, dividends, etc., that I have set aside for the said Lower Circular Road Baptist Church shall be made over and paid to the Pastor for the time being of the Howrah Baptist Church for the benefit of the said Church generally and, the other half thereof to the Reverend Arthur Jewson's Faith Orphanage at present of No. 117, Dhurumtolla Street (if then existing), or if not in existence, to the Pastor of the Lall Bazar Baptist Church for the benefit of the said Church and of the poor of the Church." We have no concern with the Faith Orphanage in this appeal, because it was stated that the Faith Orphanage had ceased to exist at the material time, and the consequence was that the two churches, the bequests to which were in question in this case, were the Howrah Baptist Church and the Lall Bazar Baptist Church.

The question which was argued on the appeal was whether the gifts to the Howrah and Lall Bazar Churches were invalid on the ground of remoteness.

It was said that by the terms of the Codicil No. 2 these gifts were to vest upon the happening of a specified uncertain event (*viz.*, the failure of the Circular Road Church to perform the conditions set out in the 2nd Codicil), which might be too remote.

It was urged that it was possible that the above-mentioned event might not happen until some time (whether it is short or long is immaterial) after the lifetime of the last survivor of the persons living at the testator's decease, mentioned in clause 17 of the Will, and that consequently the gifts would be invalid by reason of section 101 of the Succession Act of 1865, for the vesting of the bequests would be delayed beyond the lifetime of one or more persons living at the testator's decease.

The first point raised was that this matter was *res judicata* by reason of the decision which Mr. Justice Chaudhuri had given in the same suit on the 16th of July 1912.

Section 11 of the Code of Civil Procedure is the material section. That runs as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them

claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

I am not sure that having regard to the words of the section, it applies to this case at all.

It prohibits the trial of a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a *former suit*, and the first explanation provides that "the expression 'former suit' shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto."

In this case the previous decision was in the same suit.

Further, although Mr. Justice Chaudhuri in his judgment of 1912* did decide that the gift over to the Howrah and Lall Bazar Churches was valid and that there was no intestacy, he confined the directions to the disposal of the residuary Trust Funds during the lifetime of Eliza Humphreys, who was the last survivor of the persons mentioned in clause 17 of the Will, and the decree concluded as follows:—"And this Court doth not think fit at present to determine the destination of the income of the said residuary Trust Funds or of the corpus thereof or the rights of parties therein and thereto respectively after the death of the said Eliza Humphreys and doth defer the determination of the said questions until after the death of the said Eliza Humphreys, when the parties entitled shall be entitled to apply to the Court in this suit for the determination thereof."

I think this provision left it open to the parties to raise the question of the validity of the gift over to the two churches, which would be one of the questions involved in considering the matter, the determination of which was expressly deferred by the decree.

Further it appears that the argument which was based on section 101 of the Succession Act was not raised before Mr. Justice Chaudhuri in 1912, and in any event, in my judgment, the previous decision of Mr. Justice Chaudhuri would not prevent him considering and deciding that question on the further hearing in the same suit. In view of the above-mentioned matters and the express reservation contained in the decree of 1912, which has been already referred to, I do not think the matter can be said to have been "finally decided" within the meaning of section 11 of the Code of Civil Procedure so as to prevent Mr. Justice Chaudhuri considering the point raised in respect of section 101 of the Succession Act.

In any event, in my judgment, the matter must be open to the appellants in this appeal.

The decree of 1912 did not finally decide all the matters raised in the suit.

On the contrary, it expressly deferred for determination in the future the question of the destination of the corpus and income of the residuary Trust Funds after the death of Eliza Humphreys, and this is the matter now under discussion.

It was in a sense an interlocutory decree in the suit and it did not finally decide the above question. This was not finally decided until Chaudhuri, J.'s judgment in March 1918.

For these reasons, in my judgment, it was open to the appellants to raise the matter in dispute on this appeal.

As regards the main question in the appeal, it was argued on behalf of the appellants that the question must be decided by the terms of section 101 of the Succession Act, that the Act was one which amended and defined the rules of law applicable to intestate and testamentary succession in British India, and that unless the two churches in question could shew that the bequests to them were specifically excepted from the operation of its provisions, the Act must apply.

It was argued by Mr. Avetoom for the Lall Bazar Church that the bequest to charity was one bequest and included the gifts to the two churches in question, and that the mere shifting of the charitable bequest from one object to another was not material and did not render the bequest invalid.

Mr. Camell for the Howrah Church argued that the rule against perpetuity involved two matters:—

*See 21 Ind. Cas. 163.—*Ed.*

(1) a provision against perpetual inalienabilily,

(2) a prohibition against vesting beyond a certain time.

He urged that perpetual trusts in favour of charities were permissible in India, and if so, there was no reason why the exception which had been grafted on to the rule in England allowing the shifting of the charitable bequest from one object to another, as in *Christ's Hospital* v. *Grainger* (6), should not also be permitted.

In other words, it was argued that the above principles of English Law were in force in India at the time of the passing of the Succession Act in 1865 and that it was not the intention of the Legislature to alter the law in India by departing from the law of England in this respect.

In my judgment that is not the course which should be adopted in construing this Act.

In *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (7) the Judicial Committee of the Privy Council indicated the proper mode of dealing with an Act intended to codify a particular branch of the law.

At page 26, Lord Herschell's opinion in *Bank of England* v. *Vagliano* (8) was approved. It is as follows:—"The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions....." And the head-note of the Privy Council case is: "A Code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered."

This was with reference to the Succession Act of 1865 which we have now under consideration.

The Act recites that it is expedient to amend and define the rules of law applicable to intestate and testamentary succession in British India.

Section 2 provides as follows:—"Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession." So that, saving the exceptions there mentioned, the rules in the Act contained are to constitute the law in India applicable to *all* cases of intestate and testamentary succession.

With reference to this section it has been held by this Court in *Nepen Bala Debi* v. *Siti Kanta Banerjee* (9) that the words "applicable to all cases" operate as a repeal of the previously existing law, and that subject to the exception in the section the Courts must look to this Act and this alone for the law of British India applicable to all cases of testamentary and intestate succession and with regard to the exceptions, the burden is upon those who rely upon the exceptions to prove that their case comes within them.

The first part of the exception in section 2 is clearly confined to provisions which are to be found in the Act itself, and the other half refers to provisions of "any other law for the time being in force."

I have great doubt whether this can be taken to mean that the rules of English Law which were in force in India

(6) (1849) 1 Mac. & G. 460; 16 Sim. 83; 1 H. & Tw. 533; 19 L. J. Ch. 33; 14 Jur. 339; 41 E. R. 1343; 84 R. R. 128.

(7) 23 I. A. 18; 23 C. 563; 6 Sar. P. C. J. 667; 6 M. L. J. 71; 12 Ind. Dec. (N. S.) 374.

(8) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

(9) 8 Ind. Cas. 41; 15 C. W. N. 158; 12 C. L. J 459.

at the time of the passing of this Act are to be preserved: but it is not necessary to decide that, because, in my judgment, the matter under discussion is dealt with by the Act, and the positive language of the Act, as contained in the provisions of section 101, is sufficient to preclude the application of English Law.

Section 101 provides as follows:—"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

The provisions of this section create a rule which is different to the rule in English Law existing at the time of the passing of the Act. The rule in English Law was that no valid interest could be created which did not of necessity vest within the prescribed period of a life or lives in being and 21 years after: subject to the exception which had been grafted upon the rule that where charities were concerned, the mere shifting of a charitable trust from one object to another did not invalidate the bequest.

By section 101 the above rule is departed from, for the bequest is not valid if the vesting may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the *minority* of some person who shall be in existence at the expiration of that period, and then only if the thing bequeathed is to belong to him if he attains full age.

By the definition in clause 3, 'minor' means a person who shall not have completed the age of 18 years, and minority means the status of such person. So that the rule in India as laid down by the section is different from that existing in England at the time of the passing of the Act.

The language of the section is positive; it provides that "no bequest is valid whereby, etc." To apply the plain meaning of the language used, "no bequest" must mean no bequest of any kind, whether a bequest to an individual or a charity. It is said that the words contained in the section relating to the minority of some person show that this section could not be intended to apply to a charitable bequest, but could only be applicable to bequests to individuals. I do not think this is a sound argument.

The section in the first part provides that no bequest is valid if the vesting may be delayed beyond the lifetime of one or more persons living at the testator's decease—the second part of the section provides that in a certain event the vesting may be still further delayed, *i.e*, it may be delayed for the minority of a person who shall be in existence at the expiration of that period (*i. e.*, the lifetime of one or more persons already mentioned), provided that the thing bequeathed is to belong to him if he attains full age.

It was argued that the result of holding that a charitable bequest was included in section 101 would be that the vesting of the bequest could not be delayed for so long a time as if the bequest had been to an individual living at the testator's decease with a gift over to a minor if he attains full age. That may be so; but that does not seem to me a sufficient reason for disregarding the plain words of the section.

Section 105 deals with bequests to religious and charitable uses: so that the framers of this Act had bequests to charity in their minds at the time the Act was drafted, and they must be presumed to have known of the exception in favour of charitable bequests as laid down in *Christ's Hospital* v. *Grainger* (6), and it seems to me that if the Legislature had intended to except bequests to charities from the operation of section 101, nothing would have been easier than to add a proviso to section 101 carrying out the rule laid down in *Christ's Hospital* v. *Grainger* (6).

There, however, is no such proviso: The main rule of English Law in this respect has been materially altered, as I have shown, by the provisions of the section, and that being so, and in the absence of any specific provision in the Act preserving the exception which had been grafted on to the English rule of law in favour of charities, I see no reason for holding that

the Act intended the exception to be preserved.

The language of section 101, in my judgment, is clear and unequivocal and applies to all bequests, whether they are of a charitable nature or not.

In my judgment, therefore, the bequests to the Lall Bazar and the Howarh Churches are within the section 101, and it remains to be considered what is the result.

It was not seriously disputed that by the terms of clause 17 of the Will and clauses 7 and 8 of the 2nd Codicil the bequests to the Howrah and Lall Bazar Churches might not come into operation until sometime after the death of the last survivor of persons living at the testator's decease, *viz.*, those persons mentioned in clause 17 of the Will: for the Lower Circular Road Church might have performed the conditions set out in clause 7 of the 2nd Codicil for a time (it might have been for a year or years, the length of the time is not material) and then it might have failed to comply with the conditions, so that the bequests to the Howrah and Lall Bazar Churches were dependent upon the happening of a specified uncertain event (*viz.*, the failure by the Lower Circular Road Church to perform the conditions laid down in clause 7 of the 2nd Codicil), which might not have occurred until sometime beyond the lifetime of persons living at the testator's decease as mentioned in clause 17 of the Will.

Consequently, in my judgment, the bequests to the Howrah and Lall Bazar Churches were not valid on the ground that the vesting of the funds bequeathed to these churches might be delayed beyond the lifetime of one or more persons living at the testator's decease.

There is one more argument which I must deal with, *viz.*, that presented by Mr. Avetoom, that there was only one bequest to charity, and that it vested upon the death of Miss. Eliza Humphreys. This I cannot accept, and I think the terms of the Will and the 2nd Codicil make it clear that there were three bequests, one to the Circular Road Church and the other two to the Howrah and Lall Bazar Churches, which latter bequests would only come into force in the event of the Lower Circular Road Church failing to perform the conditions laid down; and as regards the vesting, in my judgment, the bequests to the Howrah and Lall Bazar Churches would not vest in them until the Lower Circular Road Church had failed to perform the specified conditions. That this must be so, is indicated by the terms of section 107, which relate to the vesting of a legacy: the same reasoning would apply to the vesting of the bequests.

There is no doubt that in fact the bequests to the Howrah and Lall Bazar Churches, if valid, would have *in fact* come into operation on the death of Miss Eliza Humphreys, inasmuch as it appears from the decree of 1912 that the Lower Circular Road Church had not complied with the conditions contained in the Codicil and was not in a position to do so; but the question does not depend upon what did in fact happen: it was admitted that the material question was whether under the terms of the Will and the Codicil the bequests to the two churches in question *might* be delayed beyond the time specified by the Act.

For these reasons, in my judgment, the appeal should be allowed and a declaration made that the bequests to the Howrah Church and Lall Bazar Church are invalid, that as regards the corpus and income of the residuary Trust Funds in question after the death of Eliza Humphreys there is an intestacy, and that an enquiry by the Registrar, if necessary, should be held as to the next-of-kin entitled thereto. There should be a direction to the Administrator-General to make over the corpus and income to the persons so found to be entitled thereto.

We think that having regard to the terms of the Will and the Codicils the costs of all parties, except of those to whom I shall refer directly, should come out of the estate, the costs of the Administrator-General being as between attorney and client. Of the three respondents Mrs. Blanche Grace Walsh, Wilfred Boswell and Mrs. Nesta Naomi Sherwin, Mrs. Blanche Grace Walsh did not appear, and we make no order as to her costs,

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With regard to W. Boswell and Mrs. N. N. Sherwin we think that the proper order is this :—The question of their costs cannot be determined definitely at the present moment and it will be dependent upon the enquiry as to the next-of-kin. The order, therefore, will be that if it turns out upon the enquiry that they are entitled as next of kin, then they will get their costs of this appeal out of the estate: If it turns out that they are not entitled as next-of-kin, then they will not get costs out of the estate, but will have to bear their own costs themselves.

We think that the Administrator-General may, pending the enquiry as to the next-of-kin, invest the sum, which is now released, in the War Loan.

WOODROFFE, J.—In my opinion it is quite clear that the question before us is not *res judicata*. On the contrary the decree of 1912 expressly reserved the question of the destination of the corpus and income of the residuary Trust Fund after the death of Eliza Humphreys, which is the matter now for decision.

On the merits it appears from the Indian Succession Act that its framers had in mind charities, and have in fact under section 105 made a new and specific provision therefor. The language of section 101 is plain and applicable to the present case, unless it be shown that a reservation in favour of charities existed either by virtue of the previous law or by the Act itself. The Act itself has no such reservation: Though its framers must have been aware of the leading case of *Christ's Hospital* v. *Grainger* (6), they have not made the finding in that decision a proviso to the section. This indicates, so far as it goes, that it was not the intention to apply this decision to this country, and this again meets the argument that this exception in favour of charities is to be found in a law existing previously to, and now independently of, the Act, assuming that there is now such a law of succession.

I may here add that according to English Law a gift to charity may be bad for remoteness if it follows the gift to an individual. Upon the contention of the respondent that section 101 does not apply to charities at all, it follows, and indeed it is admitted, that there is no section in the Act which would exclude a case of remoteness not allowed by English Law. It is accordingly said that the whole matter is to be dealt with independently of the Act—whether the bequest is a good or a bad one. I do not think, however, that this was the intention of an Act enacted to deal with the whole subject. There may be matters with which it has not dealt; but this is, in my opinion, not one of them. The language of section 101 is clear and no exception is stated.

The argument that we are here to deal with only one bequest, is not in accordance with the facts.

I agree, therefore, with the judgment of the learned Chief Justice.

Appeal allowed.

PUNJAB CHIEF COURT.

FULL BENCH.

REVISION PETITION No. 976 OF 1916.

January 2, 1918.

Present:—Mr. Justice Chevis, Mr. Justice Shadi Lal and Mr. Justice Broadway.

Chaudhri KISHEN SINGH—DEFENDANT—PETITIONER

versus

INDUSTRIAL BANK OF INDIA IN LIQUIDATION—PLAINTIFF—RESPONDENT.

Companies Act (III of 1913), *s.* 171—*Appeal arising out of suit in which Company was plaintiff—Leave of Court, whether necessary.*

An appeal or an application for revision arising out of an action brought by a Company does not come within the purview of section 171 of the Companies Act and can be instituted or proceeded with without the leave of the Court. [p. 394, col. 1.]

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Petition for revision, under section 44 (*e*) of Act III of 1914, against the order of the Senior Sub-Judge, Ludhiana, dated the 26th June 1916, modifying that of the Munsif, second class, Ludhiana, dated the 3rd July 1915.

Mr. *Jai Gopal Sethi*, for the Petitioner.

Mr. *Niranjan Pershad*, Official Liquidator, for the Respondent.

JUDGMENT.—The question of law, which has been referred to the Full Bench for decision, is whether an appeal or an application for revision arising out of a suit, in which a Company was the plaintiff, comes within the purview of section 171 of the Indian Companies Act VII of 1913, and cannot consequently be instituted or proceeded with without the leave of the Court. Section 171, upon the interpretation of which the answer to the question depends, runs as follows:—

"When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, and subject to such terms, as the Court may impose."

Now there can be no manner of doubt that an appeal or an application for revision is a legal proceeding, within the meaning of the section, but the matter does not rest there. Can such a proceeding arising out of an action brought by a Company be regarded as a proceeding against the Company? *Prima facie* there is considerable force in the view taken by a Division Bench of this Court in *Milawa Ram* v. *People's Bank of India* (1) that the proceeding is intended to wrest from the decree obtained by it in the Court below, a decree which but for the appeal or revision would establish the Company's title in the subject-matter of the suit, and that it should, therefore, be treated as a proceeding against the Company.

On the other hand, the language of the section can be construed to mean that the proceeding in question should not be treated as a thing apart, irrespective of what has gone before, and that it should be viewed with reference to the action out of which it arises. This view has found favour with the highest Judicial Tribunal in England, and after considering the matter carefully we do not think that there is any adequate ground for our taking a contrary view. There can be no doubt that when an action is brought by or on behalf of the Company, the defendant can file his written statement and resist the action without the leave of the Court. Suppose, the defence fails in the Court of first instance, is the defendant precluded from asking the higher Court to adjudicate upon that defence without first obtaining the leave of the Court conducting the liquidation? It can be legitimately contended on his behalf that he did not take the *initiative* in setting the machinery of the Court into motion, and that consequently his failure in the Court of first instance should not debar him from going up to the higher Court and satisfying it that his defence was correct and that the action against him ought not to have been successful.

This, in substance, is the *ratio decidendi* of the judgment of the House of Lords in *Humber* v. *Griffiths* (2), where Lord Davey in delivering the judgment of the Court observed that "when once an action by the Company itself has been proceeded with, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf"; and further remarked that "the respondents having been successful" in the lower Court "cannot now object to the appellants' defending themselves against the consequence of the judgment by the ordinary means of an appeal to this house".

This judgment proceeds upon section 87 of the English Statue, 25 and 26 Victoria, Chapter 89, which section is practically *in pari materia* with section 171 of the Indian Act, the only difference being that the English Statute uses the words "any suit, action or other proceeding." while the Indian Act contains the words "suit or other legal proceedings"; but the difference is merely a verbal one and indicates no change in substance. The judgment o the House of Lords was delivered in 1901, and has never been questioned so far. Indeed, the Companies Act of 1862 has been repealed by the Companies (Consolidation)

(1) 36 Ind. Cas. 618; 91 P. R. 1916; 80 P. L. R. 1917.

(2) (1901) 85 L. T. 141.

Act of 1908, and section 87 has been re-enacted by section 142 of the new Statute; and this new enactment in almost identical terms lends support to the view that the exposition of the law contained in that judgment has received the implied approval of the Legislature.

Dissenting, therefore, from the rule laid down in *Milawa Ram* v. *People's Bank of India* (1) and following the exposition of the law contained in *Humber* v. *Griffiths* (2), we hold that an appeal or an application for revision arising out of an action brought by a Company does not come within the purview of section 171 of the Indian Companies Act and that it can be instituted or proceeded with without the leave of the Court. The case must now go back to the Single Bench for decision on the merits.

Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE BOARD OF REVENUE, UNITED PROVINCES.

April 16, 1918.

Present:—Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Rani PARBATI KUNWAR—APPELLANT

versus

THE DEPUTY COMMISSIONER OF KHERI AND ANOTHER—RESPONDENTS.

Oudh Rent Act (*XXII of* 1886), *Ch. VII-A*—Thikadar—*Enhancement of rent.*

Chapter VII-A of the Oudh Rent Act, 1886, applies to *thikadars*, and consequently a "favourable rent" payable by a *thikadar* or person to whom the collection of rents in a *mauza* has been leased, is liable to be enhanced in the circumstances and subject to the condition therein provided. [p. 396, col. 1.]

Appeal from a decree of the Board of Revenue for the United Provinces of Agra and Oudh, dated the 2nd April 1915, reversing that of the Commissioner, Lucknow, dated the 7th October 1914.

FACTS of the case are sufficiently stated in their Lordships' judgment. In the appeal the question for determination was whether the rent payable by the appellant under a lease therein set out was liable to enhancement under Chapter VII-A of the Oudh Rent Act, 1886 (XXII of 1886). The Board of Revenue had held that it was.

Messrs. *DeGruyther*, *K. C.*, and *Amiend Jackson*, for the Appellant, submitted that Chapter VII-A of Act XXII of 1886 applied only to grants of land. The lease in suit was not a grant: it gave appellant no right of occupancy in the land. Appellant was a *thikadar*, not a tenant under section 3 (10). Chapter VII-A did not apply to her, and the rent payable by her was not liable to enhancement. Various sections of Act XXII of 1886 were discussed.

Sir *Erle Richards*, *K. C*, and Mr. *O'Gorman*, for the Respondents.—Act XXII of 1886 applies to the case. Before that Act a grant like that in the lease was liable to resumption after the death of the grantor under section 52 of Act XVII of 1876. That liability was taken away by Chapter VII-A, which was added to Act XXII of 1866 by U. P. Act IV of 1901, and the liability to enhancement of rent was substituted. There was thus no hardship to the *thikadar*. The policy of the Government was to put an end to grants of this class, as they affected the proprietor's ability to pay the Government revenue. Chapter VII-A applies to all such grants whatever name is given to them.

Mr. *DeGruyther*, *K. C.*, replied.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 2nd April 1915, of the Board of Revenue for the United Provinces of Agra and Oudh, which set aside a decree, dated 7th October 1914, of the Court of the Commissioner of Lucknow, and restored a decree or order, dated the 4th June 1914, of the Court of the Deputy Commissioner of Sitapur.

The suit in which this appeal has been brought was instituted in a Court of Revenue which alone had jurisdiction to entertain the suit, a Civil Court having no jurisdiction in the matter. In the suit the plaintiffs claimed a decree for the possession of the entire village Mauza Bandhia Kalan, situate in Pargana Nighasan, in the district of Kheri, by resumption of the *muafi*, and in the alternative

that the rent might be fixed at a proper amount under section 107G of Act XXII of 1886 (the Oudh Rent Act, 1886), and other reliefs which need not be referred to. The Deputy Commissioner of Sitapur, before whom the suit came for trial, did not grant a decree for resumption, but having found that the rent was liable to be enhanced under section 107G of Act XXII of 1886, by his decree declared that the defendant was a tenant of the Mauza without any right of occupancy, and determined the rent to be payable at 2,000 rupees per annum. The only question to be considered in this appeal is, whether the rent at which the Mauza was held by the defendant of the plaintiffs at the date of suit was or was not liable to be enhanced, and that question depends upon the nature of the lease under which the Mauza was held by the defendant.

Mauza Bandhia Kalan is part of the Taluqdari estate of Majhgain. On the 13th November 1882, Raja Milap Singh, in whom was then vested that estate, by his Will devised Mauza Bandhia Kalan to his wife Rani Dhan Kunwar, who on his death obtained possession of the Mauza. Thereafter Rani Dhan Kunwar, in order to provide maintenance for her daughter, who is the defendant in this suit and the appellant in this appeal, and maintenance for that daughter's son executed on the 23rd February 1891 the following lease :—

"Lease in favour of Chhoti Betia, *i. e.*, Parbati, who is married at Malanpur, and also in favour of the grandson, *i. e.*, the dear son of the said daughter, granted by Rani Dhan Kunwar, 'talukdar' of Majhgain and Bhur, Pargana Nighasan.

"Mauza Bandhia Kalan, Pargana and Tahsil Nighasan, 'Hadbast' No. 61, owned and possessed by me, the executant, the revenue of which, along with that of the entire 'Taluka,' is paid to Government, is leased to you from 1297 Fasli up to the term of your life and that of your dear son, at a 'jama' of 584 rupees per annum. You should take possession of the said Mauza from 1297 Fasli as a lessee for life and bring into your own use all sorts of receipts which include 'mal' and 'siwai' and pay to me 584 rupees annual lease money, instalment by instalment, year by year, without objection, and all sorts of profits will belong to you and your dear son during your respective lives and after you and your dear son the lease of the Mauza will end and it will, as before, revert to the possession of the holder of the 'liaka' (estate). During your life and that of your dear son neither I nor any heir or representative of mine will have power to set aside the lease. If you do not pay the 'jama' reserved by the lease at the proper time, it will be duly recovered from you without interest by means of a suit in Court. You should, during the period of your lease, fully carry out all orders issued by the authorities in respect of the village, so that no stigma of disobedience of orders might attach to you or to the 'taluka' (estate). You should keep the tenantry satisfied in every way, so that the population of the village might increase and the village might not become desolate. Under proper circumstances you are also authorised to eject the tenants so that you might eject them after issuing notice of ejectment. You should, however, see that they are not oppressed. You are authorised to enhance or reduce the rent of the tenants so far as it is just. You shall carry on all the affairs of the village just as they have been hitherto conducted.

"These few presents have, therefore, been executed by way of a lease to stand as evidence.

"Boundaries of Mauza Bandhia Kalan :—

"*East.*—Bandhia Khurd.
"*West.*—Hamlet of Gangaband
"*North.*—Oudh forest.
"*South.*—Gangaband.
"Dated the 23rd February, 1891.

"RANI DHAN KUNWAR."

Under that lease the defendant became the *thikadar* or person to whom the collection of rents in the Mauza had been leased by Rani Dhan Kunwar, who was then the landlord. Rani Dhan Kunwar died in 1891. After her death the Taluq vested in Raghubar Singh, a plaintiff and one of the respondents, and in Raj Mangal Singh, represented in this suit and appeal by the Deputy Commissioner of Kheri as the

special manager of the Court of Wards of the estate of Majhgain.

Land forming a Mahal or part of a Mahal which is under Chapter VII-A of Act XXII of 1886 liable to be resumed by the proprietor or to have the rent payable in respect of it enhanced must be land held rent-free or at a favourable rate of rent. By section 107-I of the Act it is enacted that:—

"For the purposes of this Chapter (Chapter VII-A) a grant of land at a favourable rate of rent means a grant of land at a rent less than the aggregate of the revenue and local rates payable thereon."

All three Courts in India have found that the rent of 584 rupees, which was made payable by the lease of the 23rd February 1891, was a favourable rate of rent within the meaning of Chapter VII-A. But it has been contended on behalf of the appellant that Chapter VII-A does not apply to persons holding land as *thikadars*. That contention is based on section 3, clause (10) of the Act, according to which a—

"tenant means any person, not being an under-proprietor, who is liable to pay rent; and in the following portions of this Act, namely, sections 13, 14, 17, 18, 29, 53, 54, 55, sub-sections (1) and (2), 56, 59, 60, 61, 62, 108, 126 and 138, but in no others, the expression 'tenant' shall be held to include a *thikadar* or person to whom the collection of rents in a village, or portion of a village has been leased by the landlord."

Section 3 (10) which contains that definition was part of Act XXII of 1886 as it was passed in 1886. Chapter VII-A, which deals with the resumption and the enhancement of the rent of land held rent-free or at a favourable rate of rent and contains section 107A to section 107K, was added to Act XXII of 1886 in 1901 by an amending Act, U. P. Act IV of 1901, and consequently the specific enactments of Chapter VII-A are not limited in their application by section 3 (10), which must be regarded as a mere glossary defining the terms "tenant" and "thikadar" as those terms are employed in the Act XXII of 1886 as it stood in 1886 when it was passed.

The object of enacting Chapter VII-A which the Government of India had in view obviously was the protection of the Government revenue assessed upon agricultural lands, and as far as possible to maintain proprietors of lands in a position to enable them to pay the Government revenue and the local rates assessed upon their lands, and thus to avoid losing their lands by making default in payment of the revenue due to the state. In some parts of India, in Oudh for instance, many proprietors of lands were in the habit of acting improvidently in making grants of lands, by lease or otherwise, rent-free or at rents which did not enable them to pay the public revenue and local rates assessed upon their lands. As early as 1793 the Governor-General in Council passed Regulation XIX of 1793, with a similar object of protecting the Government revenue derivable from lands. In section 1 of that Regulation it is stated: "By the ancient law of the country, the ruling power is entited to a certain proportion of the produce of every *bigha* of land (demandable in money or kind, according to local custom) unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a Zemindar made a grant of any part of his lands to be held exempt from the payment of revenue, it was considered void from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution." That Regulation was applied to Oudh after the annexation of that province.

By section 52 of Act XVII of 1876 (the Oudh Land Revenue Act, 1876), it was enacted:—

"52. All grants (whether in writing or otherwise) by proprietors, or the persons whom they represent, of land to be held exempt from the payment of rent or at a favourable rate of rent, are hereby declared

to be liable to resumption, unless such grants have been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner.

"Provided that, if such grants are held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, they shall be held valid against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate which was current at the date of the grant."

Section 52 was subject to the procedure and exemptions contained in sections 53, 54 and 55 of that Act.

Section 52 of Act XVII of 1876 was wide enough to apply to grants to *thikadars* of land in Oudh exempt from the payment of rent or held at a favourable rate of rent, and it authorised the resumption of such grants when they had not been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner of Oudh. Sections 52, 53, 54 and 55 of Act XVII of 1876 continued in force until Act IV of 1901 was passed. By section 107E, which by Act IV of 1901 was added to Act XXII of 1886, it was enacted as follows:—

"107E. Land held rent-free or at a favourable rate should be liable to resumption, only when by the terms of the grant or by local custom it is held—

"(*a*) at the pleasure of the grantor;

"(*b*) for the performance of some specific service, religious or secular, which the proprietor no longer requires;

"(*c*) conditionally or for a term, and the conditions are broken or the term expires."

* * * *

That section limited the lands which might otherwise have been resumed if section 52 of Act XVII of 1876 had remained in force, and in that respect was more favourable to the grantees of such lands than section 52 of Act XVII of 1876 had been.

By section 107A, which was one of the sections which were added to Act XXII of 1886, the proprietor of a Mahal or part of a Mahal was, amongst other rights of suit, given a right to sue to enhance the rent of any land held at a favourable rate of rent, whether so held by grant in writing or otherwise. And by section 107B, all land in Oudh held at a favourable rate of rent was made liable to enhancement of rent unless the holder established certain specified facts, which have not been established in this case. That section is subject to the following proviso: "Provided that no land held under a written instrument, whether executed before or after the 1st day of January 1902, by which the grantor expressly agrees that the grant shall not be resumed, shall be liable to resumption or assessment or enhancement of rent until the grantor dies, or the term of the current settlement of the local area in which the grant is situated expires, whichever event first occurs." In the present case not only did the grantor of the lease die before suit, but the term of the settlement current at the date of the lease, of the local area in which Mauza Bandhia Kalan is situate, expired before the suit was brought.

By section 107G, which is one of the sections which in 1901 were added to Act XXII of 1886, it is enacted as follows:—

"107G. (1). Land not liable to resumption under section 107E and to which the provisions of section 107H do not apply shall be liable to assessment or enhancement of rent as the case may be.

"(2) When a grant held rent-free or at a favourable rate is found to be liable to have rent assessed or enhanced thereon, the grantee shall be deemed to be a tenant without a right of occupancy under sections 36 and 37 of this Act, and the rent shall be determined at such rate as the Court may consider to be fair and equitable, having regard to the rents paid for land of similar quality and with similar advantages in the neighbourhood.

"(3) The period of seven years for which he (the grantee) shall be entitled to retain the holding shall begin from the first day of July next following the date of the institution of the suit."

Mauza Bandhia Kalan was not liable to resumption under section 107E, as the term for which the lease was granted has not expired, and it is not proved that any condition contained in the lease has

been broken. The provisions of section 107H do not apply in this case, and consequently section 107G does apply, as the lease of the 23rd February 1891 was a grant of land at a favourable rate of rent, and Mauza Bandhia Kalan was land held by the defendant at a favourable rate of rent within the meaning of Chapter VII-A of Act XXII of 1886. The decree of the Board of Revenue, which set aside the decree of the Commissioner of Lucknow and restored the decree or order of the Deputy Commissioner of Sitapur enhancing the rent to Rs. 2,000 per annum, was right.

Their Lordships will humbly advise His Majesty that the decree of the Board of Revenue should be affirmed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: *T. L. Wilson & Co.*

Solicitors for the Respondents, The Solicitor, India Office.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 57 OF 1918.

August 21, 1918.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

DEUTSCHE ASIATESCHE BANK—

PLAINTIFF—APPELLANT

versus

HIRA LALL BURDHAN & SONS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 9, 15, applicability of—"Disability" and "inability", meanings of—Alien enemy, right of suit of—Limitation, running of.

Section 9 of the Limitation Act covers the case of an alien enemy who is debarred from suing in consequence of a declaration of war. [p. 399, col. 2.]

The general rule is that once limitation has begun to run, a subsequent "disability" to sue will not avail to stop it in the absence of express statutory provision. [p. 399, col. 2; p. 400, col. 1.]

Per *Sanderson, C. J.*—The Legislature in enacting section 9 of the Limitation Act did not mean exactly the same thing by the use of the two words "disability" and "inability." [p. 399, col. 2.]

An express statutory provision on a particular matter would have the effect of overriding any common law rule regarding the same. [p. 399, col. 2; p. 400, col. 1.]

Per *Woodroffe, J.*—Section 15 of the Limitation Act clearly refers to orders of Civil Courts, and not to the condition of things under which an alien enemy is prevented from suing owing to a declaration of war. [p. 400, col. 2.]

Appeal from the judgment of Justice Sir Asutosh Chaudhuri, KT., dated the 22nd July 1918, in Original Suit No. 591 of 1918, reported as 47 Ind. Cas. 122.

The Advocate-General, Bengal (with him Mr. *Avetoom*, instructed by Messrs. *Orr, Dignam & Co.*), for the Appellant.

Mr. *N. Sarkar*, instructed by Messrs. *B. N. Bose & Co.*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from a judgment of my learned brother Mr. Justice Chaudhuri* and the facts may be gathered from the plaint to this effect; a suit was brought by the Deutsche Asiatesche Bank, which is a German Bank which used to carry on business in Calcutta and is now in liquidation under the orders of the Government of India, and the defendants are Messrs. Hira Lall Burdhan and Sons who carry on business as merchants in Calcutta. The suit was brought in respect of four promissory notes which were made payable on demand, and their respective dates were 4th of June 1914, 11th of June 1914, 30th of June 1914 and 30th of June 1914. These notes were endorsed to the plaintiff Bank, and it is agreed that the cause of action in respect of the notes which were payable on demand would arise on the dates of the notes. Consequently, the periods within which a suit or suits in respect of the notes would have to be brought would expire in June 1917. The suit was brought on the 9th of May 1918, and, therefore, *prima facie* it was out of time. But the appellants allege that a certain period ought to be excluded from the time specified by the Act of Limitation. They refer to the fact that the war with Germany broke out on the 4th of August 1914, and that thereby they, the plaintiffs, were debarred from suing in Civil Courts in this country, and they allege that it was not until the 1st of November 1915 that the plaintiff Bank obtained a license from the Governor-General in Council to carry on their business in British India with a power to sue for the recovery of debts which were owing to the Bank. Conse-

*See 47 Ind. Cas. 122—*Ed.*

quently they urge that the period from the 4th of August 1914 to the 1st of November 1915 ought to be excluded from the time prescribed by the Act of Limitation. The learned Judge has come to the conclusion that that period cannot be excluded, and I think that the learned Judge has come to a right conclusion.

I need not deal with all the reasons that the learned Judge has relied upon in his judgment, but I am not sure that I am prepared to adopt all the reasons which he has given. There is no doubt that when the war broke out on the 4th of August 1914, the plaintiff Bank being an enemy alien had no right to sue in Civil Courts in this country until the Bank obtained a license or authorization from the Crown or from the Governor-General in Council as the representative of the Crown.

I think it is clear further that in the circumstances of this case the right of the plaintiff Bank to recover upon the promissory notes was suspended for the time being. In November 1915 the license which was given to the plaintiff Bank was as follows: It was addressed to Deutsche Asiatesche Bank, and authorized them to carry on their business to the extent and in the manner therein specified, and one of the clauses was: "To continue legal proceedings already instituted and with the sanction in each case of the said Controller to institute further suits for the recovery of debts due to the Company."

After that license was given, it was within the power and the right of the plaintiff Bank to sue in the Civil Courts of this country for the recovery of debts owing to the Bank.

Now, in the case of each of the notes the time for the purpose of the Limitation Act began to run from a date in June 1914, which was before the outbreak of the war, and the question is whether there is any statutory provision or common law rule which would avail the plaintiffs in their contention that the period between the 4th of August 1914 and November 1915 ought to be excluded in computing the period prescribed by the Limitation Act within which the suit should be brought. Section 9 of the Limitation Act, IX of 1908, provides as follows: "Where once time has began to run, no subsequent disability or inability to sue stops it." Now, *prima facie* that section covers this case, because I think that either the words "disability" and "inability" would be applicable to the position of the plaintiff Bank at the time the war broke out. I think it can truly be said that the plaintiff Bank by reason of the outbreak of the war was "disabled" from suing, or it may be said that by reason of the outbreak of the war the plaintiff Bank suffered from "inability" to sue. *Prima facie*, the words of the section will cover this case. But the learned Advocate General on behalf of the plaintiff Bank argued that the section was not intended to deal with the contingency of the outbreak of war but was intended to deal only with such disability or inability as might be referred to in the Act itself, and he drew our attention to the "disability" which is referred to in section 6 and also in section 7. I am not prepared at present to accede to that argument, for I think the section is in accordance with the general rule that once the time for the purpose of limitation has begun to run, "disability" to sue will not avail to stop it, in the absence of express statutory provision.

But even if the learned Advocate-General's argument on that point is correct, there remains the word "inability", to which the above argument does not apply, unless the word "inability" means no more than "disability", for the learned Advocate-General has drawn our attention to the fact that section 9 is the only section in the Act where the word "inability" occurs. We are bound to give some meaning to the word "inability". I do not think we are entitled to assume that the Legislature in enacting this section, when it used the word "disability" and the word "inability", meant exactly the same thing by the use of the two words. Consequently I do not see how we can escape from the conclusion that this case is covered by section 9. I agree, therefore, with the conclusion at which the learned Judge has arrived.

As regards there being any common law rule, which would avail the plaintiffs upon this point, I do not know of any; and even if there were, here we have an express statutory provision which I think,

would have the effect of overriding any such rule.

As regards the question of hardship to which the learned Advocate-General referred, I do not think that he was referring to any hardship in this particular case but that he was referring to other cases where it might arise. In this case there is no doubt that there is no hardship inasmuch as although the plaintiff Bank's business in Calcutta was put an end to in August 1914 when its officers were interned, the Governor-General in Council appointed a gentleman, whose name was Mr. Gros, so long ago as December 1914 for the purpose of liquidating assets and paying debts of the Bank, and then in November 1915 the Governor-General in Council gave an express authority to the plaintiff Bank to institute proceedings in order that it might recover the debts which were owing to it, and if this suit had been brought within a reasonable time from November 1915, there can be no doubt that the suit could have been brought within the time specified by the Act of Limitation. Instead of that, a period of time, which extended from November 1915 to May 1918, was allowed to pass before the suit was brought. In these circumstances, I think in this particular case there has been no hardship.

In my judgment for the reasons that I have stated above, this appeal should be dismissed with costs.

We think that in this case the appeal must be treated as an appeal from a decree, and we leave it to the discretion of the Taxing Officer to do what is right in respect of the taxation of costs. We may say for his guidance that as far as the appeal is concerned, it was not a long matter and that the appeal was disposed of in less than three hours. With reference to this question I may mention that the appellant himself in the memorandum of appeal purports to appeal from a decree.

WOODROFFE, J.—The general rule is that when limitation has commenced to run it will continue to run. Has anything been shown to us which creates an exception to this general rule by reason of the suspension of rights due to the existence of the state of war? There is, in my opinion, none shown: nor does section 15 of the Limitation Act apply, for the word "order" there clearly refers to orders of Civil Courts and not to the condition of things with which we have here to do. As the suit is admittedly barred unless the period mentioned in the plaint is excluded, I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 691 OF 1917.

July 16, 1918.

Present :—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

ANCHAL—PLAINTIFF—APPELLANT

versus

DALIP SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Acquiescence, what amounts to—Plaintiff willing to sell his own share.

In a suit brought by the plaintiff for pre-emption on the ground that he was a co-sharer in the property sold and a brother of the vendor while the vendee was a co-sharer only, it appeared that the plaintiff was heavily in debt at the time of sale, that he had no money and that he was willing to sell his own share in the property to the vendee along with his brother:

Held, that this conduct of the plaintiff amounted to an acquiescence by him in the sale, and that his suit must, therefore, be dismissed. [p. 401, col. 2.]

Second appeal from a decree of the District Judge, Saharanpur, dated the 17th April 1917.

Mr. *Nehal Chand*, for the Appellant.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff was a co-sharer as also were the vendees, but the plaintiff was own brother of the vendor whilst the vendees were distant connections. The vendees pleaded various defences. They denied the custom: They denied the plaintiff's preferential right and alleged that the sale was made with the consent and knowledge of the plaintiff. The Court of first instance held that

the custom of pre emption prevailed and that the plaintiff had a preferential right, and it held against the defendants on the issue of the acquiescence. The lower Appellate Court held that the entry in the *wajib-ul-arz* was insufficient to establish the existence of the custom and that the weight to be attached to the record was greatly diminished by the fact that a number of other matters were recorded, which could not possibly be customs, in the very same clause.

The plaintiff has appealed. We may mention here that the lower Appellate Court has not dealt with the issue of acquiescence on the part of the plaintiff. We think that this issue ought to have been decided and inasmuch as the lower Appellate Court has not decided the issue, we are entitled to decide the issue ourselves. We have already mentioned that the plaintiff is own brother to the vendor. *Prima facie*, therefore, if the plaintiff had been ready and willing to keep the property, there would be no person to whom the vendor would be more likely to wish to sell the property than to his own brother. It is not pretended that there was any quarrel or dispute between the brothers. In the written statement it was expressly pleaded that the plaintiff had acquiesced in the sale, that he was a man who was heavily in debt, that his property was under mortgage, that he had previously sold a large portion of his property and that five days before the sale-deed was executed, he had sold another portion. The plaintiff, when cross-examined, admitted that he was in debt. He admitted that he had sold a considerable portion of his property and that one sale had taken place almost simultaneously with the sale to the defendants, the vendees in the present suit. Evidence was produced on behalf of the vendees to the effect that the sale to the vendees had been negotiated by the two brothers and that the plaintiff at that very time wanted to sell his own property to the vendees, who explained that they had not sufficient money to buy the shares of both brothers. The witness who deposed to these facts was hardly (if at all) cross-examined in respect to these matters. Bearing in mind the initial probability of this evidence being true having regard to the close relationship that existed between the vendor and the plaintiff, namely, that they were own brothers, we think it extremely surprising that the learned Subordinate Judge who tried this case in the first instance absolutely discarded the evidence. The learned Subordinate Judge says that if the plaintiff knew of the sale, the vendees would have required the plaintiff to be a witness to the sale-deed. The vendees no doubt might have done this had they anticipated roguery on the part of the plaintiff. But if, on the other hand, the evidence be true that the plaintiff was actually asking the vendees to purchase his own property at the very same time, it is hardly surprising if the vendees never anticipated that after they had purchased the other brother's share a suit of this nature would have been instituted. The learned Subordinate Judge says:—"It is further urged that the plaintiff is in debt and had not the means to purchase a share. I do not think this argument plausible. Plaintiff could advance Rs. 1,120 or had sufficient property by selling part of which he could raise Rs. 1,120."

Now in the present case it is admitted by the plaintiff himself that he was in debt, that he had no money and that he was selling his own property, and yet the learned Subordinate Judge thinks that there was no force in the argument that he would in that condition be unwilling to purchase this property. The learned Judge says that the plaintiff could easily have raised the money by selling another portion of his property. This seems to be a very poor argument. It does not appear very reasonable that a man who has no ready money should sell a share which is already in his possession, for the privilege of buying another share which is not in his possession, having of course to meet some expense in connection with the transfer.

Under the circumstances of the present case we have not the least hesitation in holding that the plaintiff knew and acquiesced in the sale to the vendees-defendants.

We dismiss the appeal with costs.

Appeal dismissed.

AMBALIKA DASI *v.* ARPANA DASI.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 86 OF 1915.

February 6, 1918.

Present :—Mr. Justice N. R. Chatterjea and Mr. Justice Walmsley.

Srimati AMBALIKA DASI AND OTHERS—DEFENDANTS NOS. 6 TO 9—APPELLANTS

versus

Srimati ARPANA DASI AND OTHERS—PLAINTIFFS AND REMAINING DEFENDANTS—RESPONDENTS.

Hindu Law—Grant, construction of—Succession, whether can be altered by agreement—Sanad laying down special rule of succession, validity of—Successive life-estates, whether can be created in favour of unborn persons—Custom, family, proof of—Evidence.

A grant of lands made by a Hindu in favour of another Hindu, in so far as it lays down a rule of succession unknown to the Hindu Law, is absolutely void. [p. 409, col. 1.]

The Hindu Law does not permit the creation of successive life-estates in favour of unborn persons, the estate itself remaining undisposed of. [p. 409, col. 1.]

An agreement between a grantor and a grantee cannot alter the line of succession according to law. [p. 408, col. 1.]

A rule of succession laid down in a grant creating successive life-estates in the property granted to certain female members of a Hindu family cannot be binding upon the family even though it has been actually followed in the family for a long time, unless it has ripened into a family custom. [p. 407, col. 2; p. 409, col. 1.]

In deciding the question whether there was a family usage under which certain female members of a family acquired by succession ownership to the family property, the fact that the female members who were in possession of the properties for the time being made transfers and otherwise dealt with the properties as if they were owners thereof, cannot be excluded from consideration. [p. 408, col. 2.]

In order to establish a *kulachar* (family custom) it must be shown that the custom has existed from time immemorial, and where the custom set up is peculiar only to a single family the rule is more strictly enforced than in other cases. [p. 409, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Khulna, dated the 17th of November 1914.

Mr. *B. C. Mitter*, Dr. *Jadulall Kanjilal* and Babu *Bhudhar Halder*, for the Appellants.

Sir *Rash Behari Ghosh*, Babus *Mohendra Nath Roy*, *Hara Prasad Chatterjee*, *Biraj Mohan Mozumdar* and *Suresh Chandra Bose*, for the Respondents.

JUDGMENT.

CHATTERJEA, J.—This appeal and Appeal No. 59 arise out of a suit instituted by the plaintiffs as executors to the estate of one Kali Prosanna Ghosh for the partition of a property called Taraf Katia Nangla and for allotment of a one-third share thereof to the plaintiffs.

Taraf Katia Nangla, Touzi No. 1086 of the Khulna Collectorate, consists of 8 Mouzahs, one of which bears the name of Katia Nangla. It is situated in Pargana Sahas, and the revenue payable for it was included in the Dowl of Pargana Sahas at the time of the Decennial Settlement, but has all along been treated as a separate property and a separate Touzi number was given to it when the Cess Act came into force. The plaintiff claims title to one-third share of it in the following manner:—

Pargana Sahas belonged to the Chanchra Raj family, and Raja Baroda Kant (the last Raja) left three sons, Jnanada Kant, Hemoda Kant and Manada Kant. Hemoda Kant Roy, one of the sons, sold his undivided one third share of Zamindari Mahal Pargana Sahas, Touzi No. 1086 of the Khulna Collectorate, to Kali Prosanna Ghosh by a conveyance dated the 15th December 1892 "together with a like share of and in all and singular subordinate interests in the said Zamindari including the Ranian Britti 1,15,000." At that time the life-estate in Taraf Katia Nangla was held by Rani Durga Sundari, the mother of Hemoda Kant, under a family arrangement, the latter having a vested remainder in one-third share of the property. In the year 1901 Kali Prosanna Ghosh brought a suit for partition of Pargana Sahas including Mouza Katia Nangla. The case was amicably settled, and Pargana Sahas was partitioned; and it was agreed in that suit that Taraf Katia Nangla would remain in the possession of the Rani during her lifetime and that it would be partitioned after her death.

Rani Durga Sundari died on the 28th December 1911 and the present suit was instituted on the 7th August 1912.

The plaint was originally one for partition with a Court-fee of Rs. 10 and was directed only against the defendants Nos. 1 to 4, who are the representatives of the brothers of Hemoda Kant. The defendants Nos. 1 to 4 disclaimed all interests in the property, and stated that Taraf Katia Nangla was the Ranian Britti of the Ranis of the family. The defendants Nos. 6 to 9 (the Ranis) were thereupon added as parties. They pleaded that the Taraf was Rania Britti, that under a family custom the

AMBALIKA DASI *v.* ARPANA DASI.

Ranis of the family successively are entitled to it, that the male members of the family have no right to the same, and that accordingly the plaintiff had acquired no title to it under the conveyance executed by Hemoda Kant. The latter (the defendant No. 5) was also made a party, and he pleaded that the claim set up by the defendants Nos. 6 to 9 that the property was held by Ranis in succession was false, that the property was obtained by his mother Rani Durga Sundari by gift from one Rani Kripamoyi (who held it in absolute right) and that on the death of Rani Durga Sundari he as her sole surviving son was entitled to the whole of the Taraf, but that the plaintiff had not acquired any right to Katia Nangla under the conveyance executed by him in favour of Kali Prosanna Ghosh. The plaint was thereupon amended and the suit was converted into a title suit.

The Court below held that the defendants Nos. 6 to 9 had failed to prove the family custom set up by them, that Hemoda Kant had a vested interest to the extent of one-third in it at the time of the sale of his share of Parganas Sahas, but that a third share in Mouza Katia Nangla only, and not in the whole Taraf Katia Nangla, passed under the conveyance executed by him in favour of Kali Prosanna Ghosh, and made a decree accordingly.

The defendants Nos. 6 to 9 have preferred Appeal No 86 of 1915, and the plaintiffs have preferred Appeal No. 59 of 1915.

We will first deal with the appeal of the defendants Nos. 6 to 9, *viz.*, Appeal No. 86 of 1915.

The following genealogical table of the family will be useful in following the facts of the case: —

AMBALIKA DASI v. ARPANA DASI.

It is alleged by the defendants Nos. 6 to 9 that Raja Nil Kant executed a Sanad in favour of his step-mother Rani Indra Nilmoni on the 16th Sravan 1160 B. S. (1753). The original Sanad is not forthcoming, but it is stated in a Rubakari of the Collector of Jessore, dated the 25th March 1816, that "on reference to the Sanad and after an enquiry it became clear that Raja Nil Kant had made a gift as Britti of 5,001 *bighas* in Mouza Katia Nangla and others" together with other lands in other Mouzas to Rani Indra Nilmoni for her maintenance, that she was in possession thereof and that during her lifetime she made a gift of them to Rani Annapurna as a Youtuk Britti. The original Sanad, therefore, must have been produced before the Collector. The defendants have produced in this case a confirmatory Sanad said to have been granted by Raja Sri Kant Roy on the 4th February 1817 to his wife Annapurna and his brother's wife Rani Rajeswari (wife of Raja Gopinath), in which it is stated: "My father the late Raja Nil Kant Roy gave Taraf Katia Nangla and others in Pargana Sahas to the late Rani Indra Nilmoni as Ranian Youtuk Britti for the performance of Bratas and other charitable and pious acts..... confirming the aforesaid Britti the aforesaid Katia Nangla and others included within my Zemindari, Pargana Sahas is again granted to you as Youtuk Britti for your maintenance and performance of pious acts. You and the Ranis of the family shall remain in the enjoyment and possession of the aforesaid Britti and hold the same as Lakhiraj. You or the future Ranis shall not be entitled to make a sale, gift or *heba* of the aforesaid Britti and shall be entitled only to enjoy the profits thereof. I or my heirs shall have no claim to or concern with the aforesaid Britti. If I or they should at any time make any claim, it shall be futile and of no effect. To this effect I grant this Sanad in confirmation of the Ranian Youtuk Britti."

The defendants have also produced a Taidad of the Bajeh lands belonging to Rani Annapurna filed in the Jessore Collectorate in 1209 B. S. by one Ramdhin Singh, in which it is stated that Raja Nil Kant had granted a Britti to Rani Indra Nilmoni of lands situated in Mouzah Katia Nangla and seven other Mouzahs (named) and so she made a gift of that Britti as Youtuk of Rani Annapurna. The date of the old Sanad bearing the signature of the Raja is given as 11th Bhadra 1160 B. S. and that of the Youtuk Britti as 25th Sravan 1187.

It appears that the said Ramdhin Singh obtained a mortgage of about 3,867 *bighas* of land situated in Katia Nangla (referred to in the proceedings as purchase) from Rani Annapurna. On the death of Ramdhin, his son Mohan Singh was in possession of the property and he made a gift of portions of the same to his son-in-law and daughter's son, who were in possession when proceedings were started for resumption of the lands under Regulation XIX of 1793. The Collector of Jessore by his Rubakari, dated the 25th March 1816, referred to the Sanad dated the 16th Sravan 1160, and the facts stated above and came to the conclusion that the lands were actually the Youtuk Britti properties of Rani Annapurna, and that under the circumstances the Government had no title to the lands mentioned in the Sanad.

Rani Annapurna (the widow of Raja Sri Kant) died in 1229, and it appears from a petition of her daughter-in-law Rani Kripamoyi (hereafter referred to) that she made a gift of the entire Britti Taraf Katia Nangla during her lifetime to Rani Kripamoyi. Raja Srikant's son Bani Kant died in 1224, leaving his widow Rani Kripamoyi and a minor son Raja Baroda Kant. Raja Baroda Kant's estate having fallen into arrears of Government revenue was taken charge of by the Court of Wards.

In the meantime the mortgage-debt due to Mohan Singh (son of Ramdhin Singh) was satisfied, and Mohan Singh by a petition to the Collector of Jessore, dated the 18th December 1822, stated that he had received the whole of the principal and interest, and prayed that the name of Rani Kripamoyi as the owner of the Youtuk Britti might be entered by expunging his name.

Rani Kripamoyi on the 9th March 1823 applied to the Collector of Jessore for registration of her name in respect of Youtuk Britti Katia Nangla as the mortgage had been paid off, but stated that the property might remain under the management of the Court of Wards until the money due from her son (Raja Baroda Kant) to Government

was satisfied, when it would come back to her, and that an annual sum might be fixed for her personal expenses and religious rites, and this proposal was accepted and given effect to by the Collector as would appear from his Rubakari, dated the 22nd March 1823.

In 1823 the Government decided to restore the Pargana Sahas to the minor Raja (Baroda Kant) after a proper settlement shall have been made by the Collector and directed the Board of Revenue (by a letter dated the 13th November 1823) to issue the necessary orders.

In the year 1837 one Ram Kissen Panda put in a Taidad in the Collectorate in respect of 6,121 *bighas* of lands in Katia Nangla and other Mouzahs claiming the same under a gift from Rani Indra Nilmoni. The Collector thereupon started proceedings for assessment of revenue upon those lands under the provisions of Regulation II of 1819.

Rani Kripamoyi in her petition, dated the 4th August 1837, filed in the said proceedings stated that "since a long time before the British Government the Ranis of Rajas have been in enjoyment and possession of the Ranian Brittis in many villages, especially in Taraf Katia Nangla, as revenue-free lands. The Ranis in former times had been in possession of the Brittis in view of maintenance of the Ranis, and they had been in the enjoyment of the profits. In this way the Britti having come down from one Rani to another it descended to the late Rani Annapurna, who made a gift of the entire Brit Taraf Katia Nangla and others to me as a Youtuk for my maintenance, and since then I have been holding that property as Youtuk property and I have been in undisputed enjoyment of the profits thereof. Neither the aforesaid Panda nor any other person has a single *cotta* of Lakhiraj land in the aforesaid Taraf."

Raja Baroda Kant in his petition of the same date stated that "in the year 1197, when a Decennial Settlement of the entire Zemindari was concluded with my grandfather the late Maharaj Sri Kant Roy, the entire Ranian Britti was resumed and being assessed with revenue was included in the Dowl of the Zemindari. Thereupon the late Raja paid the revenue of the resumed Brit along with the Zemindari and maintained the grant (Britti) to the Ranis Rajeswari and Annapurna as before for their maintenance. After their death my mother Srimati Rani (Kripamoyi) succeeded to the Brit (property) who defrayed the expenses of her maintenance out of it, and I have been paying the revenue of the entire property to Government. But they have not the power of making a sale or gift of that Brit. When the Ranian Britti was resumed by Government in the year 1197 and assessed with revenue, and when the Ranis have not the power of making a sale or gift, how can it be possible that Rani Indra Nilmoni made a valid rent-free gift of the aforesaid 6,121 *bighas* of land to aforesaid Panda?"

The matter came up before the Special Deputy Collector and he held by his order, dated the 16th January 1838, that the lands in dispute were in fact the resumed lands of the Ranis, they having been resumed by the Government and their rents added to the entire Zemindari of the Raja at the time of the Decennial Settlement, that the lands had been granted away for maintenance of Rani Kripamoyi, that the claim of Ram Kissen Panda was false and that the claim of the Government to resume the lands on the ground of the same being Lakhiraj was untenable. The order of the Special Deputy Collector was upheld by the Commissioner by his Rubakari, dated the 16th February 1839.

Rani Kripamoyi lived for a long time and appears to have been in possession of Katia Nangla as long as she was alive.

In the abstract statement of the *jamabandi* of Pargana Sahas prepared by the Collector in 1232 (1826), apparently when the estate of the minor Raja was taken charge of by the Court of Wards, Katia Nangla was not included. The Rani, however, as we have seen, agreed that Katia Nangla should be in the possession of the Court of Wards so long as the debts of the minor Raja was not paid off. She asserted her right and possession before the Special Deputy Collector when Ram Kissen Panda set up a claim based upon the alleged gift from Rani Indra Nilmoni, and she was supported by her son Raja Baroda Kant and her right was recognised by the Special Deputy Collector and the Commissioner in 1838. The *jama wasil baki* papers (Exhibit D series), from 1279 to 1286, *pattas* granted

by Rani Kripamoyi (Exhibit A series), *kabuliyats* (Exhibit E series), *saltamami nikash jama kharach* (Exhibit C), rent receipts (Exhibit F series), counterfoil rent receipts (Exhibit H series) and decrees, show Rani Kripamoyi as being in possession of "Youtuk Britti" or "Ranian Britti" Katia Nangla.

There is one instance, however, which shows that Raja Baroda Kant asserted his right to a portion of Taraf Katia Nangla. It appears that one Dwarka Nath Bose claimed 45 *bighas* of lands as included within his Mahal Gandamaka in certain proceedings before the Deputy Collector in the year 1857, and Raja Baroda Kant claimed it and asserted his possession to it as being included in Mouza Sukdara (one of the Mouzas of Taraf Katia Nangla) within his 'Zemindari Pargana Sahas."

He lost the case, and it does not appear that Rani Kripamoyi was any party to the proceedings.

Rani Kripamoyi made a gift of Katia Nangla to Rani Durga Sundari and the latter was in possession of the Taraf so long as she lived. There is a large number of documents showing her possession as not disputed.

After the death of Raja Baroda Kant, disputes arose between Manada Kant (the son by his third wife) and Jnanada Kant and Hemoda Kant, his sons by his wife Rani Durga Sundari. Rani Durga Sundari claimed Taraf Katia Nangla and certain other properties as her Ranian Britti. The dispute was settled by a release, dated the 17th February 1884, executed by her in favour of Manada Kant, whereby she gave up her claim to the properties other than Taraf Katia Nangla claimed by her. It was agreed that the three brothers would get the whole estate with the exception of Taraf Katia Nangla in equal shares, that Taraf Katia Nangla would remain with their consent in the possession and enjoyment of Rani Durga Sundari for her maintenance for life and for the performance of religious duties, and that the sons would not be able to claim Katia Nangla during her lifetime.

Subsequently Hemoda Kant sold his one-third share of the Pargana Sahas "including the Ranian Britti in Katia Nangla" by a conveyance, dated the 15th December 1892, as stated above to Kali Prosanna Ghosh. On the 21st January 1901 Kali Prosanna Ghosh instituted a suit for partition of Pargana Sahas, in which he prayed that "Mouza Katia Nangla may also be partitioned but to be held by Rani Durga Sundari during her life under the agreement." Rani Durga Sundari and the representatives of Jnanada Kant and Manada Kant were parties defendants to that suit. The suit was amicably settled and Rani Durga Sundari filed a petition of compromise in which she stated that "Taraf Katia Nangla" which was in her enjoyment and possession under the deed of release, dated the 17th February 1884, would remain in her possession and enjoyment in her life. On the 19th March 1905 a decree was passed by consent for partition of Touzi No. 186 (Pargana Sahas) and it was ordered that "Taraf Katia Nangla included in Pargana Sahas at present held by Rani Durga Sundari in life-interest being now not to be partitioned be kept undivided, and the same be partitioned after her death."

Rani Durga Sundari died on the 28th December 1911 and since her death the Ranis of the family, *viz*; the defendants Nos. 6 to 9, claim to be in possession of Taraf Katia Nangla. Their possession is not seriously disputed. The second issue in the case was: "Are the Ranis mentioned in the written statement in possession of the whole or any part of the property?" And the learned Subordinate Judge says in his judgment that it (along with some others) had not been passed.

The original Sanad of 1160 (1753) as already stated is not forthcoming, but having regard to the fact that it was produced before the Revenue Authorities a century ago (1816) [see Rubakari of Collector of Jessore, dated 25th March 1816 Exhibit 1 (3)], there can be no doubt that there was such a Sanad. However, it is not set out in the Rubakar and all that appears is that there was a gift of 500 *bighas* of land in Katia Nangla by Raja Nil Kant to his step-mother Rani Indra Nilmoni for her maintenance.

The next grant set up by the defendants as stated above is that of Raja Sri Kant Roy, dated the 4th February 1797 (Exhibit M), in favour of his wife Rani Annapurna and his brother's wife Rani Rajeswari. The

learned Subordinate Judge was of opinion that this document was not genuine. It is said that this was in the record room of the defendants and was accidentally found in 1317. The evidence on the point was not believed by the Court below, and we do not think that the evidence is convincing. The grant, however, is referred to in Exhibit O, which is said to have been found along with it. This Exhibit O is a registered document "appertaining to Ranian Britti Mahal Taraf Katia Nangla and others belonging to Rajmata Rani Kripamoyi," purporting to have been prepared in the year 1284 B. S. It mentions (among various other documents) "a Sanad confirming Ranian Youtuk Britti, dated the 25th of March 1203 B. S., granted by Raja Srikant Roy to Rani Annapurna and Rani Rajeswari." The Taidad (Exhibit N-a) and the Exhibit O do not appear to have been challenged in the Court below, and the learned Subordinate Judge has not referred to Exhibit O at all in his judgment. So far back as the 4th August 1837 Raja Baroda Kant in his petition to the Special Deputy Collector stated that the late Raja "maintained the grant (Britti) to the Ranis Rajeswari and Annapurna as before for their maintenance." The Sanad of 1203 does not appear to have been produced before the authorities at the time. It may be (as suggested on behalf of the defendants) that as Raja Baroda Kant and Rani Kripamoyi were resisting the claim of Ram Kissen Panda based upon an alleged gift by Rani Indra Nilmoni (who had got Taraf Katia Nangla under the Sanad of 1160 from Raja Nilkant), the confirmatory Sanad of 1203 was not of importance in these proceedings.

The learned Subordinate Judge was of opinion that the Sanad of 1203 is consistent with other subsequent unimpeachable evidence. The Taidad of 1209 states that there was at first a gift of Taraf Katia Nangla to Rani Indra Nilmoni, and then that property was given to Rani Annapurna in 1187, whereas the Sanad of 1203 shows that the property was given to the two Ranis Annapurna and Rajeswari. The Collector's proceedings of 1816 also show the same thing. Then again Rani Annapurna alone mortgaged the property to Ramdhin Singh, and the petition of Mohan Singh also shows that Rani Annapurna alone was the owner. Rani Kripamoyi also in her petition of 1229 also sets up the previous title of Annapurna alone. Rani Rajeswari did not object to the transfer of Katia Nangla by Annapurna to Ramdhin, nor does she appear to have dealt with the property in any way although she did not die until 1244. On the other hand Rani Rajeswari was dealing with certain other properties without any reference to Rani Annapurna. An explanation was attempted on behalf of the Rani defendants based upon the fact that there were other properties besides Taraf Katia Nangla which were given as Ranian Britti to Rani Annapurna and Rani Rajeswari, and it was suggested that by some arrangement between themselves Rani Annapurna obtained Taraf Katia Nangla, and Rani Rajeswari got other properties, and that this would explain why the Ranis were dealing with certain properties without reference to each other. The Sanad of 1203 no doubt refers to the grant of Taraf Katia Nangla "and others" are also stated to be in Pargana Sahas. The properties dealt with by Rani Rajeswari do not appear to be situate in Pargana Sahas. That being so, the explanation is not satisfactory. Though the fact that Rani Rajeswari had some properties which she was dealing with as her Britti without reference to Rani Annapurna may suggest the possibility of other grants to the two Ranis and an agreement between them, there is no evidence to show that there was any other grant to the two Ranis. We need not, however, discuss the matter further, because, in our opinion, the genuineness of the Sanad of 1203 does not help the case of the Rani defendants. The learned Subordinate Judge was of opinion that "if this document (Sanad of 1203) be a genuine one, then the contention of the Ranis is true." But the Sanad states, "you and the Ranis of the family shall remain in the enjoyment and possession of the aforesaid Britti and hold the same as Lakhiraj, you or the future Ranis shall be entitled only to enjoy the profits thereof." Now in so far as it lays down a rule of succession limited to the Ranis

of the family, it is not valid. An agreement such as that laid down in the Sanad cannot alter the line of succession according to law. Its value as evidence of the family usage will be considered later on, and this brings us to the main question in the case, *viz*, whether any family custom or usage has been proved under which the Ranis are entitled to succeed to the Ranian Britti property Katia Nangla to the exclusion of persons who are entitled to succeed according to law.

As already stated, Rani Indra Nilmoni first obtained the property under Sanad of 1160. She made a gift of it as Youtuk Britti to Rani Annapurna during her lifetime. This is clear from the Rubakari, dated the 25th March 1816; and the Rubakari of the Collector, dated the 22nd March 1823, states that Rani Annapurna filed a *hebanama* in respect of Taraf Katia Nangla. Then again it appears from the petition of Rani Kripamoyi, dated the 4th August 1837, that Rani Annapurna also made a gift of the Taraf to Rani Kripamoyi as Youtuk Britti. It is contended on behalf of the Ranis that the conveyance by one Rani in favour of another during her lifetime merely accelerated the succession, and reliance is placed upon the statement of Rani Kripamoyi in her petition, dated the 4th August 1837, that after the death of one Rani, another Rani succeeded to the right of enjoyment for her maintenance. But as the Kulachar is based upon these instances, we cannot ignore the fact that there were conveyances by one Rani in favour of another. The right of Rani Durga Sundari to the property was disputed by her step-son Manada Kant, and the dispute was settled by the release executed by her, under which she was to enjoy the property only for her life.

It is to be observed that Rani Annapurna claimed the properties as her Youtuk Britti obtained by gift from Rani Indra Nilmoni. She mortgaged Katia Nangla to Ramdhin Singh, and Rani Kripamoyi treated the mortgage as valid. Had there been a family custom that each Rani was to hold only a life-estate, Rani Kripamoyi would have been entitled to succeed to the property on the death of Rani Annapurna without redeeming the mortgage. It is contended on behalf of the Rani defendants that Rani Annapurna died in 1229 and Kripamoyi got the property in the same year, and that the mortgage money had been satisfied, by the time Annapurna died, out of the profits of the property, and it was, therefore, unnecessary on the part of Rani Kripamoyi to embark on a litigation to show that Rani Kripamoyi had no right to mortgage the property. It appears, however, from the petition of Mohan Singh (the son of the mortgagee Ramdhin Singh), dated the 18th December 1822, that after the death of Rani Annapurna, the balance of the money due under the mortgage was received by him, and Kripamoyi in her petition, dated the 9th March 1823, stated that the mortgage was redeemed by the Government.

Rani Rajeswari also was dealing with her Ranian properties without reference to Rani Kripamoyi. By a Kobala, dated the 26th January 1810 (Exhibit 1-1), Rani Rajeswari transferred certain Mouzahs out of Taraf Madhu Khali by way of conditional sale for Rs. 10,501 in favour of Gouri Charan Ghose and others, and from the Rubakari of the Collectorate, dated January 1828, it appears that she applied to the Collector to pay off the mortgage on behalf of the minor Raja (whose estate was then under the Court of Wards), "as there will be no heir to the said Milkiat except the said minor." Then it appears that with regard to another Britt property of Rani Rajeswari, which consisted of Tauper lands, Raja Baroda Kant on the 26th May 1911 claimed that he was entitled to it on her death, and prayed for settlement of the same with him. It is clear, therefore, that so far as Rajeswari's Britt properties were concerned, they came to be inherited by Raja Baroda Kant, and not by any Ranis of the family as laid down in the Sanad of 1203.

It is contended that the fact that the Ranis purported to transfer does not show that they had the power to do so, and that Hindu widows often make alienations in excess of their powers. But in deciding the question of family usage the fact that the Ranis have dealt with the properties as if they were owners thereof, cannot be excluded from consideration.

AMBALIKA DASI v. ARPANA DASI.

It is contended on behalf of the plaintiffs that the rule of succession set up is based upon a grant and not upon a Kulachar or family usage. The defendant Jyotish Kant in the 19th paragraph of his written statement stated that Taraf Katia Nangla constitutes the "Ranian Britti created by a valid grant." Further on he says that the properties have all along been held uninterruptedly by the respective Ranis "as of right" and according "to the long established family usage" and "custom of the country prevalent among specially respectable families." So that it was based upon grant, Kulachar and also Desachar. In the written statement of the Rani defendants they set up the original grant of 1160 to Rani Indra Nilmoni, and the confirmation of the grant in 1203 by Raj Sri Kant and also set up the long-standing and uninterrupted usage and family custom in the Raj family, "as being held by the Ranis in succession, each Rani having only a life-interest without having any right to make any sort of gift, etc."

As observed above, the grant, in so far as it lays down a rule of succession, is absolutely void as it prescribes a rule of succession unknown to Hindu Law. It is also void as it purports to create successive life-estates in favour of unborn persons, the estate itself being undisposed of. Even if the rule of succession laid down in the Sanad of 1203 has actually been followed, it cannot be treated as binding upon the family unless it has ripened into a family custom.

It is contended on behalf of the Ranis that ever since 1160 B. S., for more than a century and a half, the Ranis of the family have been successively in possession of the property as Ranian Britti and there is no evidence to show that any Raja was in possession of it.

But in order to establish a custom it must be shown that the custom has existed from time immemorial and where the custom set up is peculiar only to a single family, the rule is mere strictly enforced than ever. It is true that a family custom of proved antiquity is entitled to be recognized by the Courts, irrespective of position and rank of the family, and the Chanchara Raj family appears from Hunter's Statistical Account of Jessore to be an ancient family of position and importance.

It is contended on behalf of the plaintiffs that no question of immemorial usage can possibly arise when the origin of the alleged usage is known. In the present case the custom is said to have originated with the grant in 1160. Assuming that there can be a valid custom where the origin is known, it must be shown that there has been a long line of succession in accordance with the usage. In *Sumrun Singh* v. *Khedun Singh* (1) the Sudder Diwany Adaulat, after taking the opinion of Pandits, held that in order to legalize any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors in the family when it becomes known by the name of Kulachar, and in that case only two instances having been adduced in support of the Kulachar set up in that case, the Court held that it was not sufficient; see also *Pertaub Deb* v. *Sarrup Deb Raikut* (2). In the case of *Ramlakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (3) their Lordships of the Judicial Committee observed: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable, and...should be established to be so by clear and unambiguous evidence; for it is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty, on which alone their legal title to recognition depends." It is contended on behalf of the defendants that in this country a custom would be valid if in existence from before the year 1793, and reliance is placed upon the observations of Sir Charles Grey, C. J., in an early case referred to in Banerjee's Stridhan, page 234, and it is pointed out that in the case of *Garuradhwaja Prasad* v.

(1) 2 Sel. Rep. 147; 6 Ind. Dec. (o. s.) 470.
(2) 2 Sel. Rep. 321; 6 Ind. Dec. (o. s.) 602.
(3) I. A. Sup. Vol. 1 at p. 3; 17 W. R. 552; 12 B. L. R. 396; 2 Suth. P. C. J. 603; 3 Sar. P. C. J. 108; 14 M. I. A, 570; 20 E. R. 898.

AMBALIKA DASI *v.* ARPANA DASI.

Superundhwaja Prasad (4), the existence of a family custom for 80 years was held to be sufficient. Although there may be no definite rule in Hindu Law as to how old a custom must be in order that it may have the force of law, in the present case (as will be presently shown) there does not appear to have been succession according to any family usage from before the year 1793.

In the case reported as *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (4) there was evidence of a family custom (succession by primogeniture) for 80 years, and the family belonged to a group of families in which the custom had been in existence from time immemorial, and it was held under the circumstances that the family custom had been proved.

The only case in which a family custom of succession from mother-in-law to daughter-in-law was set up, was in the case of *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (5) and it was held not to be proved.

In the present case Rani Indra Nilmoni obtained the property under an express grant. Ranis Annapurna and Rajeswari also had a Sanad (though a confirmatory Sanad) assuming the same to be genuine, and there was a gift by Rani Indra Nilmoni during her lifetime to Rani Annapurna. The Sanad of 1203 does not refer to any family custom. It merely recites the grant of Taraf Katia Nangla and others in Pargana Sahas as Ranian Youtuk Britti to Rani Indra Nilmoni and states that the Taraf Katia Nangla and others is *again granted* to Ranis Rajeswari and Annapurna as Youtuk Britti and lays down the line of succession as to future Ranis. No question can, therefore, arise of any family custom up to the time when Rani Annapurna got the property. Rani Annapurna admittedly made a gift of the property to Rani Kripamoyi during her lifetime, and it was during the time of Rani Kripamoyi, when Ram Kissen Panda claimed the property under an alleged gift from Rani Indra Nilmoni, that the custom was set up for the first time. It is said that it was the first occasion on which it was necessary to set it up. But had there been a family custom as described in the petition of Rani Kripamoyi, dated the 4th August 1837, *viz.*, that since a long time before the British Government the Ranis of the family had been in enjoyment and possession of the Ranian Britti, and that after the death of one Rani another succeeded to the rights, it would have been mentioned in the Sanad of 1203, granted by Raja Sri Kant.

In the proceedings which took place in 1837, Rani Kripamoyi, after reciting the custom as stated above, said that the property descended to Rani Annapurna who made a gift of it to her as a Youtuk and since then she had been holding the property as Youtuka property. Raja Baroda Kant by his petition of the same date stated that his mother *succeeded* to the Britti property. The suggestion is that the gift by one Rani during her lifetime to another merely accelerated the succession. But the custom set up in the petition of Rani Annapurna was that "after the death of one Rani another succeeded to the rights." Without attaching, however, any importance to these distinctions, the only instance of succession which can possibly be relied upon on behalf of the defendants is that of Rani Kripamoyi. Leaving aside the fact that there was a gift to her by Rani Annapurna during her lifetime, can it be said that Rani Kripamoyi succeeded under any family custom? There was no case of succession according to family custom before she succeeded; and there could not be any family custom between the date of grant to Rani Annapurna in 1203 and the succession of Rani Kripamoyi. In any case one instance of succession cannot establish a family usage. We have not referred to the oral evidence because it is not of any value, and in any case does not prove anything more than what appears from the documentary evidence.

After the death of Raja Baroda Kant, Rani Durga Sundari's right to the Ranian Britti was challenged by her step-son Manada Kant, and the dispute was settled between her and the sons, by giving to Rani Durga Sundari only an estate for life, and in the suit for partition brought by Kali Prosanna Ghose it was expressly agreed upon by Rani Durga Sundari and the representatives of Jnanada and Manada that Taraf Katia Nangla would be partitioned after her death. It is true that the Rani defendants were no parties to these suits. But the husbands

(4) 27 I. A. 238; 23 A. 37; 10 M. L. J. 267; 5 C. W. N. 33; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724 (P. C.).

(5) 2 C. L. J. 20.

(of some of the defendants), who in the present suit say that the ladies of the family succeed to the Ranian Britti under a family usage, were parties, and Bhuban-Mohini the widow of Jnanada Kant was also a party to the partition suit. Bhuban Mohini would have been entitled to succeed under the alleged custom on the death of Rani Durga Sundari, but she along with the husbands of some of the present Rani defendants agreed to the arrangement. A decree was passed by consent and the property was dealt with in a manner which is inconsistent with the existence of the family usage set up.

It is to be observed that no definite rule of succession is prescribed by the Kulachar. The Ranis of the family are to succeed according to the Kulchar, but whether the daughters-in law alone or grand-daughters-in-law also are to succeed, is not clear. In the present case the Rani defendants are all grand-daughters in-law of Rani Durga Sundari. Then again it is not stated what would happen, if a Raja becomes widower and there is no dowager Rani, or daughter-in-law or grand-daughter-in-law and the Raja subsequently marries a second time. On the whole we are of opinion that the special family usage set up by the defendants has not been established, and the appeal must, therefore, be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 896 OF 1917.

February 25, 1918.

Present :—Mr. Justice LeRossignol.

KAMAN—PLAINTIFF—PETITIONER

versus

UMRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 137, 138, 142, applicability of—Purchaser of bare site—Possession, symbolical, value of—Dispossession—Limitation.

Plaintiff sued to recover possession of a bare site in March 1916, on the allegation that he purchased the site in dispute in July 1902 and took symbolical possession thereof in October 1904 and that defendants had ousted him therefrom two years before suit:

Held, that the property in dispute being a bare site, plaintiff's symbolical possession was equivalent to actual possession, and that the article *prima facie* applicable to the suit was Article 142 of the Limitation Act.

Articles 137 and 138 of Schedule I of the Limitation Act apply only where the purchaser has never taken possession of the property.

Revision from the order of the Senior Subordinate Judge, Jullundur, dated the 3rd May 1917.

Mr. *Harcharan Das Bhalla*, for the Petitioner.

Mr. *Chaman Lal Gulati*, for the Respondents.

JUDGMENT.—On the following facts alleged by the plaintiff, *viz*, that he purchased the area in suit in July 1902 and took possession in October 1904 and the defendants had ousted him two years before suit brought in March 1916, the Courts below have dismissed the suit as time-barred; the trial Court applied Article 138, the lower Appellate Court Article 157 or Article 142.

Both Courts are wrong in applying Articles 137 and 138, which apply only when the purchaser has never taken possession of the property.

In this case the petitioner-plaintiff obtained symbolical possession in 1904 and as the property is a bare site, his symbolical possession was equivalent to actual possession.

The Article of *prima facie* application to the suit is Article 142; the suit is well within time and the defendants can defeat the claim only by shewing an adverse possession of more than twelve years.

Consequently the lower Appellate Court cannot decide the suit on limitation without first deciding the nature and duration of the defendants' possession.

I accept the petition and set aside the lower Appellate Court's decree and remand for decision on the merits. Costs to follow final event.

Case remanded.

RASH MOHAN SAHA *v.* KRISTO DAS ROY.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 100 OF 1916.

June 4, 1918.

Present :—Mr. Justice Teunon and Mr. Justice Richardson.

RASH MOHAN SAHA AND ANOTHER — PLAINTIFFS—APPELLANTS

versus

KRISTO DAS ROY AND OTHERS — DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Preference to one creditor—Mortgage in favour of creditor to secure payment of genuine debt, validity of, as against other creditors.

A mortgage executed by a debtor in favour of one of his creditors to secure the payment of a genuine debt, the properties mortgaged not exceeding in value the amount which they are intended to secure, is not invalid under section 53 of the Transfer of Property Act as against the other creditors, even where the mortgage bond is taken after the mortgagee-creditor has knowledge that other creditors of the mortgagor are exercising pressure for the re-payment of debts due to them. [p. 415, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Faridpur, dated the 30th March 1916.

FACTS—This appeal arises out of a suit brought on a mortgage-bond which was executed by defendants Nos. 1 to 3 in favour of the plaintiff on the 16th Falgoon 1318 to secure the payment of Rs. 16,000. The defendants Nos. 4 to 6 in the suit were the purchasers of the mortgaged properties in execution of a money-decree obtained by them against the mortgagors subsequent to the execution of the mortgage-bond. The lower Appellate Court found that the defendants Nos. 1 to 3 owed to the plaintiff on the date of the bond the amount secured thereby and passed against them a money decree for the sum of Rs. 6,000. The Court dismissed the suit as against defendants Nos. 4 to 6, on the ground that the bond represented a fraudulent preference given by defendants Nos. 1 to 3 to one creditor, *i.e.*, the bond was executed not so much to secure re-payment to the plaintiffs as to protect the interests of defendants Nos. 1 to 3, so as to enable them to retain their properties against the claims of other creditors.

Babu *Dwarkanath Chakrabarty* (with him Babu *Gopal Chandra Das*), for the Appellants.—This appeal arises out of a suit for recovery of money due upon registered *kistibandi* bond, dated 18th May 1914. The bond was executed on account of money due to the firm named Surya Kumar and others, with whom business was going on from 1307 to 1317. The appellant is a relation of defendants Nos. 1 to 3. The other defendants Nos. 4 to 6 are the purchasers of the mortgaged properties in execution of a money-decree obtained by them against the mortgagors subsequent to the execution of the bond. Defendants Nos. 4 to 6 deny the *bona fides* of the transaction also the consideration and say it was a *benami* transaction.

The lower Appellate Court dismissed the suit on the ground that the plaintiff's claim was one which could not be enforced in view of section 53 of the Transfer of Property Act, because it was a preference given to one of the creditors. I submit the claim was a *bona fide* one and the relationship did not affect the case at all. *Musahar Sahu* v. *Hakim Lal* (1) referred to.

The evidence as to the value of the land was shut out by the order of the Court and hence the observation by the lower Appellate Court about the small value of the land is not fair.

The bond was executed after giving a remission of Rs. 2,000. This shows that there was a genuine debt and the relationship did not affect the case at all.

The lower Appellate Court has wrongly applied the case reported as *Chidambaram Chettiar* v. *Srinivasa Sastrial* (2).

The latest cases on this point are reported as *Musahar Sahu* v. *Hakim Lal* (1), *Mina Kumari Bibi* v. *Bijoy Singh* (3).

The case of *Chidambaram Chettiar* v. *Srinivasa Sastrial's case* (2) is the earliest of the three Privy Council cases and hence that cannot be applied here.

The law on this point is clear. Because

(1) 32 Ind. Cas. 343; 43 I. A. 104; 23 C. L. J. 406; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 18 Bom. L. R. 378; 43 C. 521 (P. C.).

(2) 23 Ind. Cas. 714; 18 C. W. N. 841; 26 M. L. J. 473; 36 M. 227; 16 M. L. T. 286; (1914) M. W. N. 754; 16 Bom. L. R. 783; 1 L. W. 963; 20 C. L. J. 571 (P. C.)

(3) 40 Ind. Cas. 212; 21 C. W. N. 585; 32 M. L. J. 425; 1 P. L. W. 425; 5 L. W. 711; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 C. 662; 44 I. A. 72 (P. C

one creditor is preferred and another is unpaid, that does not vitiate the transaction under section 53. *Mina Kumari Bibi* v. *Bijoy Singh* (3), and observation on page 589 of 21 C. W N. referred to.

The law is clear on this point and if there is a consideration existing, the transfer is valid.

The finding of the Subordinate Judge that the relationship of the plaintiff has prejudiced the case is absolutely without jurisdiction. Transaction was going on for some 10 years.

The prayer was for a decree of Rs. 6,000 on account of the mortgage and also some money as damages from defendants Nos. 4 to 6, on the ground that the defendants have removed some huts and some 12 tin godowns.

[TEUNON, J.—There is no finding on this point].

The case was dismissed and hence there is no finding.

Babu *Jogesh Chandra Roy* (with him Babu *Rupendra Kumar Mitra*), for the Respondents.—The real finding of the lower Appellate Court comes to this, that the mortgage was taken for the protection of defendants Nos. 1 to 3. Defendant No. 2 is plaintiff's sister's husband.

On the 9th April 1912 defendant No. 4 instituted a money suit for Rs. 14,000 against defendants Nos. 1 to 3 and another man.

Defendant No. 1 is father of defendant No. 3.

Mortgage-bond sought to be enforced was registered on the 16th April 1912, though it bears the date 26th February 1912.

From the mortgage-bond it is clear that the instalments for payment extend to the year 1332. This shews that the real intention was to protect the property and defeat or defraud other creditors. *Hakim Lal* v. *Mooshahar Sahu* (4) referred to.

The main point is to look to the real object of the transaction, *i.e.*, the intention. They owed him Rs. 18,000 and Rs. 2,000 was remitted.

The money-decree was obtained on 6th August 1913 for about Rs. 14,000. The plaintiff put in a claim which was disallowed on the 20th March 1914.

On the 30th May 1914, defendants Nos. 4 to 6 purchased those properties.

The plaintiff's case is that the bond was in possession of the defendants Nos. 4 to 6 but they deny all knowledge of possession. In a criminal case this bond was filed by the defendant No. 2.

Prayer for attachment before judgment was made on the 25th April and the defendants Nos. 1 to 3 must have communicated this news to the plaintiff. These elements must be considered. *Musahar Sahu* v. *Hakim Lal* (1) affirms the decision in *Hakim Lal* v. *Mooshahar Sahu* (4).

The Privy Council case referred to does not lay down a general provision of law with regard to consideration.

The real intention of the bond was not mere satisfaction of the debt but to avoid the claims of other creditors.

If it is a cloak to avoid other creditors, *bona fide* consideration is not sufficient to make the transaction valid. *Hakim Lal* v. *Mooshahar Sahu* (4) referred to.

To make the transaction valid, three things are necessary

1. Adequate consideration.
2. Good faith.
3. It must not be a mere cloak for the benefit of the debtor.

Conditions 2 and 3 are not satisfied. See *Hakim Lal* v. *Mooshahar Sahu* (4).

It is a case of secret trust. Referred to *Hakim Lal* v. *Mooshahar Sahu* (4).

Defendant No. 2 is sister's husband of the plaintiff. Defendant No. 1 is father of defendant No. 2 and No. 3 is brother of defendant No. 2.

Two children of defendant No. 1 are servants of the plaintiff.

The mortgaged property was worth Rs. 500 but no body would take it as security for Rs. 16,000.

[TEUNON, J.—A part is better than the whole.]

No book was produced to prove that interest was realised.

There was no agreement as to the interest in the beginning and it was an afterthought, and hence the interest of some years was put down.

There is no evidence to show that this firm is alone responsible for the money

(4) 34 C. 939 at pp. 1010, 1016; 11 C. W. N. 889; 6 C. L. J. 410.

and not the other two firms with whom business was going on.

It would have been a strong case if any amount of the principal was due; only interest is alleged to be due but no book has been produced for the claim of the interest. The only evidence is the oral testimony of the plaintiff.

The interest in other cases is much below the rate at which in the present case it is charged.

JUDGMENT.—This appeal arises out of a suit brought on a mortgage-bond. The mortgage-bond was executed by defendants Nos. 1 to 3 in favour of the plaintiff on the 16th Falgoon 1318, to secure the payment of a sum of Rs. 16,000. The defendants Nos. 4 to 6 in the suit were the purchasers of the mortgaged properties in execution of a money-decree obtained by them against the mortgagors subsequent to the execution of the mortgage-bond. The learned Subordinate Judge has found that in fact defendants Nos. 1 to 3 owed to the plaintiff on the date of the bond the amount secured thereby, and he has made against them a money-decree for the amount claimed in the suit, a sum of Rs. 6,000. He has dismissed the suit as against defendants Nos. 4 to 6 on the ground that the bond in fact represents a fraudulent preference given by defendants Nos. 1 to 3 to one creditor, namely, the plaintiff, over others, or in other words, that the bond was executed not so much to secure re-payment to the plaintiff as to protect the defendants Nos. 1 to 3 and to enable them to retain their properties against the claims of other creditors.

In appeal, it is contended before us that even on his own findings the learned Subordinate Judge's decision cannot be upheld. On the other hand the respondents seek to support his decision by contending, *firstly*, that in fact on the day on which the bond was executed there was nothing due by defendants Nos. 1 to 3 to the plaintiff, and *secondly*, by contending that even if there was such a debt due yet by the bond a benefit was reserved to the debtor, it representing or concealing merely a secret trust in favour of the mortgagors.

As to the question of the debt it is not disputed that as a matter of fact defendants Nos. 1 to 3 had transactions with the plaintiff for a series of years extending from 1307 to 1318. But it is contended that there was no arrangement made that interest should be charged by the plaintiff or paid by the defendants. We have been referred to many passages of the evidence in support of that contention, but we find there is ample oral evidence in support of the agreement to pay interest. No doubt there are some discrepancies in that evidence as to the existence of what is spoken of as Falat books, and no doubt it is the case that the Falats spoken of as kept by the firm of Pitamber and Nilamber from which the moneys were actually taken for the benefit of the defendants have not been produced. But simply because the plaintiff and the defendants are relations, we see no improbability in the plaintiff's claiming and requiring them to pay interest on advances made to them. The oral evidence on the point is supported by many entries in the plaintiff's books of account, and is also further supported by the fact that the plaintiff himself had apparently to pay interest to the firm from which the money was actually taken. It has been suggested that that firm and the plaintiff's firm are really one and the same. But no doubt though there is a close relationship between the partners, it cannot be said, and in fact there is no evidence to show, that the businesses are not separate and independent. For these reasons we agree with the learned Subordinate Judge in holding that on the day the bond was executed there was a sum of Rs. 18,000 and odd due by the defendants Nos. 1 to 3 to the plaintiff and that after granting a remission of a sum of Rs. 2,000 the plaintiff obtained the bond in question for the sum of Rs. 16,000 due and owing to him.

In support of their second contention the respondents point to the following facts, that the defendant No. 2 is the plaintiff's sister's husband, that though the transactions had extended over a period of some ten years, yet until the day in question resort to a mortgage-bond had not been had, and that this mortgage-bond was taken after the plaintiff had knowledge of the debt due to defendant No. 4 and of the pressure exercised by defendant No. 4 on defendants Nos. 1 to 3, that the bond was in fact taken or at least registered a few

days after the institution of the suit brought by defendant No. 4 against defendant No. 1 and further that the bond provides for payment by instalments extending up to the year 1332. These considerations, however, do not to our minds outweigh the facts, namely, that there was in reality a genuine debt of some Rs. 16,000 due by defendants Nos. 1 to 3 to the plaintiff, that there has been no exaggeration or overstatement of that consideration and there is in fact no suggestion that the properties mortgaged exceeded in value the amount which they were intended to secure. Because the plaintiff is related to defendant No. 2 and was aware of the fact that defendant No. 4 was demanding his dues from defendants Nos. 1 to 3 and was bringing pressure to bear upon them, are no reasons why the plaintiff should not require the defendants to secure the re pay ment of the money which was honestly due to him. In fact we are of opinion that the Subordinate Judge has been misled by his misapplication of the case reported as *Chidambaram Chettiar* v. *Srinivasa Sastrial* (2). In that case it was found as a fact that of the consideration money only half was in fact due from the assignor and the other half was not due from him but merely represented a benefit reserved for him. There is nothing of that nature in the present case, and the principles applicable to the present case are to be found in the case reported as *Musahar Sahu* v. *Hakim Lal* (1) and in the case reported as *Mina Kumari Bibi* v. *Bijoy Singh* (3).

For these reasons we set aside the decree of the Subordinate Judge and decree the suit as a suit on a mortgage-bond against defendants Nos. 4 to 6 and as against defendants Nos. 1 to 3. If the money be not paid within three months from this date the mortgaged properties will be sold. The issue as to the personal liability of defendants Nos 4 to 6 will be decided should the plaintiff hereafter find it necessary to apply for a decree under the provisions of Order XXXIV, rule 6, Civil Procedure Code. This appeal is, therefore, decreed with costs against the contending defendant No. 4 throughout and with costs on the *ex parte* scale throughout against the other defendants.

RICHARDSON, J.—I agree.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 531 OF 1917.

February 26, 1918.

Present :—Mr. Justice LeRossignol.

GHULAM HAIDAR—PLAINTIFF —PETITIONER

versus

Musammat BHAGAN—DEFENDANT —RESPONDENT.

Co-operative Benefit Society—Manager refusing to receive subscription of contributory—Contributor whether entitled to refund of past subscriptions.

Plaintiff was a member of an association each member of which was bound to contribute a certain monthly sum, and the total contributions were then placed at the disposal of each contributor in turn. He alleged that the defendant who was the organiser of the scheme had improperly refused to receive his contributions, and he claimed to recover the sum of his past contributions on the ground that by the action of the defendant he had lost all prospect of taking the pool:

Held, (1) that if it was found that it was the plaintiff who refused to continue his contribution he must prove that he had a right to a refund, and if so at what time; [p. 416, col. 1.]

(2) that if, on the other hand, the defendant was responsible for the breach, the burden lay on him of proving that no refund was claimable. [p 416, col. 1.]

Revision from the decree of the District Judge, Sialkot, dated the 30th March 1917.

Mr. *Abdul Rashid*, for the Petitioner.

Mr. *Ghulam Rasul*, for the Respondent.

JUDGMENT.—The plaintiff's claim was for the aggregate of his subscriptions to a certain pool, generally called a "committee." He alleged that the organizer and manipulator of the scheme had refused to continue to receive his subscriptions, he, therefore, had lost all prospect of taking the "pool" and he consequently demanded a return of his subscriptions.

The defendant denied all knowledge of the matter and averred that her mother was responsible, but this the mother denied. The first Court decreed for plaintiff, but the learned District Judge without coming to definite findings of fact held that the plaintiff had shifted his ground and had not established the rules of the "pool" governing the question of refund.

I cannot find any ground for holding that the plaintiff in his pleas varied the position he had taken up in his plaint, nor is it necessary to consider the *reductio ad absurdum* deduced by the learned District Judge.

If the District Judge agrees with the first Court that the defendant ran the

scheme and for reasons quite unconnected with the scheme refused the subscriptions of the plaintiff, she is bound to indemnify him in respect of past subscriptions.

The enforcement of the liability of these individuals who work these schemes is imperative, for I understand that they are very numerous and, when honestly conducted, are a form of co-operation whereby capital is placed at the disposal of each contributor in turn on the condition that he shall pay a monthly subscription to the "pool", and I understand further that when a contributor is unable to continue his subscription, always provided that he has not yet taken the "pool", he generally receives the aggregate of his subscriptions after all the other regular contributors have drawn the "pool".

If the lower Appellate Court finds that it was plaintiff who refused to continue his subscription, plaintiff must prove that he has a right to a refund, if so, when? The learned District Judge has held that plaintiff has not proved such a right, but if the defendant is responsible for the breach, on her will lie the burden of proving that no refund is claimable.

For these reasons I accept the petition, set aside the lower Appellate Court's decree and remand the case for fresh decision on the points indicated.

Costs shall follow final event.

Case remanded.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 659 AND 758 OF 1917.

June 26, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

KARIM BAKSHA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ABDUL JABBAR MIAJI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 85—Under-raiyati lease, permanent, validity of—'San ba san,' meaning of.

A permanent under-*raiyati* lease registered in contravention of section 85 (2) of the Bengal Tenancy Act is not operative even as against the *raiyat* who granted it. [p. 418, col. 1.]

A registered under-*raiyati* lease, while making provision for the holding passing from generation to generation and for being sold by the under-*raiyat*, described itself as a *san ba san* (year to year) lease and stipulated that if the under-*raiyat* ever reduced the rent by raising any objection he would be liable to ejection without notice:

Held, that the under-*raiyati* lease was a permanent lease and as such contravened the provisions of section 85, Bengal Tenancy Act, and was, therefore invalid. [p. 418, col. 1.]

Appeals against the decrees of the District Judge, Noakhali, dated the 5th of March 1917, affirming those of the Munsif, 2nd Court at Lakhipur, dated the 27th of July 1915.

FACTS appear from the judgment.

Babu *Romesh Chander Sen*, for the Appellants.—The appeals arise of two suits for recovery of possession of lands covered by two under *raiyati* leases from the heirs of the deceased under-*raiyat*. The question is, whether the leases are in contravention of the provisions of section 85 of the Bengal Tenancy Act, and whether the plaintiffs are not estopped from questioning their validity. The leases are described as *san ba san* (year to year) and at the same time they are not transferable and heritable from generation to generation. The leases are from year to year and, therefore, do not contravene the provisions of section 85 of the Bengal Tenancy Act. Assuming the leases do contravene the provisions of section 85, the lessors cannot now turn round and rely on the invalidity of the leases. Referred to *Gonesh Mondol* v. *Thanda Namasundrani* (1).

Section 85, sub-clause (2) of the Bengal Tenancy Act, refers to registration of the document so far as landlord is concerned and unless registered the sub-lease is not valid as against the landlord. A sub-lease by a *raiyat* is valid against the *raiyat*, otherwise the Legislature would have made a provision to that effect. See *Temijuddi* v. *Asgar Howladar* (2), *Manik Borai* v. *Bani Charan Mandal* (3).

A sub-lease granted by an under-*raiyat* is operative. Referred to *Guru Das Das* v. *Kali*

(1) 38 Ind. Cas. 480; 24 C. L. J. 539.
(2) 1 Ind. Cas. 942; 36 C. 256; 13 C. W. N. 183.
(3) 10 Ind. Cas. 469; 13 C. L. J. 649.

Das Changa (4), *Hari Mohon Pal* v. *Atul Krishna Bose* (5), *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (6), *Abdul Karim Patwari* v. *Abdul Rahman* (7).

[WALMSLEY, J.—*Telam Pramanik* v. *Adu Shaikh* (8) is clearly against you.]

Carnduff, J., came to that conclusion with great reluctance. Even assuming the lease is invalid also against the *raiyat* and contravenes the provision of section 85, still in this case the lease is from year to year as the word "*san ba san*" occurs in the first part, middle and last part of the lease.

So far as estoppel is concerned, there is no contrary case.

The Courts should construe a document so that it may be operative. Referred to *Lani Miah* v. *Muhammad Easin Mia* (9).

Dr. *Sarat Chander Bysak* (with him Babu *Amulya Chun Banerjee*), for the Respondent. —The lease expressly says that you should enjoy and possess the property from generation to generation. It is a permanent grant and the rent was fixed for ever, the grant was heritable and transferable.

On the 2nd point I submit there are numerous cases on the point but not consistent. So far as section 85, sub-clause (2), is concerned, the prohibition is with regard to the registration of the deed. All the cases decided that so far as the lease is concerned, it is not admissible in evidence. The latest case on the point in which all the other cases are reviewed, is *Chandi Charan Nath* v. *Somla Bibi* (10), *Mohim Chandra Dey* v. *Baidya Nath* (11) and *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (6) are referred to in *Chandi Charan Nath* v. *Somla Bibi* (10). Under the authority of this Court so far as the lease goes, it is void and no oral evidence is admissible on the point.

As to estoppel, there is no issue and the observation of Beachcroft, J., in *Chandi Charan Nath* v. *Somla Bibi* (10) would apply here with equal force. There is no estoppel against a Statute.

Babu *Romesh Chandra Sen*, in reply.—In *Mohim Chandra Dey* v. *Baidya Nath* (11) the lease is not from year to year. The opinion of Beachcroft, J., in *Chandi Charan Nath* v. *Somla Bibi* (10) in view of the authorities cannot be taken as binding authority.

JUDGMENT.

WALMSLEY, J.—The plaintiff brought the two suits out of which these two appeals arise to eject the defendants from two holdings. His allegation was that he had granted an under-*raiyati* to Makram Ali, the predecessor of the defendants, and that on Makram Ali's death he wanted to take *khas* possession, but the defendants who were Makram Ali's heirs had not given possession to him. The defendants replied that the plaintiff had executed two *pattahs*, one in respect of each holding, conferring upon Makram Ali permanent and heritable rights. They also said that the plaintiff, although he described himself as a *raiyat*, was really a tenure-holder.

The first Court found that the plaintiff was, as a matter of fact a *raiyat* and this was not disputed in the lower Appellate Court. The Courts below further found that the leases granted by the plaintiff to Makram Ali were permanent and heritable leases and they held that the leases had been registered in contravention of the provisions of section 85 (2) of the Tenancy Act and that they were not admissible in evidence, consequently the plaintiff's suits were decreed in both the lower Courts.

It is now contended on behalf of the defendants that the leases ought to have been regarded only as leases from year to year which might properly have been registered under section 85 (2). The translations of the leases have been placed before us and we find that they make provision for the holdings passing from generation to generation and for the holdings being sold; and the only stipulation with regard to ejectment is in these terms: "If you do reduce the rent by raising any objection then you will be liable to be ejected from the land without notice." At the beginning and the end of the documents, however, occurs the word *san ba san*; and we are asked

(4) 24 Ind. Cas. 287; 18 C. W. N. 882.
(5) 32 Ind. Cas. 503; 19 C. W. N. 1127.
(6) 35 Ind. Cas. 754; 24 C. L. J. 541 at p. 546; 20 C. W. N. 1340; 44 C. 771.
(7) 13 Ind. Cas. 364; 15 C. L. J. 672; 16 C. W. N. 618.
(8) 18 Ind. Cas. 791; 17 C. W. N. 468.
(9) 33 Ind. Cas. 448; 20 C. W. N. 948.
(10) 44 Ind. Cas. 254; 22 C. W. N. 179 at p. 182; 28 C. L. J. 91.
(11) 29 Ind. Cas. 879; 21 C. L. J. 478.

to hold that that word should modify our view of the nature of the agreement. It appears to me that it is much more important to consider the other parts of the document. The terms about heritability and transferability are terms which generally occur in permanent leases and I think the proper view to take of these *pattahs* is that they were intended to create a permanent interest, and I may add that the defendants fought the cases in the lower Courts on the footing that they had acquired a permanent interest. That being so, I think the provisions of section 85 (2) come in and the documents ought not to have been registered. It is urged, however, that the plaintiff as lessor cannot raise this question. Numerous authorities have been cited to us upon this matter of the proper construction to be put upon section 85 (2). It is not necessary to refer to more than a few of them, for they have all recently been dealt with in a judgment delivered by Mr. Justice Beachcroft in the case of *Chandi Charan Nath* v. *Somla Bibi* (10). The particular cases to which I refer are *Jarip Khan* v. *Durfa Bewa* (12), *Telam Pramanik* v. *Adu Shaikh* (8) and *Mohim Chandra Dey* v. *Baidya Nath* (11). The facts of those cases are generally similar to those of the present case and I think, following the principles adopted in those cases, that these appeals should be dismissed.

One other point has been raised, and that relates to the matter of compensation. It is urged that the plaintiff should be called upon to pay compensation to the defendants. No issue, however, was raised on this subject in the first Court and there appears to be no material on which it could be ascertained what sum, if any, ought to be paid as compensation.

The appeals must be dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

(12) 15 Ind. Cas. 476; 17 C. W. N. 59; 16 C. L. J. 144.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1382 OF 1913.

February 20, 1918.

Present:—Mr. Justice Scott-Smith and Mr Justice LeRossignol.

MUHAMMAD MIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAIZUL HASSAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92, applicability of—Sale or mortgage—Sale-deed—Oral evidence to show that transaction was mortgage, admissibility of—Pre-emption—Pre-emptor, position of.

A deed of sale, containing a stipulation that the sale was an out and out one and that there was no agreement to reconvey the property was duly executed and registered. The next day the vendee executed an agreement, which was duly registered to reconvey the property sold by the deed of sale to the vendor, provided the latter repaid the purchase-money together with the price of improvements within two years. One *F.* instituted a suit for pre-emption of the property:

Held, (1) that the sale-deed being an out and out sale in express terms, as soon as that sale was completed the right of pre-emption accrued and *F.* was, therefore, entitled to a decree; [p. 419, col. 2.]

(2) that oral evidence to show that at the time of the execution of the sale-deed the agreement to reconvey was in contemplation was inadmissible under section 92 of the Evidence Act. [p 419, col. 2.]

Obiter dictum.—Had the litigation lain solely between the vendor and the vendee, it might have been held that the two transactions taken together amounted merely to a conditional sale or to an English mortgage. [p. 419, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 26th March 1913.

Dr. *Muhammad Iqbal*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—On the 13th of July 1911 Nasir Shah, son of the original plaintiff *Musammat* Nasira Begam, purchased a stamp paper on which the endorsement by the stamp vendor is to the effect that the paper is to be used for engrossing a deed of conditional sale. On the 14th of July 1911 a deed of sale was executed by *Musammat* Nasira Begam in favour of Mutmaz Hussain, her relation. The deed contains a distinct stipulation that the sale is an out and out one and that there is no agreement to reconvey the property. This stipulation was entered in the deed apparently to meet any objection that

might have been based on the stamp vendor's endorsement. The deed of sale was registered on the 15th of July 1911 and on the same day, the vendee purchased another stamp paper on which he executed an agreement to reconvery the property sold by the deed of sale of the 14th of July 1911 to *Musammat* Nasira Begum, provided that she repaid the purchase-money together with the price of improvements within two years. This agreement to reconvey was registered on the 17th of July 1911. On the 6th of July 1912 Faizul Hassan, the maternal uncle of the vendee, instituted a suit for pre-emption, whilst on the 12th of July 1912 *Musammat* Nasira Begam, the plaintiff in this case, instituted a suit for possession of the house in terms of the agreement executed by Mumtaz Hussain on the 15th of July 1911. *Musammat* Nasira Begam succeeded in the first Court, but the learned Additional Divisional Judge on appeal dismissed her suit and gave Faizul Hassan a decree for possession by pre-emption of the property sold, holding that the sale of the 14th of July 1911 was an out and out sale and that the pre-emptor is not bound by the subsequent agreement entered into by the vendee to reconvey the property under certain conditions and within a certain time to the vendor.

Musammat Nasira Begam has come to this Court on second appeal, and it has been argued before us that as the interval of time between the deed of sale and the agreement to reconvey was only one day, the transactions should be considered as one only and consequently the transaction amounted to a mortgage and no right of pre-emption accrued. The following cases have been cited before us: *Palaniappan* v. *Subbaraya Gounden* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ram Saran Lal* v. *Amirta Kuar* (3) and *Balkishen Das* v. *W. F. Legge* (4). These cases, however, are not of great value in connection with this case, for in them the relation of the vendor and the vendee or the mortgagor and mortgagee is considered. In this case the position of a third party, *viz.*, the pre-emptor, has to be considered and that circumstance distinguishes this case from those cited. It would appear that the original intention of the parties was to execute a deed of conditional sale, but we are not concerned with the original intention of the parties but only with the intention of the parties at the time when the deed of sale was executed. At that time the parties had resolved to abandon their original intention and clearly determined, for reasons best known to themselves, on the execution of an out and out sale. It is no doubt true that at that time the agreement to reconvey was in contemplation, but we are unable to receive any oral evidence as to a contemporaneous oral agreement varying the terms of the sale-deed, for such evidence is barred by section 92 of the Indian Evidence Act. As a fact the sale-deed executed on the 14th of July 1911 was an out and out sale in express terms and as soon as that sale was completed, the right of pre-emption accrued. Had the litigation lain solely between the vendor and the vendee, we might have held that the two transactions taken together amounted merely to a conditional sale or, perhaps, to an English mortgage, but we find that on the 14th of July 1911 an absolute sale was accepted by the vendor and the vendee and that transaction opened the door to pre-emption. In this view we agree with the learned Additional Divisional Judge that the sale from the pre-emptor's point of view was a sale absolute and he is entitled to his decree.

We dismiss the appeal, but in the peculiar circumstances of the case we leave the parties to bear their own costs.

Appeal dismissed.

(1) 22 Ind. Cas. 4; 14 M. L. T. 579; (1914) M. W. N. 222; 1 L. W. 80.

(2) 12 A. 387; 17 I. A. 93; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 (P. C.).

(3) 3 A. 369; A. W. N. (1881) 39; 2 Ind. Dec. (N. S.) 174 (F. B.).

(4) 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 433 OF 1913.

May 9, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

Srimati KAMINI SUNDARI CHOWDHURANI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL HALIM MOULAVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 105, 106, 109—*Application under s* 105, *subsequently withdrawn, effect of—Suit under s.* 106, *dismissed for non-joinder of parties, whether bars civil suit—Landlord and tenant—Rent, non-payment of, whether bars landlord's right to assess rent—Limitation Act (IX of* 1908), *Sch. I, Art.* 130, *applicability of.*

An application made under section 105 of the Bengal Tenancy Act for assessment of fair rent but subsequently withdrawn should be treated as if it had never been made, so that it cannot bar a suit in the Civil Court for the same purpose under section 109 of the Bengal Tenancy Act [p 421, col 2; p 422, col. 1.]

Where a suit brought under the provisions of section 106 of the Bengal Tenancy Act, for a declaration that an entry in the Record of Rights that no rent was paid in respect of a tenure was wrong and that in fact a certain sum was payable as rent, is dismissed for non-joinder of parties, section 109 of the Act is no bar to a subsequent suit in a Civil Court for assessment of fair rent upon the tenure. [p. 421, col. 2.]

The mere non-payment of rent, for a certain period does not bar the landlord's right to have the rent assessed and to recover it from his tenant. [p. 422, col. 1.]

Unless and until a tenure is found to be a rent-free tenure, Article 130 of the Limitation Act can have no application to a suit for assessment of its rent. [p. 422, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Barisal, dated the 16th September 1912, affirming that of the Munsif, 4th Court at Patuakhali, dated the 21st of September 1911.

FACTS.—This appeal is on behalf of the plaintiffs and it arises out of a suit for assessment of rent on a *nim howla* tenure. In respect of the area within which this tenure is situate, a Record of Rights was prepared and published under Chapter X of the Bengal Tenancy Act. In that Record of Rights, this tenure was entered as one for which no rent was paid but as one which was liable to assessment of rent. The plaintiffs then brought a suit under section 106 of the Bengal Tenancy Act for a declaration that the entry in question was incorrect and that the annual rent payable for the tenure was Rs. 13 and odd. That suit was dismissed for defect of parties. There was also an application under section 105 of the Bengal Tenancy Act which was subsequently withdrawn. Thereafter the present suit was instituted. The suit has been dismissed by both the Courts below as being barred by the provisions of section 109 of the Bengal Tenancy Act and also by Article 130 of the Limitation Act.

Babu *Dwarka Nath Chakraburty* (with him Babus *Gunoda Charan Sen, Surendra Nath Guha* and *Nakuleswar Mukherjee*), for the Appellants.—The suit under section 106 was dismissed on the ground that the plaintiff being a co-sharer landlord could not alone maintain such a suit, and, therefore, the Courts below have thought that the present one is barred by section 109 of the Bengal Tenancy Act. The Courts below are wrong in so holding, because in that suit there was no adjudication on the merits. Section 109 is only a corrolary to section 107 of the Bengal Tenancy Act; it provides that the same matter should not be dealt with by two concurrent Courts. The question here is, what is the effect of the judgment in section 106 case, which was dismissed for non-joinder of parties and which did not at all touch the question now at issue. In section 106 case the prayer was for declaration that the rent of the tenure was Rs. 13 and odd and that the entry in the Record of Rights that no rent was paid for the tenure was incorrect, and that case was dismissed because all the co-sharer landlords were not joined, whereas the present suit is for assessment of rent. The scope and subject-matter of that suit is quite different from that of the present suit.

As regards the application under section 105 of the Bengal Tenancy Act it appears that that application was withdrawn; it was not an application in respect of which there was any trial, and so it cannot bar this suit, because it can be taken to be one which was never made. The Courts below have, therefore, erred in holding that the present suit is barred. *Chiodith* v. *Tulsi Singh* (1), *Parbati* v. *Toolsi Kapri* (2), *Barhamdal Missir* v. *Krishna Sahay* (3).

Babu *Biraj Mohan Mozumdar* (with him Babu *Sarat Chandra Dutt*), for the Respond-

(1) 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467.
(2) 20 Ind. Cas. 1; 18 C. W. N. 604; 18 C. L. J. 128.
(3) 20 Ind. Cas. 310; 18 C. W. N. 466.

ents.—The suit under section 106 of the Bengal Tenancy Act was no doubt dismissed for defect of parties, but in deciding that suit the learned Judge also entered into the merits of that case. Section 109 provides that a Civil Court shall not entertain any application or suit concerning any matter which has already been the subject of an application made or a suit instituted under sections 105 to 108. Here there was a suit under section 106 and that suit was dismissed, and so the present suit in the Civil Court is barred. The case comes under section 109, as there was a decision in a suit under section 106. The scope of section 109 is wider than that of section 107. Section 109, does not require that to bar a suit in the Civil Court there shall be a final decision.

As regards the application under section 105 it cannot be treated as one never made, because it was not withdrawn with the leave of the Court.

The next point is that the case for the defence is that no rent was ever realized in respect of the tenure and that this *nim howla* is a rent-free tenure. Both the Courts below have found that no rent was realized for this tenure at least from the year 1882. So clearly the present suit is barred by the provisions of Article 130 of the Second Schedule to the Limitation Act. The fact that for a long time past no rent was realized from this tenure, raises a presumption of the Lakheraj character of the tenure. Refers to *Birendra Kishore Manikya Bahadur* v. *Bhairab Chandra Chakrabarti* (4). In the case of *Bipradas Pal* v. *Monorama Debi* (5) the plaintiffs were recorded under the Settlement proceedings as persons in possession of a number of plots, each less than 50 *bighas* in area, without payment of rent but as liable to pay rent. They instituted suits under section 106 of the Bengal Tenancy Act and proved long possession without payment of rent. It was held that their long possession without payment of rent raised a presumption of Lakheraj right in their favour. If, therefore, the tenure can be presumed to be a rent-free tenure, then there can be no assessment of rent.

(4) 27 Ind. Cas. 12; 20 C. L. J. 295.
(5) 47 Ind. Cas. 49; 22 C. W. N. 396; 45 C. 574.

Babu *Dwarka Nath Chakraburtty* in reply.—As the tenure has not been found to be a rent-free tenure, Article 130 of the Limitation Act does not apply to this case.

JUDGMENT.—This appeal arises out of a suit brought for assessment of rent on a certain tenure which is spoken of as a *nim howla*. The Court of first appeal dismissed the suit on two grounds, namely, that the suit was barred by reason of the provisions of section 109 of the Bengal Tenancy Act, and, *secondly*, that it was barred by the rule of limitation to be found in Article 130 of the Schedule to the Indian Limitation Act.

It appears that in respect of the area within which this *nim howla* lies a Record of Rights was prepared under the provisions of Chapter X of the Bengal Tenancy Act and was finally published on the 18th May 1906. In that Record of Rights this tenure was entered as one in respect of which at the moment no rent was paid but as one liable to pay rent. Thereupon the plaintiffs Nos. 1 and 2, who are co-sharer landlords of the *howla*, brought a suit under the provisions of section 106 of the Act. In that suit they prayed to have it declared that the entry in the Record of Rights was incorrect and that as a matter of fact the rent annually payable in respect of the *nim howla* was a sum of 13 Rupees odd. That suit was dismissed, and dismissed in effect on the ground that the other co-sharer landlords were not made parties thereto. The Subordinate Judge has held that the institution of that suit by reason of section 109 bars the entertainment of the present suit in the Civil Courts. We are unable to agree with him in this opinion, as it seems to us that the subject-matter of the suit under section 106 and the subject-matter of the present suit are entirely different. The first suit was brought in order to have it declared that the rent annually payable was a certain sum. That suit having failed, the plaintiffs bring their present suit in order that fair rent should be assessed upon the holding. That is a matter different from the subject matter of the present suit.

Reference has next been made to an application which was made under section 105 for assessment of fair rent on this *nim howla*. That application, it appears, was withdrawn.

We are of opinion that that also does not bar the present suit, as we think, agreeing with the view taken in the case reported as *Chiodith* v. *Tulsi Singh* (1), that an application made but withdrawn is to be treated as one never made.

The next question is, whether the suit is barred by limitation. In the Court of first instance that issue was raised, but at the trial it was abandoned. The mere non-payment of rent for a certain period does not bar the landlord's right to have the rent assessed and to recover rent from his tenant. We are of opinion that unless and until this tenure is found to be a rent-free tenure, Article 130 of the Limitation Act can have no application.

Having taken the view he did on these two points, the Subordinate Judge did not enter into the merits of the case. Differing from him on the issue in bar, we set aside his decree and remand the appeal to him in order that it may now be tried and disposed of on the merits. Costs of this appeal will be costs in the case.

Case remanded.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 1130 OF 1917.
February 27, 1918.
Present:—Mr. Justice LeRossignol.
BRIDGES AND CO.—PLAINTIFFS—PETITIONERS
versus
SHAMAS DIN AND CO.—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXX, rr. 1, 6—Suit against firm—Plaintiff, right of, to know names of persons constituting firm—"Individually," meaning of—Partner, appearance of.

Under Order XXX, rule 1 of the Civil Procedure Code, a plaintiff suing a firm is entitled to know who the persons are who constitute the firm and the information cannot be withheld. The information is necessary so that the plaintiff may know who will be personally liable in execution for the satisfaction of his decree.

The word "individually" in Order XXX, rule 6 of the Civil Procedure Code, is not synonymous with "in person". No partner can be forced under this rule to appear in person, but in his absence after service of summons, he will be dealt with *ex parte*. If, however, appearance is put in for him, it will be reckoned as his individual appearance.

Revision from the order of the Senior Subordinate Judge, Amritsar, dated the 6th October 1917.

Mr. *Brandon*, for the Petitioners.

Mr. *Muhammad Hussain*, for the Respondents.

JUDGMENT.—The Court below has evidently not understood the law nor its object.

Under Order XXX, rule 1, a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld. The information is of course necessary so that plaintiff may know who will be personally liable in execution for the satisfaction of his decree.

Order XXX, rule 6, also has been misconstrued. "Individually" is not synonymous with "in person." No partner can be forced under this rule to appear in person, but in his absence after service of summons, he will be dealt with *ex parte*. If, however, appearance is put in for him, it will be reckoned as his individual appearance.

I accept the petition with costs and direct that plaintiff be supplied with the information he prays for. Pleader's costs Rs. 32.

Revision accepted.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 153 OF 1916.
May 10, 1918.
Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.
SUKLAL BANIKYA—DEFENDANT—APPELLANT
versus
BIDHU MINDHU—PLAINTIFF—RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859), s. 33—Suit to set aside revenue sale—Ground not urged before Commissioner taken in suit—Plaintiff, whether can succeed.

In a suit to set aside a revenue sale the plaintiff cannot urge any ground which he did not take in his appeal to the Commissioner under section 2 of Bengal Act VII of 1868. [p. 424, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Dacca, dated the 15th of May 1916.

SUKLAL BANIKYA *v.* BIDHU MINDHU.

FACTS appear from the judgment.

Babu *Basanta Kumar Bose* (with him Babus *Prokash Chandra Pakrasi* and *Nilkanta Ghosh*), for the Appellant.—I submit there was no irregularity; non-mention of certain Mouzas in the notice cannot vitiate the sale. Again this ground was not specifically taken before the Commissioner nor in the plaint. A general ground won't do. Section 33 of Act XI of 1859 says that the ground must be specifically taken before the Commissioner.

Again I invite your Lordships' attention to *Ramgopal* v. *Shamskhaton* (1), which says that "specified" means "specifically taken in the memorandum of appeal."

[N. R. CHATTERJEA, J.—I suppose there are other rulings to this effect.]

Yes, my Lord, there is one in *Sheikh Mohammed Aga* v. *Jadunandan Jha* (2), per Mookerjee and Newbould, JJ. There is another case in *Radha Charan Das* v. *Sharfuddin Hossein* (3). There is also another case in *Gobind Lal Roy* v. *Ranjanam Misser* (4) and another in *Lala Gauri Sanker Lal* v. *Janki Pershad* (5), and all these cases support my contention that the ground must be specifically mentioned.

Babu *Akhoy Kumar Banerjee*, for the Respondent.—Although the ground was not specifically taken it was taken in general words in grounds Nos. 2 and 7. However, I leave the matter in your Lordships' hands.

JUDGMENT.—This appeal arises out of a suit to set aside a sale held under the Revenue Sale Law (XI of 1859).

The sale was in respect of a residuary share only. Various irregularities were alleged in the plaint, but the learned Subordinate Judge held that the omissions to mention some of the *kismats* in the notice under section 6 was an irregularity, and further that the understatement of the Government revenue in the sale proclamation was also an irregularity. He was of opinion that the first named irregularity, namely, the omission to mention some of the *kismats* in the notice under section 6 resulted in substantial injury to the plaintiff and accordingly set aside the sale.

The defendant purchaser has preferred this appeal.

It is contended on his behalf that the ground upon which the sale has been set aside was not specified in the ground of appeal to the Commissioner, nor was it mentioned in the plaint in the present suit, and that being so, the sale cannot be set aside.

Having regard to section 33 of the Act we think that this contention must prevail.

The omission to mention some of the *kismats* in the notice under section 6 was not at all specified in the ground of appeal to the Commissioner. That being so, it is not open to the plaintiff to set aside a revenue sale upon any grounds other than those urged before the Commissioner [see *Gobind Lal Roy* v. *Ranjanam Misser* (4) and *Sheikh Mohammed Aga* v. *Jadunandan Jha* (2)].

The objection based on the understatement of Government revenue appears to have been taken before the Commissioner; but the learned Subordinate Judge has not found that that has affected the sale or resulted in substantial injury.

It may be mentioned that neither of the two grounds on which the sale has been set aside, was taken in the plaint in the present suit.

Under the circumstances, the sale cannot be set aside and the decree of the lower Court must accordingly be reversed, the result being that the sale will stand and the suit dismissed with costs of this litigation, which we assess at Rs. 350 in all for both Courts.

This, no doubt, is a hard case for the respondent. The appellant, however, agrees to grant a permanent lease to the respondent of 3 *kanis* of *khamar* land and the actual homestead land, which before the sale belonged to the plaintiff, at an annual *mokurari* rent of Rs. 15 (rupees fifteen) in consideration of the respondent paying to the appellant the costs mentioned above, namely, Rs. 350, within three months from this date. If the respondent fails to pay

(1) 20 C. 93; 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63 (P. C.).
(2) 10 C. W. N. 137 at pp. 142, 143; 2 C. L. J. 325.
(3) 20 Ind. Cas. 423; 41 C. 276; 17 C. W. N. 1135.
(4) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind Dec. (N. S. 679.
(5) 17 C. 809; 17 I. A. 57; 5 Sar. P. C. J. 518; 8 Ind. Dec. (N. S.) 1083 (P. C.).

the said amount within the time specified above, this appeal will stand decreed with costs, in all Rs. 350 for both Courts.

If the amount is paid, the appellant agrees to execute a permanent lease and the respondent agrees to execute a *kabuliyat* with respect to the *khamar* and the homestead land within three months of the said payment. It is agreed that the lease is to commence from the 1st Baisak 1325 B. S.

Decree reversed.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

May 2, 1918.

Present:—Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

LAL SRIPAT SINGH— DEFENDANT—APPELLANT

versus

LAL BASANT SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XIX of 1868), ss. 3, 52, 102—Oudh land laws—Tenures recognised in Oudh—Proprietor, under-proprietor and tenant—Incidents of tenure attached by law, whether can be varied by consent of tenure-holder.

The Oudh Rent Act, 1868, recognises three classes of persons, and three only, as having an interest in and entitled to hold land for the purposes of the Act in the province of Oudh, *viz*, "proprietor", "under-proprietor" and "tenant". [p. 427, col. 2.]

The law attaches to the status of under-proprietor certain rights, among them the right to transfer: and while he retains that status he cannot be divested of any of those rights. [p. 428, cols. 1 & 2.]

Where, therefore, at the time of settlement a landowner applied to be recorded as an under-proprietor, and under pressure from the Settlement Officer consented to be recorded as an under-proprietor without right of transfer:

Held, that this was creating a tenure unknown to the law and that no effect could be given to the words "without right of transfer" in the Settlement Officer's decree. [p. 428, col. 1.]

Appeal from a decree of the Judicial Commissioners (Stuart, A. J. C., and Kanhaiya Lal, A. J. C.), Oudh, dated the 29th April 1914, reported as 25 Ind. Cas. 743, affirming that of the Subordinate Judge, Partabgarh,

FACTS of the case are sufficiently stated in their Lordships' judgment.

The plaintiff sued to recover possession: he had been ejected by the Rent Court, which had jurisdiction to eject him if he were a "tenant", but not if he were an "under-proprietor" within the meaning of Act XIX of 1868. The suit was decreed by the Subordinate Judge, who held that plaintiff was an under-proprietor within the meaning of the Act, and this decision was affirmed by the Judicial Commissioner's Court. Hence this appeal.

Mr. *De Gruyther, K. C.* (with him Mr. *Dube*), for the Appellant:—All rights in Oudh having been confiscated after the Mutiny, every person there has to show a re-grant from Government. Here the second Summary Settlement was made with Sheoamber and conferred an absolute interest on him. The respondent's only claim is under the compromise, which was long prior to Act XIX of 1868. The Settlement Officer could only give effect to that compromise. The words *kabiz darmiani*, translated as under-proprietary right, do not of necessity mean a herit- and transferable interest. The Settlement officer's order shows that those words are not conclusive. We say the interest he got was heritable, but not transferable.

[VISCOUNT HALDANE.—Suppose a Judge has declared him to be an under-proprietor without power of transfer, what is the legal effect of such declaration?]

[LORD SUMNER.—The Act of 1866, which was in force at the time of the compromise, only gave statutory force to administrative orders which were in effect before—since 1856.]

That date is wrong: see Sykes' Taluqdari Law, page 144 at top.

[LORD SUMNER.—But from 1866 at all events 'under-proprietor' had a definite sense.]

The Settlement Officer could not have understood that *kabiz darmiani* meant under-proprietor in that sense, or he would never have directed an enquiry.

[LORD SUMNER.—The Settlement Officer had no authority to adjudicate: he might refuse to record the agreement, but he could not pass a separate decree.]

[LORD DUNEDIN.—It may be *kabiz-darmiani* was ambiguous and the intention of the parties could not be gathered from the document alone.]

[LORD SUMNER.—That would mean they had not come to terms. Unless they were *ad idem* the decree had no binding effect.]

The Settlement Officer was not bound by any Civil Procedure Code: he had instructions from Government to compromise disputes as much as possible. They came to him with a vague agreement and he got them to come to a more definite one. The plaintiff's only right is under the Settlement Officer's decree, and that does not make him an under-proprietor within the meaning of the Act.

Mr. *H. N. Sen*, for the Respondent, was not called upon.

JUDGMENT.

MR. AMEER ALI.—The sole question for determination in this appeal relates to the status of the plaintiff-respondent under the Oudh Land Laws, *viz.*, whether he is an "under-proprietor" or, as the defendant alleges, a mere lessee. The suit was brought in the Court of the Subordinate Judge of Partabgarh to recover possession from the defendant, the *talukdar* of Rajapur, of the village of Daulatpur, lying within the *taluka*, on the ground that it was owned by the plaintiff as "under-proprietor," and that he had been wrongfully dispossessed therefrom by the defendant in execution of a rent-decree. The defendant denied the plaintiff's title as "under-proprietor", and alleged that he was only a lessee, and was, therefore, liable under the Rent Law to ejectment for default in the payment of his rent. The Subordinate Judge held in favour of the plaintiff, and decreed his claim for possession and for mesne profits during the period he has been kept out of possession. And this decree has been affirmed by the Court of the Judicial Commissioner of Oudh. The defendant now appeals to His Majesty in Council.

A short statement of the facts will explain the relative position of the parties, as also the nature of their respective contentions. The plaintiff and defendant are closely related, being cousins in the first degree. The *taluka* of Rajapur, now held by the defendant, was settled with his father, Sheoamber Singh, in 1859. In 1861, in the course of the Regular Settlement, the plaintiff applied for a settlement of a half share with him on the ground that he was jointly entitled to the estate with Sheoamber. On this petition he was directed to "bring a claim at the time of settlement." Six years later, whilst the Regular Settlement was still proceeding, he applied again to the Settlement Authorities to have his name recorded as a co-owner in respect of a moiety of the *taluka*.

In this petition the grounds of his claim were more specifically stated: that his father, Lal Din Singh, and Sheoamber were full brothers and members of a joint family, and that the *taluka* had been acquired in the name of Sheoamber for the benefit of both brothers. This petition was entered as a suit before the Extra Assistant Commissioner of Partabgarh. Sheoamber contested the claim of the plaintiff to a half share of the property, but admitted his right to maintenance as a junior member of the family. Before trial, however, the parties compromised the dispute. The terms of the settlement arrived at are embodied in a joint petition filed in Court on the 29th October 1867. By this compromise, in consideration of the plaintiff withdrawing his suits and abandoning his claim to a share of the *taluka*, Sheoamber gave to him the village of Daulatpur, at a rent of Rs. 461-4-0, being the Government revenue payable thereon, together with certain lands situated in other villages at fixed rentals. As regards the village of Daulatpur the plaintiff was to pay, besides the "rent," the wages of the *patwari* and *chowkidar* and the village expenses. And then followed the conditions of the grant, "that the plaintiff will pay to the *talukdar*, the defendant, the above-mentioned *jama* every year; that the plaintiff and his heirs will appropriate the profits of the above-mentioned village and lands, and that the defendant will have no right to resume them or to enhance the rent."

The prayer of the petition is important. It runs thus :—

"The plaintiff, therefore, prays that all the suits filed by the plaintiff, with the exception of these in respect of the village Daulatpur, 34 *bighas* land of village Jogapur, and 26 *bighas* (*sic*) land of village Rajapur, be dismissed, and that a decree for the under-proprietary right of the entire village Daulatpur, 34 *bighas* land of village Jogapur

and 26 *bighas* (*sic*) land of village Rajapur be passed in favour of the plaintiff."

There is no dispute that the words *qabiz-darmiani* in the original of this petition are correctly rendered as meaning an "under-proprietary right."

On the 1st November 1867, the Extra Assistant Commissioner made an order that the "under-proprietary rights" in respect of the lands within his jurisdiction should be decreed to the plaintiff in terms of the compromise; and that as regards Daulatpur, which apparently lay outside his jurisdiction, the petition should be referred for final orders to the Settlement Officer.

The matter relating to Daulatpur then came before the Settlement Officer (Mr. Forbes) on the 8th June 1869, and he recorded the following order on the petition of compromise:—

"Plaintiff has filed a deed of compromise setting forth that defendant has agreed to grant plaintiff an under-proprietary right in Mouza Daulatpur, subject to an annual payment of Rs. 461-4-0, and certain *sir* in two other villages (which has been judicially recorded by the S.M.). Plaintiff to bear *patwari's* and *choukidar's* dues. Defendant never to have the power, he or his posterity, of ever increasing the demand now fixed. This is verified by the parties in my presence. As, however, there is no grant or reservation of the right of transfer, the Court sends for defendant, his agent being too ignorant and useless, and will have the matter formally cleared up before passing any orders."

On the 14th June the case was again placed before the Settlement Officer, when the final order which has given rise to the present contest was made. It is in these terms:—

"Decree—an under-proprietary right in Mouza Daulatpur in favour of plaintiff without right of transfer, subject to an annual payment of Rs. 461-4-0 and subject also to the other conditions contained in the deed of compromise."

On the 21st October 1872, a further agreement was entered into between Sheoamber and the plaintiff describing themselves, respectively, as "the proprietor and under-proprietor" of the village of Daulatpur. The terms of this document have an important bearing on the contentions of the defendant and his attempt to reduce the plaintiff's status to that of a lessee. The first clause recites that—

"The Government has assessed the *jama* of this village at Rs. 450. The income from mines is separate from this. If any mine be discovered in our village, then we, the superior and-under-proprietor, will be liable to pay to the Government a share out of the income (of those mines)."

In the third clause Sheoamber Singh declares that he is the *talukdar* and "*lambardar* of Rajapur," that after his death the *taluka* would devolve in the male line to a single heir by rule of primogeniture. The description "*lambardar*" is significant; it shows that the Government revenue in respect of Daulatpur is paid through him.

The fifth clause among other matters records the under-proprietor's undertaking to pay "the salaries of the *patwaris* and *choukidars* along with the last instalment." And further that, "the leases and receipts will be given to the tenants after getting them recorded by the *patwari*;" and the under-proprietor undertakes to "get the payments made by each tenant recorded in the *patwari's siaha*": "In case of any fault being committed by a *patwari* or a *choukidar*, the under-proprietor was at liberty to make an application to the Government for his dismissal, and in case of his dismissal to get other nominee of his appointed in the place of the dismissed *patwari* or *choukidar* with the sanction of the Government."

It is clear from this document that the acknowledged status of the plaintiff was quite different from what is now attempted to be fixed upon him.

Since 1869 the plaintiff's name stands recorded in the village register as "under-proprietor", and a sub-settlement appears to have been made with him. In August 1899 the defendant himself brought a suit against the plaintiff for arrears of rent in which he described their relative positions as that of "superior proprietor and under-proprietor" respectively, of the village of Daulatpur. From 1872 to 1909 there does not appear to have been any contest regarding the status of the plaintiff. In 1902 he mortgaged the village to one Safdar Hossain and let him into possession. This man defaulted in the payment of the rent and the defendant thereupon brought

a suit against the plaintiff under section 52 of the Oudh Rent Act (XXII of 1886) and obtained a decree. In execution of this decree the defendant ejected the plaintiff and took possession of the village. The plaintiff then brought a suit under clause 10, section 108 of the Rent Act, for recovery of possession and obtained a decree in his favour in the Court of the Deputy Collector, which, however, was set aside on appeal by the Commissioner, whose order of dismissal of the plaintiff's action was affirmed by the Board of Revenue, on the ground that so far as the Revenue Courts were concerned the matter was *res judicata* in consequence of the decision in the defendant's suit under section 52 and that the plaintiff's remedy lay in the Civil Courts. This view of the Board as to *res judicata* has necessitated further litigation extending over six years.

The Board's order was made on the 30th November 1911, and the present suit was brought on the 2nd August 1912.

Their Lordships cannot help observing that, so far as appears from the record, the defendant for the first time in 1909, in the proceedings in the Revenue Courts, put forward the contention that the plaintiff was not an "under-proprietor" but only a "lessee." In his written statement in the present action he did not commit himself specifically to that contention. In paragraph 3 he simply states:—

"It is admitted that a compromise was entered into, but the power of transfer was never allowed. The word *qabiz-durmiani* during those days did not particularly mean what it now means in legal phraseology."

He does not say, however, what it actually meant. This was left to his Pleader to develop in the statement recorded by the Court under the provisions of the Civil Procedure Code It was then that he expressly took up the position that the plaintiff was a mere "lessee" and, therefore, liable to ejectment. And he based his contention on the words, "without right of transfer," introduced as would appear *ex abundanti cautela* by the Settlement Officer (Mr. Forbes) in his order of the 14th June 1869 on the petition of compromise jointly executed by Sheoamber and the plaintiff.

The position of a *qabiz-durmiani* or "under-proprietor" was fully understood in Oudh before the passing of Act XIX of 1868, which definitely crystallized and gave statutory recognition to his rights and status. It had come into being from the circumstances of the times; the exactions of the revenue collectors under the old regime had forced many small proprietors to protect themselves against oppression by engaging with some more powerful neighbour to pay the Government revenue through him, but retaining their right in the property. In 1866 the Indian Legislature recognised their right to obtain a sub-settlement of their property, and the Act of 1868 clearly defined their position.

It recognises three classes of persons, and three only, as having an interest in and entitled to hold land for the purposes of the Act in the province of Oudh, *viz.*, "proprietor," "under-proprietor," and "tenant". It defines a "proprietor" thus: "Proprietor" does not include an under-proprietor. Where there are two private rights of property, one superior and the other subordinate, in the same land, "proprietor" means the holder of the superior right only. (The importance of the words "rights of property" cannot be overlooked in connection with the present dispute.)

An "under-proprietor" is defined in the following words: "'Under-proprietor' means any person possessing a heritable and transferable right of property in land, for which he is liable to pay rent."

And a "tenant" is defined to mean any person, not being an under-proprietor, who is liable to pay rent.

That the Act does not recognise any other status except the three it defines is clear from section 102, which gives the right to sue under its special provisions for the recovery of land from which the "applicant" has been illegally dispossessed to "landlord, under-proprietor, and tenant." "Tenants" are divided into two classes, *viz.*, those with the right of occupancy and those without such right. Tenants with a right of occupancy have a "heritable," but not a "transferable," right, and all tenants are entitled to a lease and are liable to be ejected for default in the payment of rent, which they may resist on different grounds.

It is thus absolutely clear that the Act draws a sharp distinction between an

"under-proprietor" and a "tenant." And this was the law when Mr. Forbes made his "decree" on the 14th June 1869. The parties had come to a compromise and embodied the terms in a document which both had signed. Sheoamber had given to the plaintiff, in consideration of his withdrawing his suits, then pending, for a half-share of the *taluka*, the "under-proprietary right" in the village in question on a rent which was the exact amount of the revenue payable thereon to Government, and had expressly abandoned any right "to take back or resume the property" so given. Nothing could be clearer than the intention of the parties expressed in this document, that Sheoamber intended to give and the plaintiff intended to take the properties as "under-proprietor." When the matter went before the Settlement Officer, he, in an excess of caution, wanted to ascertain from Sheoamber whether the *talukdar* wished to convey to the plaintiff "the right to transfer." Sheoamber was sent for, but failed to attend; and the plaintiff, to avoid further harassment, appears to have agreed to the passing of a decree without "right of transfer." The Settlement Officer's order involves a contradiction in terms. He "decrees" to the plaintiff the status of an "under-proprietor," and then adds the words "without right of transfer," which totally nullifies the previous declaration. He must have been aware of the law, and must have used the word "under-proprietor" in its statutory and, what is more, its ordinary sense, the sense in which the parties had, their Lordships have no doubt, used it in their deed of compromise. As the Commissioner in the suit under section 52 observed, Mr. Forbes' decree "created a tenure which is quite outside the Rent Act as it now stands." More correctly, it created a tenure unknown to the law as it then stood.

A good deal of stress has been laid on the fact that the plaintiff agreed to a decree with those words added, showing that he himself gave up before the Settlement Officer his right to transfer. The plaintiff was declared to be an "under-proprietor" in accordance with the terms of the compromise; the law attaches certain rights to that status, so long as he retains that status he remains clothed with those rights and he cannot be divested of those rights unless and until he loses that status. Their Lordships are of opinion that the words "without right of transfer" in Mr. Forbes' decree do not affect the rights of the plaintiff as under-proprietor; and that the decrees of the Courts in India are perfectly right. Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Ranken, Ford* and *Chester.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 444 OF 1914.

April 30, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

MAHAMMAD SHAFIKUL HUQ CHOWDHURY—PLAINTIFF—APPELLANT

versus

KRISHNA GOBINDA DUTTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54, whether exhaustive—Ejectment—Equities in favour of person in possession—Agreement, unregistered, for conveyance, whether can be pleaded by defendant in answer to ejectment suit.

Under the influence of the defendant brought to bear upon the execution-purchasers of his lands, the plaintiff got from them a transfer of those lands for a consideration subject to an oral agreement to reconvey a part thereof to the defendant. While the defendant was in possession of that part the plaintiff brought a suit to eject him therefrom:

Held, that as the defendant's possession was itself a title which the plaintiff must displace before he could eject the defendant, the plaintiff's suit could not succeed even though it was too late for the defendant to sue for specific performance of the oral agreement. [p. 432, col. 2.]

Per *Richardson, J.*—The Transfer of Property Act does not contain the whole law on the subject of transfer of property. [p. 432, col. 1.]

Appeal against the decree of the Subordinate Judge, Sylhet, dated the 28th May 1914.

Babu *Dwarka Nath Chuckerbutty* and Moulvi *Nuruddin Ahmed*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babus *Bepin Chandra Bose* and *Paresh Lal Shome*, for the Respondents.

MUHAMMAD SHAFIKUL HUQ *v.* KRISHNA GOBINDA DUTTA.

JUDGMENT.

TEUNON, J.—In execution of a mortgage decree three *taluks* belonging to the defendant-respondent in this appeal were brought to sale. The sale took place on the 4th May 1901, and was confirmed on the 1st of March 1902.

On the 8th of March the auction-purchaser transferred the properties by a conveyance executed ostensibly in favour of the present plaintiff-appellant.

His case is that the purchase was one made by him on his own account, while the defendant-respondent alleges that the purchase was for his benefit and that the plaintiff was his *benamidar*.

The question thus arising is the only question of fact we have to determine in this appeal.

It is not dispued that the purchase-money was in fact provided by the plaintiff but this, the defendant says, was in pursuance of negotiations initiated before the execution sale and was in part payment to the defendant of a sum of Rs. 6,000 for which the defendant had agreed to sell to the plaintiff two smaller Bhils (Rongia Bhil and Rongia Howar) and an 8-anna share in a larger Bhil, the Souleswar Bhil. These Bhils, are part of the properties included in the mortgage and sold under the mortgage-decree first referred to. The remaining 8-anna share in the Souleswar Bhil had been previously sold by the defendant to one Abdul Hamid and others, this sale taking place after the mortgage but before the institution of the suit thereon. The Bhils, it may be observed, are excluded from the plaintiff's claim.

That there was what may be called a secret arrangement between the parties is admitted by the plaintiff, who says however that the arrangement was not with regard to the 3 Bhils but with regard to the defendant's homestead, 5 *nals* of land adjoining the homestead and also a parcel of land outside the 3 mortgaged *taluks* known as Kobadigha Kotta.

The learned Subordinate Judge has accepted the case made for the defendant, and having been taken over the whole of the evidence I agree in his conclusions.

The auction-purchasers who executed the conveyance now in question were 4 in number, of whom two are dead. Of these two the son of one and the two brothers of the 2nd, and of the two survivors (both Mohammadans) one Mohammad Jaifar have been examined by the defendant. They are disinterested witnesses and I cannot but attach importance to their evidence. That evidence is in itself reasonable and clearly explains how it was that for a small profit of Rs. 400 *plus* small portions of the lands in suit (including a 2-anna share in each of 3 Bhils), they consented to give up to the defendant the valuable properties they had purchased and the defendant thereupon discontinued his application for setting aside the sale. The defendant's evidence is further corroborated by that of Abdul Hamid, one of the purchasers of the second half of the Souleswari Bhil. As the result of the negotiations with the defendant, out of the 8 annas they gave up $3\frac{1}{2}$ annas. The defendant's case is further supported by the value of the 3 Bhils, and by the possession given by the defendant to the plaintiff immediately after the date of the conveyance of the remaining $9\frac{1}{2}$-annas share of Souleswari Bhil. The original arrangement with the plaintiff no doubt was that he was to take 8 annas in Souleswari and the extra $1\frac{1}{2}$ annas represents the 2 annas in the Rongia Bhil surrendered to the auction-purchaser.

The case for the plaintiff is supported only by the evidence of interested witnesses. For the reasons I have given I agree with the Subordinate Judge in holding that under the conveyance in question the real purchaser was the defendant and that plaintiff was merely his *benamdar*.

In this view of the case it is not very necessary to discuss the contention advanced by the learned Pleader for the appellant, namely, that title being in the plaintiff by virtue of the conveyance, the defendant cannot resist his claim for possession on the basis of a mere agreement to reconvey. In support of this view he has placed before us section 54 of the Transfer of Property Act and the cases of *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* (1), *Timangowda* v. *Benepgowda* (2), *Kurri Veerareddi* v. *Kurri*

(1) 28 I. A. 46; 24 M. 377; 5 C. W. N. 217; 7 Sar. P. C. J. 811 (P. C.).

(2) 28 Ind. Cas. 946; 39 B. 472; 17 Bom. L. R. 335.

Bapireddi (3) and *Maung Shwe Goh* v. *Maung Inn* (4). Even if I were to accept the appellant's contention that title is in him, having regard more particularly to the immediate delivery of possession of Souleswari Bhil by the defendant, I should be inclined to hold that the present case falls within the principle enunciated in *Puchha Lal* v. *Kunj Behary Lal* (5).

In the result in which my learned brother agrees, we dismiss this appeal with costs.

RICHARDSON, J.—The appellant is the plaintiff in a suit for the declaration of his title to certain land, for possession and for mesne profits. The dispute relates to three *taluks* known by their numbers as No. 60, No. 32 and No. 21. These *taluks* originally belonged to the principal defendant, the defendant No. 1, Krishna Gobinda Dut. He mortgaged them to the Sylhet Loan Co., and then sold a portion to the defendants Nos. 3 to 10, or partly to some of those defendants and partly to the predecessors of others The mortgagee obtained a decree on the mortgage and in execution, on the 4th May 1901, *taluk* No. 60 was bought by defendants Nos. 14 and 15, *taluk* No. 32 by defendant No. 13 and *taluk* No. 21 by the father of defendants Nos. 11 and 12, the total price paid being Rs. 3,065. On the 8th March 1902, in pursuance of an agreement arrived at on 18th February 1902, when the plaintiff paid Rs. 400 as earnest money, the purchasers sold to the plaintiff for Rs. 4,000 all the lands so bought with certain exceptions. Formal possession was delivered to the plaintiff by the Court on the 26th April 1903 and confirmed on the 16th May 1903.

The plaintiff founds on the title created in his favour by the conveyance of 8th March 1902, but the suit does not extend to all the lands covered by that document. The three *taluks* comprise lands both on the north and on the south of the Kushi River. The lands on the south are known as Souleswari Bhil, Rangia Howar and Rangia Bhil. The case for the defendant No. 1 is that the plaintiff's purchase was made on his behalf under an oral agreement whereby the lands on the north of the river were to be his property and the plaintiff was to have the greater part of the lands on the south of the river at a valuation of Rs. 6,000, so that defendant No. 1 would receive from the plaintiff a sum of Rs. 1,600 in addition to the Rs. 4,000 which he had paid to the auction-purchasers and in addition to two sums aggregating Rs. 400 advanced by him during the course of the litigation.

As to the lands on the south of the river it is not disputed that the plaintiff is in actual possession of a $9\frac{1}{2}$-annas share of Souleswari Bhil. There were certain subsidiary agreements between the plaintiff and the other parties interested, namely, the prior purchasers from the defendant No. 1 and the auction-purchasers. In the case of the Souleswari Bhil a $4\frac{1}{2}$-annas share was taken by some of the prior purchasers, Hamid Ali and others, in lieu of the Sannas (subject to the mortgage) which they had bought from the defendant No. 1. A further one-anna share was retained by certain of the auction-purchasers. I need not further refer to this and the other subsidiary agreements, except to say that it is in controversy whether the plaintiff or the defendant No. 1 was instrumental in bringing them about. On the evidence I agree with the Subordinate Judge that the agreement was procured by the exertions of the defendant No. 1.

As to the remainder of the lands as well on the south as on the north of the river, the further case made for the defendant No. 1 is that he has never been derprived of actual possession, though the lands were nominally sold to the plaintiff and possession was formally given to him. Both the plaintiff and the defendant No. 1 claim actual possession of Rongia Howar and Bhil (so far as they were nominally sold to the plaintiff). As the suit does not embrace these lands, the issue is not one on which a final opinion need be expressed.

The suit is confined to the lands on the north of the river, as to which the plaintiff asserts that he lost possession by

(3) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.

(4) 38 Ind. Cas. 938; 44 C. 542; 25 C. L. J. 108; 21 M. L. T. 18; 15 A. L. J. 82, (1917) M. W. N. 117; 32 M. L. J. 6; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69.

(5) 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213.

reason of an order made by the Magistrate under section 145 of the Criminal Procedure Code on the 15th March 1912. On the evidence I accept the finding of the Court below that the defendant No. 1 was in possession throughout.

This statement of the facts leads to the crucial issues in the case, whether there was such an agreement between the plaintiff and the defendant No. 1 as the latter alleges, and if so, what was its legal effect. There is no doubt that these persons were at the time excellent friends and that the plaintiff intervened in the affairs of the defendant No. 1 at his request and in order to assist him. The evidence is that there were two agreements, one prior to the sales in execution and the other subsequent to those sales, in view of the altered position which then arose. It is common ground that the conveyance in the plaintiff's favour was preceded by some agreement between him and the defendant No. 1, but the parties differ as to its terms. The question is not entirely free from difficulty, but I agree with the learned Subordinate Judge and my learned brother that the evidence establishes the case made for the defendant No. 1. As in the case of the subsidiary agreements, it was he who induced the auction-purchasers to part with their rights for the small sum of Rs. 4,000 and as part of the whole arrangement he withdrew from the proceedings which he had instituted to have the auction-sales set aside.

It having been found that the agreement set up by the defendant No. 1 is established, the next question is whether it is in law a good defence to this action.

It is urged for the plaintiff that he has the legal title and that the legal title cannot be defeated unless the defendant No. 1 is in a position to prove a countervailing title under an instrument formally executed and registered, in compliance with the requirements of section 54 of the Transfer of Property Act. The learned Pleader referred among other authorities to the decision of a Full Bench of the Madras High Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (3) followed in *Chidambara Chettiar* v. *Vaidilinga Padayachi* (6) and in *Ramanathan* v. *Ranganathan* (7) and to the observations of the Privy Council in *Maung Shwe Goh* v. *Maung Inn* (4). No reference was made by him to the decisions of this Court based on *Walsh* v. *Lonsdale* (8) such as *Puccha Lal* v. *Kunj Behary Lal* (5) and *Khagendra* v. *Sonatan* (9), but it was contended that if there was ever an agreement capable of being specifically enforced, the appropriate remedy had not been sought within the time prescribed by the law of limitation and the defendant No. 1 was now too late to avail himself of any such rights.

Before dealing with these agreements, let me turn for a moment to the nature of the transaction. It was suggested for the defendant No. 1 in the first place that the plaintiff was a mere *benamidar* and that the position was as if the defendant No. 1 had borrowed the Rs. 4,000 and then made the purchase in the plaintiff's name. That, however, was not the form which the transaction took and it appears to me that the plaintiff was something more than a mere "name-lender." He paid the money out of his own pocket and he took in effect a substantial interest in at least a part of the property purchased. It seems nevertheless to come to this that as regards the land on the north of the river the plaintiff is a bare trustee. The plaintiff became the purchaser subject to the trust and confidence reposed in him by the defendant No. 1. In other words, he purchased the whole on behalf of the defendant No. 1 subject to the agreement between them. It is true that in the result the defendant No. 1 secures a part of the land without paying anything for it, but that was in accordance with the intention of all parties including the auction purchasers and it cannot be said that there was no consideration moving from the defendant No. 1 to the plaintiff. The consideration consisted of the influence which the defendant No. 1 brought to bear on the prior purchasers and the auction-pur-

(6) 30 Ind. Cas. 408; 38 M. 519.

(7) 43 Ind. Cas. 138; 40 M. 1134; 6 L. W. 300; 22 M. L. T. 173; 33 M. L. J. 252; (1917) M. W. N. 757.

(8) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

(9) 31 Ind. Cas. 987; 20 C. W. N 149

chasers in regard both to the principal agreement aud the subsidiary agreements, of his withdrawal from the proceedings taken to annul the execution sales and of his promise that the plaintiff should retain a part of the land at a valuation. On the merits, the plaintiff's present claim is open to be stigmatized as fraudulent. He is seeking for an advantage which no one ever intended that he should obtain.

It is clear that the agreement has been in part performed. It was under the agreement that the conveyance was taken in the plaintiff's name, and this must be coupled with the fact that the plaintiff was allowed to remain in actual possession of the lands on the north of the river.

Again, there seems no reason why the agreement should not have been specifically enforced if the defendant No. 1 had instituted proceedings for the purpose within the time prescribed.

What then is the legal effect ? As to section 54 of the Transfer of Property Act, the question is not as simple as might at first sight appear. Recent cases suggest that the Act does not contain the whole law on the subject of the transfer of property, because there are other Acts which contain provisions relating to the same subject : *Bapu* v. *Kashinath* (10) and *Loke Yew* v. *Port Swettenham Rubber Co.* (11). The Transfer of Property Act must be read for instance with the Specific Relief Act, by section 3 of which (subject no doubt to section 4) "trust" is defined as including "every species of express, implied or constructive fiduciary ownership," and "trustee" as including "every person holding, expressly, by implication or constructively, a fiduciary character." Illustrations (*g*) and (*h*) apply, in no narrow spirit, the principle underlying these definitions to concrete cases. Moreover by section 4 of the Transfer of Property Act, paragraphs 2 and 3 of section 54 are to be read as "supplemental to the Indian Registration Act, 1877." There may be a doubt as to the precise effect of those words but it is perhaps permissible to advert to section 48 of the Registration Act, which lays down that "all non-testamentary documents duly registered under this Act and relating to any property shall take effect against an oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession." Apart, however, from that provision, which might raise a difficulty as to "delivery" of possession, section 54 of the Transfer of Property Act is not of itself sufficient to carry the plaintiff home.

As to the argument that the defendant No. 1 cannot rely on the agreement because it is too late for him to sue for specific performance, it may be that he cannot now actively enforce his rights under the agreement by legal proceedings, but the answer to the argument seems to be that possession is itself a title (at any rate to remain in possession) which a plaintiff must displace before he can succeed. Here the plaintiff fails because equities founded on the agreement block his way. The possession which the defendant No. 1 was allowed to retain lulled him into security or partial security and there is no reason for denying him any advantage which that possession gives him. The observation of Lord Moulton in *Loke Yew's case* (11) is apposite : "The present action from this point of view is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and is cultivating it."

The defendant No. 1 states that he is still willing to perform his part of the agreement as regards the land on the south of the river.

I concur in thinking that the appeal should be dismissed.

Appeal dismissed.

(10) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100.

(11) (1913) A. C. 491 at p. 505; 82 L. J. P. C. 89 108 L. T. 467.

EMPEROR *v.* NUR MUHAMMAD.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 1698 OF 1917.
February 2, 1918.
Present :—Mr. Justice LeRossignol.
EMPEROR—PROSECUTOR
versus
NUR MUHAMMAD—ACCUSED.

Penal Code (Act XLV of 1860), s. 304—Criminal Procedure Code (Act V of 1898), s. 399, applicability of, to Punjab—Reformatory Schools Act (VIII of 1897)—Offender under s. 304, Penal Code, whether can be dealt with under that Act.

Section 399 of the Criminal Procedure Code has no application in the Punjab where the Reformatory Schools Act of 1897 is in force.

As laid down in Punjab Government Notification No. 37 of 20th January 1906, a convict under section 304 of the Penal Code is not liable to be dealt with under the Reformatory Schools Act.

Case reported by the District Magistrate, Attock, with his No. 29 of 18th November 1917.

FACTS appear from the following order of the Sub-Divisional Magistrate, Pindigheb :—

"The accused is aged 12. He had been playing with several other boys, at a game of *kowdi*, in the course of which he quarrelled with Karm Ilahi, a boy aged 17 or 18, and his brother. The accused's statement practically amounts to a confession, and he says the same as the P. Ws. Nos. 1 to 3, who are also boys who were present at the game. That is to say, accused was pushed against deceased, and so the latter and his brother and accused abused each other. Then accused took up a stick and hit deceased hard on the head. The blow must have been one of considerable violence (see the Civil Surgeon's statement P 10) and the boy died as a result of it.

The accused lost his temper, and was doubtless to some extent provoked, and though he did not intend to kill deceased, must have known the possibility of such a result. He is only 12. I, therefore, find him guilty under Indian Penal Code, section 304 (second paragraph), but think a light sentence will meet the case. I sentence him under Indian Penal Code, section 304, and Criminal Procedure Code, section 399, to one year's confinement in a Reformatory School."

The District Magistrate, Attock, forwarded the proceedings for revision on the following grounds :—

"(*a*) The Magistrate was not empowered to act under section 399, Criminal Procedure Code, as the Reformatory Schools Act, 1897, is in force in the Punjab.

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(*b*) Under the Reformatory Schools Act the sentence should have been one of detention for at least three years.

(*c*) A sentence of three years' detention is unsuitable in a case where a juvenile has committed an offence in a fit of anger. On proper amends being made by the juvenile's relations there would be no need to incarcerate the juvenile at all.

In the circumstances the case is submitted to the Chief Court with the request that the proceedings be quashed and the case sent back for retrial."

JUDGMENT.—The Magistrate's order, which purports to issue under section 399 of the Code of Criminal Procedure, is illegal inasmuch as that section has no application in the Punjab where the Reformatory Schools Act of 1897 is in force.

The conviction of the respondent has been had under section 304, Indian Penal Code, and as laid down in Punjab Government Notification No. 37 of 20th January 1906, a convict under that section is not liable to be dealt with under the Reformatory Schools Act.

The convict is at present confined in the Borstal Jail, Lahore, where he is in the company only of juvenile non-habitual offenders, so that his sentence will be undergone in surroundings least calculated to degrade him.

The learned District Magistrate suggests a re-trial, but there is nothing illegal in the trial and consequently no ground for quashing it. It is only the sentence that is defective and I alter it to one year's rigorous imprisonment in the Borstal Jail.

Sentence altered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.
CRIMINAL REVISION No. 83-B OF 1917.
October 19, 1917.
Present :—Sir Henry Stanyon, KT., A. J. C.
GAJJU—APPLICANT
versus
EMPEROR—RESPONDENT.

Public Gambling Act (III of 1867), s. 13—Public place, what is—Betting and gaming, distinction between—Betting, whether offence—Betting book, whether instrument of gaming.

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The words "public place" in section 13 of the Public Gambling Act, 1867, signify a place to which the public resort as a matter of fact, whether of right or with the permission of a private owner. [p. 436, col. 2.]

In order to obtain a conviction under section 13 of the Public Gambling Act, it must be proved that the accused were found playing for money or other valuable thing with some instrument of gaming (*ejusdem generis*) with cards, dice or counters used in playing any game not being a game of mere skill. [p. 438, col. 2; p. 439, col. 1.]

Recording bets or laying bets about an uncertain event which the recorders and betters cannot prevent or bring about is not playing a game within the meaning of section 13 of the Public Gambling Act. [p. 439, col. 1.]

A book in which bets are recorded is not an "instrument of gaming" within the meaning of section 13 of the Public Gambling Act. [p. 439, col. 1.]

Mere betting is no offence in the Central Provinces or Berar. [p. 439, col 2.]

Appeal against the order of the Sub-Divisional Magistrate, Khamgaon, dated the 19th June 1917.

Mr. *M. Chuckerbutty*, for the Applicant.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The following twelve persons were convicted by the Sub-Divisional Magistrate of Khamgaon, in West Berar, under section 13 of the Public Gambling Act, III of 1867, as applied to Berar, and sentenced to the fines which I place against their names :—

		Rs.
1.	Gajju, son of Sheonarayan ...	50
2.	Jairamappa, son of Bapuappa	25
3.	Rameshwar, son of Sanairam	25
4.	Ramu, son of Hukamchand	25
5.	Kanhaya Hira ...	15
6.	Vithoba Narayan ...	25
7.	Ragho Ramji ...	25
8.	Khushal Kanhayalal ...	40
9.	Pando Jaiwanta ...	15
10.	Shujatkhan, son of Dilserkhan ...	15
11.	Bhagwandas, son of Bakshram ...	40
12.	Rangu Sheonarayan ...	15

Seven of the above persons have applied for revision by this Court, namely :—

1.	Gajju	...	Criminal Revision No. 83-B of 1917.
2.	Bhagwandas	„	84-B „
3.	Jairamappa	„	85-B „
4.	Rameshwar	„	86-B „
5.	Ramu ...	„	87-B „
6.	Vithoba ...	„	88-B „
7.	Shujatkhan...	„	89-B „

These applications were heard simultaneously and this order will govern the disposal of them all.

The main facts are not disputed. The accused and other persons were assembled under a tree standing on some partially enclosed private land to which the public have access and holding what we should call a lottery or sweepstakes in connection with sales of opium in Calcutta. The transaction calls for a more detailed description than has been given by the learned Sub-Divisional Magistrate. Sales of opium by Government take place in Calcutta on one day in every month. The dates fixed for sale are previously advertised, with the number of chests of the commodity to be disposed of at each sale. Memoranda embodying this information are prepared by different firms and persons and circulated throughout the country. Exhibit P-3 is such a memorandum, setting out in a tabular form in English and vernacular the dates and amounts of Government Opium Sales in 1917 thus:—

Sales.	*On or about*	*Uncertified Benares.*	*Total chests.*
1.	January 3rd, Wednesday ...	583	583
2.	February 6th, Tuesday ...	583	583
3.	March 6th, Tuesday ...	583	583
4.	April 4th, Wednesday ...	old 40, new 543	583
5.	May 1st, Tuesday	583	583
6.	June 6th, Wednesday ...	583	583
7.	July 3rd, Tuesday	583	583
8.	August 1st, Wednesday ...	583	583
9.	September 4th, Tuesday ...	583	583
10.	October 4th, Thursday ...	583	583
11.	November 6th, Tuesday ...	583	583
12.	December 4th, Tuesday ...	587	587
	Total chests ...	7,000	7,000

The vernacular part of this memorandum—called a proclamation by the Magistrate—also gives the corresponding dates of the commercial Sambat year—in this case Sambat 1973 74.

The chance upon which money is staked seems to be the figure of the highest bid made at each opium sale. But upon this point the evidence and the judgment of the Magistrate are by no means clear and complete. Among the ring of speculators are *khaiwals* and *lagaiwals*. The *khaiwal* resembles the betting man who offers odds at a race meeting or the 'banker' who receives the stakes in a gaming house; while the *lagaiwal* is the person who accepts the odds and stakes his money. A *khaiwal* in one transaction may be a *lagaiwal* in another connected with the same opium sale. Each *khaiwal* maintains two books, one called the *farak bahi*, and the other called the *akhar bahi*. The true significance of these terms has not been ascertained by the Magistrate. The words would suggest that one book recorded bets on differences and the other bets on the last figure. From the record it appears that in both cases the betting was on the chance of what would be the highest bid, and that while the *farak-bahi* contained figures from 1 to 100 the *akhar-bahi* contained figures from 1 to 10, Each *lagaiwal* stakes whatever he pleases on any figure or figures he fancied in both books, choosing his own odds with reference to the figure 100. These bets are booked early in the morning of each day fixed for an opium sale, either for cash paid (or agreed to be paid where credit is allowable) to the *khaiwal*. Then in due course a wire is received from Calcutta and settling follows. Each *lagaiwal* who has staked money on a figure which corresponds with the last figure of the highest bid in the case of the *akhar-bahi* or either the two last figures or only the last figure in the *farak bahi*, receives payment according to the odds laid by him, and the remainder of the stakes are pocketed by the *khaiwal* like a croupier.

The present case arose out of the transactions of the 6th June 1917, connected with the 6th of the monthly opium sales, and the following extract from the evidence of one of the *lagaiwals*, Megraj (P. W. No. 5), who bet with the accused Gajju as *khaiwal*, keeping the two books, Exhibits P-1 and P-2, will facilitate a comprehension of the dealings:—

"I staked that day against the entries in the *farak-bahi*:—

	Rs.	a.	p.				
I	... 1	0	0	at	4	per	100
II	... 0	6	0	,,	3	,,	100
III	... 0	10	0	,,	$2\frac{1}{2}$	,,	100
IV	... 0	10	0	,,	$2\frac{1}{2}$	,,	100
V	... 0	10	0	,,	$2\frac{1}{2}$	,,	100
VI	... 0	10	0	,,	2	,,	100
XVI	... 0	12	0	,,	3	,,	100
XXXVI	... 1	0	0	,,	4	,,	100
LX	... 0	6	0	,,	$1\frac{1}{2}$	,,	100
LXIV	... 0	6	0	,,	$1\frac{1}{2}$	,,	100

I also had staked on *akhar*:—

VI	... 9	at	$9\frac{1}{4}$	per	100
Zero	... 4	,,	$7\frac{3}{4}$	,,	100
IX	... 3	,,	$9\frac{1}{2}$	,,	100

"These were in Gajju's *bahi*, Exhibits P.1 and P-2. The telegram was received in my name. The highest bid was Rs. 3,203. I won Rs. 25 on the stake of No. III and lost all other stakes. I had staked in all Rs. 22 and I won Rs. 25. I was thus a gainer by Rs. 3.

"As *khaiwal* I got Rs. 4 on my papers but none of the stakers won and thus I got the whole amount."

It will be seen that he took a bet of Rs. 100 to Rs. 2-8-0 on No. 3, which proved to be the winning number. If he had staked Rs. 2-8-0 at those odds he would have won Rs. 100. He only staked 10 annas, or $\frac{1}{4}$th of Rs 2-8 0. Therefore he got Rs 25 or $\frac{1}{4}$th of Rs. 100.

The convictions are assailed before me on two grounds, namely: –

(1) that the place where the bets were booked was not a public place within the meaning of section 13, Act III of 1867; and

(2) that the betting above described does not all fall within the purview of that section.

Section 13 of the above enactment as applied to Berar, so far as it is material to this case, is worded thus:—

"A Police Officer may apprehend without warrant any person found playing for money or other valuable thing with cards, dice,

counters or other instruments of gaming, used in playing any game not being a game of mere skill, in any public street, place or thoroughfare situated within the limits aforesaid.* * * * * *

* * * * *

"Such person when apprehended shall be brought without delay before a Magistrate, and shall be liable to a fine not exceeding fifty rupees, or to imprisonment, either simple or rigorous, for any term not exceeding one calendar month."

As regards the first objection urged by the applicants I do not think it has any force. It is in the main a question of fact for decision on the evidence in each particular case : and with such findings this Court does not interfere in revision under the Code of Criminal Procedure save on the most exceptional grounds. But assuming that an inference of law is also involved, namely, whether a place so situated and circumstanced as the place where the applicants were found betting is a public place within the meaning of that term in section 13, Act III of 1867, I am of opinion that such inference has been drawn correctly by the learned Magistrate. It is well established by a course of judicial decisions that in the sentence "public street, place or thoroughfare"

(1) the adjective "public" applies to each one of the three nouns "street," "place," and "thoroughfare" which follow after it; and

(2) that the word "place" means a locality *ejusdem generis* with "street" and "thoroughfare."

In support of these propositions I need only cite *Emperor* v. *Jusub Ally* (1), *Emperor* v. *Hussein* (2), in which the *dictum* of Jenkins, C. J., appears to be in conflict with the view adopted in *Langrish* v. *Archer* (3), *Durga Prasad Kalwar* v. *Emperor* (4), *Quen-Empress* v. *Srilal* (5), *Queen-Emprsss* v. *Chote Lal* (6), *Emperor* v. *Ajudhia Prasad* (7) and *Ghoddu* v. *Empress* (8). But it does not follow from this that a public place must be either a street or a thoroughfare, or that the term is confined to a locality to which the public have a right to resort. The question was well answered in *Kitson* v. *Ashe* (9), where it was held by Lawrence, J., that betting on private ground where people habitually resorted for betting was a betting in a place of public resort, since the locality was in fact a place of public resort in the ordinary sense of the words. In the same case Channell, J., said :—

"Does 'other place of public resort' mean a place to which the public are entitled to go as of right, or a place to which the public do go as a matter of fact ? I am of opinion that the latter is the true meaning. As the owner of this piece of land does let the public go on to it, and the public do go there, I think it comes within the words of the by-law, and the appellant was rightly convicted."

I concur in this view and I hold that for the purposes of section 13, Act III of 1867, the words "public place" signify a place to which the public resort as a matter of fact, whether of right or with the permission of a private owner. It is found that the spot where the accused in the present case assembled to bet on the 6th June 1917 is a place to which the public go as a matter of fact. Therefore it is a public place within the above section.

The second objection of the applicants must prevail. There is a well-established difference between gaming and betting for the purposes of the criminal law, and except where it has been bridged over by special enactments going to include betting within the term gaming, the Courts have always refused to punish betting as an instance of gaming. The line of difference may be very fine in some cases, but it is always there. In the common usage of the two terms they may sometimes be employed interchangeably, but not always. If two persons play at cards for money, they are said to be gaming or gambling; but they are gaming because they lay a wager or make a bet on the result

(1) 29 B. 386; 7 Bom. L. R. 333; 2 Cr. L. J. 252.
(2) 30 B. 348; 8 Bom. L. R. 22; 3 Cr. L. J. 216.
(3) (1882) 10 Q. B. D. 44; 52 L. J. M. C. 47; 47 L. T. 548; 31 W. R. 183; 15 Cox. C. C. 194; 47 J. P. 295.
(4) 31 C. 910; 8 C. W. N. 592; 1 Cr. L. J. 531.
(5) 17 A. 166; A. W. N. (1895) 42, 8 Ind. Dec. (N. S.) 432.
(6) A. W. N. (1895) 127.
(7) A. W. N. (1904) 92.
(8) 13 P. R. 1882 Cr.

(9) (1899) 1 Q. B. D. 425 at p. 429; 68 L. J. Q. B. 286; 63 J. P. 325; 80 L. T. 323; 15 T. L. R. 172; 19 Cox C. C. 257.

of the game, and therefore to say they are betting is equally appropriate. Without the wager they would still be playing a game but not gambling. But if two persons lay a wager upon the result of a pending election, it will be said that they are betting, but not that they are gaming. There is no gaming in which the element of the wager is wanting, but there is betting which the term gaming is not commonly made to embrace. The question was exhaustively considered by the Bombay High Court in *Queen-Empress* v. *Narottamdas Motiram* (10), in which at page 689, Jardine, J., after showing that there were earlier decisions by the same Tribunal to the same effect, remaked, "except by a metaphorical use of the word, contrary to the ordinary as well as the statutory use, a bet cannot, for the purposes of the criminal law, be treated as a game." This decision was referred to without dissent in *Queen-Empress* v. *Govind* (11), though the question of the difference between betting and gaming was not directly in issue. And although the *dictum* of Jardine, J., on this point in the earlier case was doubted by Stephen, J., in *Hari Singh* v. *Jadu Nandan Singh* (12), I am of opinion with due respect that the Bombay view is quite sound. Stephen, J., remarked:—

"What is the difference between gaming and betting? The Bombay case apparently regards gaming as betting on the result of a game, which is also a contest. The distinction between the two things is based on the scientific or historical meanings of gaming as given in standard works, to which the very high authority of Murray's Dictionary may now be added. But it seems to me to raise difficult questions as to the meaning of 'game' or 'contest' which can only be decided by a highly artificial use of language. I believe that a more satisfactory distinction, that is one that is plainer and more easy of application, is to be found by considering the popular rather than a scientific use of the word. I suggest that the difference between gaming and betting depends on the nature of the event, on which the bet is made. If the event is brought about solely for the purpose of being betted about, betting on it is gaming, otherwise it is not. Ordinary marine insurance is merely betting against the happening of certain events. In practice it is very difficult to distinguish it, in a legal point of view, from betting on the result of a cricket match or horse-race. A certain kind of marine insurance is in fact a well-known form of what is popularly described as gambling. On the other hand dicing, to take an old fashioned example, is a wholly insignificant act, if it is not done for the purpose of betting on the result. If I may descend to modern examples of those games of cards, to whose names we are accustomed in legal literature, I should say that playing at poker where stakes are essential, is gaming, and that playing at bridge, where stakes, though usual, are not essential, is not. If horse-racing degenerates into nothing, but an occasion for betting, it becomes gaming and the race horses probably become instruments of gaming. Apart from legislation rain gambling is gaming, if a complete apparatus is used for the purpose, otherwise it is not."

It is manifest that there is a great deal of deep and careful thought behind the above words. But it seems to me that in navigating the straits of legal interpretation in order to reach the true difference between gaming and betting the learned Judge only avoided the Scylla of the difficulties arising out of the Bombay opinion to suffer shipwreck on a Charybdis of his own creation. Wagering is universal both on the game of bridge and horse-racing throughout the British Empire. At what point does either amusement degenerate so as to fall within the learned Judge's conception of gaming? It seems to me that if bridge played for money in a public place can obtain emancipation on any ground from the Public Gambling Act, 1867, it must be because it is a game of skill. Again, a game is nonetheless game because it is simple and affords little amusement or excitement without wagering. Poker is certainly a game, even when played for "love" as the saying goes. Two persons throw dice for the evanescent pleasure of seeing who has the better luck or because for the moment they have nothing to do. They wager nothing on the result of any throw. They are neither gaming nor betting. They are playing,

(10) 13 B. 681 at p. 689; 7 Ind. Dec. (N. S.) 451.
(11) 16 B. 283 at p. 289; 8 Ind. Dec. (N.S.) 638.
(12) 31 C. 542 at p. 548; 8 C. W. N. 458; 1 Cr. L. J. 349

however foolishly, and the thing they play is a game, however poor and unskilful. The learned Judge of the Calcutta Court would describe as a game every event "brought about solely for the purpose of being betted about." But with due respect that is not interpreting the law but making the law. In *Queen-Empress* v. *Narottamdas Motiram* (10), Jardine, J., rightly said :—

"If this Court were to hold that a bet is converted into a game, and a betting house into a gaming house, and the betters there into offenders against the criminal law, because a rain-gauge, or hour glass, or other measure is contrived and used to settle the bet, I think the Court would assume to itself the work of legislation which Parliament has confided to another authority."

At any rate so far as Act III of 1867 is concerned, the "event" on which the bet is made must be a game played by those who bet, before it can be called gaming, as I shall presently endeavour to make clear.

In England betting has always been recognized to be possible without gaming, and has received distinct legislative treatment, the enactments against betting in public places being separate in many cases from Statutes directed against gaming. Betting is a staking of money by two or more parties against one another on the result of an uncertain event. Where such an event is not a game, betting does not amount to gaming. Where the bet is on the result of a game or some part or incident of a game then, under certain conditions specified by Statute, it will amount to gaming. In English Law gaming means playing at any game, sport, pastime, or exercise, lawful or unlawful, for money or any other valuable thing, which is staked on the result of the game, sport, pastime or exercise, *i. e*, which is to be lost or won according to the success or failure of the person who has staked: *R.* v. *Ashton* (13), *Lockwood* v. *Cooper* (14), *Carlill* v. *Carbolic Smoke Ball Co.* (15).

To my mind the real difficulty lies in the fact that any definition of betting or of gaming, however carefully drawn, will be found to include many transactions which according to popular sentiment, or because of their advantages, fall clearly within such definition. This arises from the fact that neither games nor wagers laid on games or on uncertain events are ordinarily harmful. In some cases, *e. g.*, marine insurance, they may be beneficial to the community. Gaming and Betting Enactments are aimed at acts committed *ad commune nocumentum*. In England no sport, pastime, game or exercise was unlawful at Common Law unless so carried on as necessarily to involve or actually to occasion a public nuisance or a real and not merely a technical breach of the public peace, or a danger to public morals: *Sherbon* v. *Colebach* (16), *R.* v. *Rogier* (17). To make a game unlawful it is, therefore, necessary to refer to the terms of some Statute, and the question of lawfulness or unlawfulness is one of law for a Court, and not of fact for a Jury: *R.* v. *Davies* (18). The Gaming Acts of the present day are evolved from ancient Statutes direct against specific games. Thus an Act of 1388 (12 Rich. II c. 6) was directed against specified games played by certain subordinate classes and described as 'importune' games. In time the law changed from a prohibition of playing games to a prohibition of playing them in such a way as to cause a nuisance or for a purpose considered to be against public morality. Under this change exceptions became inevitable and created the difficulties which are now felt by those who make as well as by those who have to interpret and administer the law. But by reason of all Statutes placing restrictions on games being of a special and penal nature the Courts have always insisted in construing them strictly in favour of the subject.

Following these principles I am of opinion that unless the facts show that persons accused of an offence under section 13, Act III of 1867, were, in the words of the section, found *playing* for money or other valuable thing with some instrument of gaming (*ejusdem generis*

(13) (1852) 1 El. & Bl. 286; 93 R. R. 138; 22 L. J. M C. 1; 17 Jur. 501; 118 E. R 444.

(14) (1903) 2 K. B. 428; 72 L. J. K. B. 690; 67 J. P. 307; 52 W. R. 48; 89 L. T. 306; 19 T. L. R. 610; 20 Cox. C. C. 539

(15) (1892) 2 Q. B. 484; 61 L. J. Q. B. 696; 56 J. P. 665.

(16) (1690) 2 Vent. 175 86 E. R. 377.

(17) (1823) 2 D. & R. 431; 1 B. & C. 272; 25 R. R. 393; 107 E. R. 102.

(18) (1897) 2 Q. B. 199; 18 Cox C. C. 611; 66 L. J. Q. B. 513; 76 L. T. 786; 12 T. L. R. 405.

with cards, dice or counters) used in playing any *game* not being a game of mere skill, such persons cannot lawfully be convicted under that section. Every element necessary to constitute the offence must be present before the section can be enforced against an alleged offender. And here I am at one with Stephen, J., of the Calcutta High Court in thinking that the words "playing a game" should be interpreted with reference to their popular and general significance. Recording bets or laying bets about an uncertain event which the recorders and betters cannot prevent or bring about is not playing game in any reasonable sense of that expression. The enactment is directed against something which those wagering themselves bring about for the purpose of settling the bet. That something must be a game, it must be played with some instrument, the play being carried out for the purpose of ascertaining the result upon which the eventual right to the stakes depends.

It is manifest that there is nothing of the kind here. There was betting pure and simple upon an uncertain future result arising out of an event hundreds of miles away which the accused did nothing to bring about and which they could do nothing to prevent. The contingency upon which they bet was as much beyond their control as the date on which a monsoon arrives, the amount of rain which a monsoon yields, or the average temperature of a particular day. The learned Sub-Divisional Magistrate calls the books in which the bets were recorded "instruments of gaming." Some support for this view may be claimed from the decision in an *Anonymous case* (19), where it was held that lottery tickets, by reference to which it is to be decided whether the holder or purchaser wins the whole, or any part, of any stakes, are instruments of gaming within sections 1 and 4 of Act III of 1867. With due respect for the eminent authority (Peacock, C. J.) responsible for this proposition I am unable to accept it as sound. The judgment is extremely brief and the only reason given for the view is that lottery tickets "are instruments of gaming of a nature similar to cards." The only point of similarity I can see is that both tickets and cards are generally of an oblong shape made of cardboard. But there the similarity ends. Cards are essentially made to be played with in games of skill or of chance. They are part and parcel of the game on the result of which a bet may turn. There is no other way of using them. They are designed for the playing of games, and that is their use whether or not any wagers are laid. But who ever heard of a lottery ticket being used to play a game of any kind? It is a receipt or acknowledgment of a bet made or a chance taken, and beyond that its use has no control over the result on which the bet depends. Its only use is to allow of the holder of a winning number to be identified and the bets settled after the uncertain and unknown future event on which settlement depends has happened and been ascertained. It is a clear misnomer to call such a record an instrument of gaming. The decision in *Emperor* v. *Lakhamsi Malsi* (20) has reference to a Bombay Act which represents a very considerable extension of criminal legislation against gambling, and cannot be any authority or even a guide for the interpretaion of the Gambling Act of 1867. The Legislature has not seen fit so far to enter upon any criminal legislation against betting without gaming in the Central Provinces and Berar, and therefore, mere betting is no offence in either of those territories.

For the above reasons I think that the applicants were unlawfully convicted under section 13, Act III of 1867, as applied to Berar, and their convictions must be set aside and fines refunded.

The conviction of the applicant is set aside and he is acquitted. His fine, if paid, will be refunded.

Conviction set aside.

(19) 12 W. R. Cr. 34.

(20) 29 B. 264; 6 Bom. L. R. 1091; 1 Cr. L. J. 1074.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1636 OF 1917.

April 12, 1918.

Present:-Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice LeRossignol.

BAHADUR SINGH AND ANOTHER—SURETIES—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 121, 514, Sch. V, Form XI—Security for good behaviour—Offence committed in Native State—Forfeiture of bond.

A penal bond must be construed literally and strictly.

The subjects of the ruler of an independent Native State are not the subjects of His Majesty the King-Emperor.

A bond executed by a surety in the form prescribed by Schedule V, Form XI, of the Criminal Procedure Code, cannot be forfeited on the principal committing an offence in an independent Native State, inasmuch as the principal does not thereby make default in his undertaking to be of good behaviour towards His Majesty or His Majesty's subjects.

Revision from the order of the District Magistrate, Amritsar, dated the 31st August 1916.

Mr. *Herbert*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—On the 1st of June 1914 one Sorain Singh as principal, and Ram Singh and Bahadur Singh as sureties, executed a bond for Rs. 2,000 under section 121, Criminal Procedure Code, for the good behaviour of the said Sorain Singh for the period of one year. On the 10th of April 1915 Sorain Singh was convicted by a Court of the Kapurthala State of an offence under section 457, Indian Penal Code, and as a result the said sureties were called upon to show cause why the security furnished by them should not be forfeited. After hearing the sureties, the Magistrate of the first class directed that the whole amount of Rs. 2,000 furnished by the sureties should be forfeited, whereupon they appealed to the District Magistrate of Amritsar, who by his order of 31st of August 1916 overruled their contention on the legal points urged by them but directed that the case should be returned to the Magistrate in order that further enquiries might be made as to whether Sorain Singh actually committed an offence in the Kapurthala State, the District Magistrate being of opinion that the evidence on the record on this point was defective. The sureties thereupon applied to this Court to revise the order of the District Magistrate on the ground that in any event their bond could not be forfeited, inasmuch as they had bound themselves to ensure the good behaviour of Sorain Singh only towards "His Majesty and all His Majesty's subjects" and not towards the subjects of a Native State.

The bond executed by Sorain Singh and the petitioners was in the form prescribed by Schedule 5, Form XI, of the Criminal Procedure Code, and so far as the sureties are concerned, runs as follows :—

"We do hereby declare ourselves sureties for the above named Sorain Singh that he will be of good behaviour to his Majesty the King-Emperor of India, and to all His subjects during the said term, and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to His Majesty the sum of Rs. 2,000."

A penal bond, such as this, must be construed literally and strictly, and consequently the only question before us is whether by committing an offence in the Kapurthala State Sorain Singh made default in his undertaking to be of good behaviour towards His Majesty or His Majesty's subjects. The subjects of the ruler of an independent Native State are not the subjects of His Majesty the King-Emperor [see *Musammat Kishen Kour* v. *Crown* (1), *Empress* v. *Nawabji* (2) and *Roda* v. *Empress* (3)], nor by transgressing the laws of the Kapurthala State, did Sorain Singh make any default in his undertaking to be of good behaviour towards His Majesty.

In the circumstances we must accept the petition and set aside the orders of the Magistrate and the District Magistrate. We are informed that each of the sureties has paid up Rs. 250 out of the amount due from him and if this is the case, the money should be refunded.

Revision accepted.

(1) 20 P. R. 1878 Cr.
(2) 37 P. R. 1881 Cr.
(3) 30 P. R. 1889 Cr.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 379 OF 1918.
June 27, 1918.
Present:—Sir George Knox, KT., Acting Chief Justice.
AZIZUR RAHMAN—APPLICANT
versus
HANSA—OPPOSITE PARTY.

Workman's Breach of Contract Act (*XIII of* 1859), *ss.* 1, 2, *application under—Procedure—Magistrate, duty of—Subordinate Court, duty of, to follow ruling of High Court.*

An application to a Magistrate asking him to enforce the provisions of sections 1 and 2 of Act XIII of 1859 should not be summarily disposed but the matter should be enquired into and evidence fully taken. [p. 441, col. 2; p. 442, col. 1.]

A Magistrate should not follow a ruling of a High Court to which he is not subordinate, when he has a ruling of the High Court to which he is subordinate before him. [p. 441, col. 2.]

Criminal revision from an order of the District Magistrate, Agra, dated the 27th February 1918.

Mr. *Narain Prasad Asthana*, for the Applicant.

JUDGMENT.—This is an application for revision of an order passed by the Magistrate of Agra, whereby an order of a First Class Magistrate of Agra was confirmed. The First Class Magistrate of Agra had before him an application asking him to enforce the provisions of sections 1 and 2 of Act XIII of 1859. All that appears before me on the record is an order in which the learned Magistrate arrives at the conclusion that the suit does not lie under Act XIII of 1859. No evidence appears to have been taken and all that is on the record is the contract. Act XIII of 1959 is an Act which has been extended to the station of Agra. The contract is upon a stamp paper and it recites that it is a contract under Act XIII of 1859. The First Class Magistrate sets out what he believes to be the obvious object of Act XIII of 1859. He says that "it was designed to prevent coolies or labour contractors fraudulently bolting with the advances necessary for obtaining work from them and it was not designed to secure the employers enforcement of elaborate contracts with skilled artisans." I do not know from what source the learned Joint Magistrate obtains this. There is nothing in the Act to this effect. The learned Joint Magistrate will do well to consider the ruling by which he is bound, namely, *Queen-Empress* v. *Indarjit* (1). Having placed this interpretation upon the object of the Act, the learned Joint Magistrate went on to pass an order for which there is no warrant that I know of. That order runs as follows:—"The accused till to-morrow should produce balance of money due to the complainant. If he does so and the complainant takes it, accused will be acquitted. If he does so and complainant refuses the money, the case will be dismissed. If he does not produce it, it will be a clear case of bad faith and I shall proceed against him under Act XIII of 1859." The morrow came and the accused produced the money required of him. The complainant refused to take it, saying that he wished to have the work done by the accused. The learned Joint Magistrate professed to act upon a ruling of the Bombay High Court*, to which he is not subordinate and which he should not follow when he has before him rulings of this Court. I cannot moreover sanction the unwarrantable language used by the Joint Magistrate regarding an Act in the Statute book. He says: "It is altogether preposterous that this Act, designed to protect people who make cash advances in order to import or secure manual labour from people not worth powder and shot in the Civil Court, should be prostituted in this way by employers of skilled artisans." The learned Joint Magistrate had no right to use language of this kind regarding a Statute which is in force and which he is bound to respect. The Act is in full force in the station of Cawnpur for instance, and for ought I know may be in full force in the station of Agra. I call the attention of the Courts below to the case of *C. J. Lucas* v. *Ramai Singh* (2) and *Bakhtawar* v. *Emperor* (3), both to be found in 16 A. L. J. R. 164. The learned Joint Magistrate says that he cannot compel Hansa to continue the work which he contracted to perform because it requires him to sit very near the fire. He is said

(1) 11 A. 262; A. W. N. (1889) 85; 6 Ind. Dec. (N. S.) 595.

(2) 23 Ind. Cas. 185; 12 A. L. J. 152; 15 Cr. L. J. 233.

(3) 43 Ind. Cas. 832; 16 A. L. J. 164; 19 Cr. L. J. 240; 40 A. 282.

*See *Queen-Empress* v. *Rajab*, 16 B 368; 8 Ind. Dec. (N. S.) 723—*Ed.*

to have been working in the same situation in another factory. This may or may not be true. But the matter should have been enquired into and evidence fully taken. This was not a case for summary disposal. I set aside the orders of both the Courts below and I return the case in order that it may be dealt with strictly in accordance with the provisions of Act XIII of 1859.

Case remanded.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 319 OF 1918.
April 6, 1918.
Present:—Mr. Justice LeRossignol.
SURAJ BHAN—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 337, 339—Pardon, forfeiture of—Approver, trial of—Withdrawal of pardon, whether necessary—Approver, whether bound to disclose previous offence.

As a preliminary to the trial of an approver under section 339 of the Criminal Procedure Code it is unnecessary that there should be a formal withdrawal of the pardon. [p. 442, col. 2.]

It is not sufficient for an approver to help to secure the conviction of some of his accomplices, if he has screened the others. [p. 443, col. 1.]

An approver in order to satisfy the conditions of his pardon is called upon to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence or offences which are being enquired into, and not relative to offences which are at the time not being enquired into [p. 443, col. 1.]

Criminal revision from the order of the District Magistrate, Hissar, dated the 3rd January 1918.

Messrs. *Beechey* and *Ganpat Rai*, for the Petitioner.

Mr. *C. Bevan Petman* (Government Advocate), for the Respondent.

JUDGMENT.—In June or July 1917 it was ascertained that a sum of Rs. 53,000 had been withdrawn from the Hissar Treasury by means of forged vouchers and the Police made enquiries into the offences, which were held to fall under sections 467/420 of the Indian Penal Code; suspicion fell upon the petitioner Suraj Bhan in connection with those frauds and on the 14th July 1917 the District Magistrate authorised the tender to him of a pardon on the usual conditions as set forth in section 337 of the Criminal Procedure Code. The tender was accepted by Suraj Bhan and he appeared as a witness for the prosecution against his accomplices, three of whom have been convicted. Subsequently it was ascertained by the Police that Suraj Bhan had not made a full and true disclosure of the whole circumstances relative to those offences, and the District Magistrate has ordered his prosecution in accordance with the provisions of section 339 of the Code in respect of the frauds.

He has petitioned this Court and on his behalf it has been contended that though with the sanction of this Court his prosecution on a charge of perjury might be legally instituted, the District Magistrate was not competent to withdraw the pardon and to direct his prosecution on charges of fraud.

On behalf of the Crown it has been retorted that the application by the petitioner is clearly premature; that the pardon has not been withdrawn; and that the question whether the pardon has been forfeited is a matter for the decision of the Magistrate who will try the case.

In the Code of 1872 the language used suggested that the proper procedure in a case of this kind was that the trial of the approver in respect of the original charge should be preceded by a formal withdrawal of the pardon, and there are authorities to the effect that the order of withdrawal should issue from the Court which made the tender of pardon. The present law, however, is somewhat different and contains no reference to a withdrawal of the pardon and there are several authorities, of which it is necessary to mention only *Emperor* v. *Saber Akunji* (1) and *Sashi Rajbanshi* v. *Emperor* (2), for the view that as a preliminary to the trial of the approver it is unnecessary that there should be any formal withdrawal of the pardon, so that in the present case the argument on behalf of the petitioner that the pardon has been withdrawn by an unauthorised Magistrate falls to the ground.

(1) 27 Ind. Cas. 184; 42 C. 756; 19 C. W. N. 179; 16 Cr. L. J. 120.
(2) 26 Ind. Cas. 657; 42 C. 856; 19 C. W. N. 295; 16 Cr. L. J. 65.

Next it is urged that the strictest faith should be kept with a person who has accepted a tender of pardon, who has appeared in the witness box on behalf of the prosecution and has secured the conviction or helped to secure the conviction of three of his accomplices. This argument assumes that the approver has fulfilled completely the conditions on which the tender of pardon was made. It is not sufficient for an approver to help to secure the conviction of three of his accomplices, if he has screened the fourth and it is precisely on the ground that the approver petitioner has screened one of his accomplices that the District Magistrate has ordered his prosecution. If this is a correct view, the approver has not fulfilled completely the conditions of his pardon, and he, therefore, has no reason to complain if that pardon is declared to be forfeited. The question, whether as a fact he has forfeited his pardon, is one which will have to be determined by the trial Magistrate who will have to place that issue in the forefront of the case.

Another objection raised is that one of the grounds on which the District Magistrate is proceeding against the petitioner is that subsequent to the discovery of frauds amounting to Rs. 53,000 it was ascertained that at a still earlier date the approver had committed another fraud which was unknown to the Police at the time when the pardon was tendered to him. The objection appears to me to have some force, for the approver in order to satisfy the conditions of his pardon was called upon to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence or offences which were then being enquired into, and not relative to offences which were at that time not being enquired into. On this point, however, I prefer not to pass any final decision, inasmuch as this too is a matter which the trial Magistrate should decide and also because the other grounds for prosecuting the petitioner are quite sufficient even if his failure to disclose the earlier offence be left out of the question.

From the foregoing it appears that the District Magistrate's action was taken by him in his capacity as chief prosecuting agency of the district and as there is nothing illegal in the same, this Court has no power nor desire to interfere.

The petition is consequently dismissed.

Revision dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 156 OF 1916.

August 24, 1916.

Present:—Mr. Mittra, Offg. A. J. C.

MANGALCHAND—APPLICANT

versus

MOHAN—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 422—Appeal by accused—Notice to complainant, whether necessary—Omission to give notice—Revision.

Where an appeal by an accused is not dismissed summarily, section 422 of the Criminal Procedure Code does not require that notice of the appeal should be given to the complainant. It is, however, the practice to give notice to the complainant as well as to the District Magistrate in a case instituted upon a complaint, but failure to give notice to the complainant does not furnish a ground for interference in revision. [p. 444, col. 1.]

Criminal revision against the order of the Sessions Judge, Nagpur Division, dated the 19th June 1916, confirming the conviction and remitting the fine imposed by the Cantonment Magistrate, 1st Class, Kamptee, on the 10th April 1916.

JUDGMENT.—The applicant obtained sanction for the prosecution of the non-applicant for an offence under section 193, Indian Penal Code. The non-applicant was convicted by the Cantonment Magistrate of Kamptee and sentenced to imprisonment till the rising of the Court and also to a fine of Rs. 200. The Magistrate ordered that Rs. 100 out of the fine, if realized, was to be paid to the complainant as compensation. Against this conviction the non-applicant appealed to the Sessions Judge who remitted the fine, as, in his opinion, the offence which consisted in denying as a witness the fact that the non-applicant was previously fined for an assault was a trivial one and as the true answer would not have affected his credit as a witness to any appreciable extent. This petition has been filed on the ground that no notice to the applicant was given by the Sessions Judge

and that he has been prejudicially affected by the order, so far as his claim for compensation is concerned.

In the first place I doubt the propriety of the order passed by the Cantonment Magistrate. Under section 545 of the Criminal Procedure Code the Magistrate could order the expenses, properly incurred in the prosection, to be defrayed out of the fine. The second part of the section which allows compensation such as could be recovered by civil suit is inapplicable, as substantial compensation was not recoverable by civil suit for the perjury. It seems that the Court was thinking of compensation when it had only power to award actual costs. However that may be, this was an order subject to the result of an appeal. The Appellate Court, I take it, differed from the first Court. Was the applicant entitled in law to be noticed? I think not, for section 422 requires notice to be given to such officer as the Local Government may appoint in this behalf. There is a Madras case, *Ambakkagari Nagi Raddi* v. *Basappa* (1), which deals with appeals from an award of compensation under section 250 of the Criminal Procedure Code. The learned Judges laid down that it would be better if in such cases notices were given to the accused. But the absence of notice was held not to be an illegality and the High Court declined to interfere with the appellate order disallowing compensation. The practice of this Court is to give notice to complainants as well as to the District Magistrate in cases instituted upon a complaint. The lower Courts will be well-advised if they follow this practice. On the whole, I see no ground for interference in revision.

Revision rejected.

(1) 1 Ind. Cas. 79; 33 M. 89; 5 M. L. T. 262; 19 M. L. J. 130, 9 Cr. L. J. 150.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 293 OF 1918.

April 12, 1918.

Present :—Mr. Justice Scott-Smith.

SOHAN SINGH—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Motor Vehicles Act (VIII of 1914), s. 14—Punjab Motor Vehicle Rules, rr. 10, 17, applicability of—Servant driving motor car without lights—Master, liability of.

Rules 10 and 17 of the Punjab Motor Vehicle Rules only apply to the driver or to a person using the car at the time it is being driven, and not to an absent owner. The owner of a car, therefore, is not liable to be fined because in his absence his servant drove his motor-car without lights after lighting-up time. [p. 445, col. 1.]

Case reported by the Sessions Judge, Rawalpindi, with his No. 169 of the 25th February 1917.

Bakhshi *Gokal Chand*, for the Accused.

FACTS.—The accused, on conviction by Mr. H. B. Anderson, Cantonment Magistrate, exercising the powers of a Magistrate of the First Class, in the Rawalpindi District, was sentenced by order, dated 27th August 1917, under rules 10 and 17 of the rules made in 1915 under the Motor Vehicles Act, VIII of 1914, to pay a fine of Rs. 5.

PROCEEDINGS.—The proceedings were forwarded for revision on the following grounds :—

"Petitioner was not in the car himself at the time the offence is said to have been committed and I fail to understand how he can be held to be criminally responsible for the act of his servant in driving the car in contravention of the rules. It is not, as the Magistrate says, a well-recognised principle of law that the master is responsible for the wrongful acts of his servants. It is true that so far as civil liability goes, it is a recognised principle that the master is liable for all tortuous acts of his servant done in the course of his employment and for the master's benefit, but as regards criminal liability the principle is that he only is criminally punishable who immediately does the act or permits it to be done. There are certain exceptions to this principle, but the offence of which the petitioner has been convicted is certainly not one. The owner of the car, as has been said, was not in the car at the time the offence was committed and there is no evidence to show that he permitted the wrongful act complained of to be done.

"It is to be noted also that the date on which the offence was committed is entered in the extract from the Cantonment Magistrate's Summary Register as the 8th June 1917, whereas the complaint (*vide* letter No. 1604-2-5, dated the 19th May, from the Brigade Major, Rawalpindi, to the Cantonment Magistrate, Rawalpindi) shows that the offence was committed on the 17th May 1917.

SAVARAJULU NAYUDU, *In re.*

"I am of opinion that the petitioner has been wrongly convicted and sentenced and I would recommend that the sentence and conviction be set aside as illegal, and the fine, if paid, be refunded."

ORDER.—Petitioner has been fined because in his absence his servant drove his motor-car without lights after lighting-up time.

As stated by the learned Sessions Judge, the owner of the car has in these circumstances committed no criminal offence.

Rules 10 and 17 obviously only apply to the driver or to a person using the car at the time it is being driven, and not to an absent owner. The conviction of petitioner is hereby set aside and the fine, if paid, will be refunded.

Revision accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 841 OF 1917.
CRIMINAL REVISION PETITION No. 682 OF 1917.
April 3, 1918.

Present:—Mr. Justice Oldfield.

In re SAVARAJULU NAYUDU AND OTHERS —ACCUSED NOS. 1, 2 AND 3—PETITIONERS.

Penal Code (*Act XLV of* 1860), *ss.* 34, 323, 325, 326, 392—*Robbery—Grievous hurt caused during robbery —Identification of offender, absence of—Separate charge against each accused without specification of common intent to cause grievous hurt—Conviction under s.* 325, *legality of—Criminal Procedure Code* (*Act V of* 1898), *s.* 106, *scope of—'Breach of peace,' meaning of.*

Accused Nos. 1, 2 and 3 were charged with having entered the complainant's house, and removed his ear-rings. The right ear was cut off with the ear-ring and the left ear was torn. The accused were charged separately and there was no specification of a common intention to inflict grievous hurt.

The 1st accused was convicted under sections 326 and 392, the 2nd under sections 326, 325 and 109 and the 3rd under sections 325 and 392, Indian Penal Code. In appeal, the Sessions Judge substituted convictions under sections 325 and 392 with 109 as regards 1st accused. The accused were also ordered to furnish security under section 106, Criminal Procedure Code:

Held, (1) that as the identification of the person who inflicted the grievous injury was not made out, and as there was an absence of common intent, the conviction under section 325 was bad, for which must be substituted convictions under section 323; [p. 446, col. 1.]

(2) that the order under section 106 was not illegal even though there was technically no breach of the *public* peace by the accused. [p. 446, col. 2.]

A person who enters on another's promises and uses violence to him and deprives him of his property commits a breach of the peace in the wider sense of the expression. [p. 446, col. 2.]

Muthiah Chetti v. *Emperor* 29 M. 190; 3 Cr. L. J. 461, distinguished.

Queen v. *Kunhiya*, 4 N. W. P. H. C. R. 154 and *Muthurakka Thevan, In re*, 30 Ind. Cas. 435; 2 L. W. 631; 16 Cr. L. J. 611; 18 M. L. T. 121, not approved.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the North Arcot Division, in Criminal Appeal No. 85 of 1917, preferred against the judgment of the Court of the Sub-Divisional 1st Class Magistrate, Tiruvannamalai, in Calendar Case No. 122 of 1917.

This case coming on for hearing on the 28th of March 1918, upon perusing the petition and judgment of the lower Court and the record in the case and upon hearing the arguments of the Hon'ble Mr. *T. Rangachariar*, for the Petitioners, and of the Public Prosecutor, on behalf of the Crown, and the case having stood over for consideration till this day, the Court made the following

ORDER.—The undisputed facts are that the three accused, resenting complainant's conduct, entered the house, where he was working and attacked him. His ear-rings were removed, one being cut off with his right ear and the other torn from his left. The accused were originally convicted, 1st accused of offences punishable under sections 326 and 392, Indian Penal Code, 2nd accused under sections 326, 325 and 109 and 3rd accused under sections 325 and 392 of the Indian Penal Code. The learned Sessions Judge, for reasons which are not clear, substituted convictions under sections 325 and 392 with 109 as regards 1st accused.

The first objection to this, that the conviction should be under section 323, not 325, must be sustained. The only grievous hurt disclosed by the evidence is the injury to the right ear. For the left ear has healed and is intact. But the learned Sessions Judge conceded in effect that identification of the accused, who caused that injury, was impossible on the evidence. He convicted, because, all three accused having joined with one common intent, it was immaterial which inflicted the wound. Each accused, however, was charged separately without any allegation of any common intent that an incised wound should be caused, the charge on 3rd accused in particular excluding the exist-

ence of such intent, since it was limited to section 323 and was, therefore, inconsistent with his responsibility for the use of a knife. The charges as framed did not admit of the application of section 34 and accused can accordingly be held answerable only for the general violence used. Convictions under section 323 must, therefore, be substituted for those under section 325.

The convictions under section 392 are attacked, because there is no evidence that the accused kept the jewels, since they may have fallen on the ground, and complainant admits that he did not look for them there, and since the learned Session Judge found that "accused were not common robbers and intended rather to punish complainant than to steal his ear rings." There was, however, evidence that they took the jewels from complainant's ears and it was for them to show that they did not do so in order to keep them. The punishment, which, as the learned Session Judge held, they meant to inflict on complainant, may as well have been by deprivation of his property as by causing pain. This objection, therefore, fails.

In view of the substitution of section 325 for 326 the sentences of rigorous imprisonment are reduced to one month in the case of each accused. The fines and sentences in default are confirmed.

The orders to give security are, it is argued, not authorised by section 106, Criminal Procedure Code, because accused have not been convicted of "assault or other offence involving a breach of the peace," assault including only the offence specified in sections 351 or 358, Indian Penal Code, and the breach of the peace contemplated being a breach of the public peace, not one committed as this was on private premises. The order against accused must be justified, if at all, as one of the latter class; and it seems to me to fall within it. The English Law is not a guide to the construcion of section 106, since under the Criminal Law Consolidation Act, 1861, security may be required on conviction of any offence except murder; and I have not been shown and cannot find that the expression "breach of the peace" has any recognized or definite meaning in England as including only breaches of the public peace or otherwise. In India also it has nowhere been defined. But the reference in section 504, Indian Penal Code, to "the public peace" and in section 107, Criminal Procedure Code, to persons "likely to commit a breach of the peace or disturb the public tranquility", show how the restricted interpretation of section 106 claimed by accused could and presumably would, if it had been intended, have been expressed. Neither rioting nor assault, the two offences specified in the latter section, necessarily involves a breach of the public peace; and there is, therefore, no ground for the application of the doctrine of *ejusdem generis*. The first case relied on by the accused, *Muthiah Chetti* v. *Emperor* (1), and the two Calcutta cases referred to therein are not relevant, since they decide that only an actual breach of the peace must be an element in the offence established, before section 106 can be applied. In *Queen* v. *Kunhiya* (2) it was, no doubt, held by a single Judge that section 280 (meaning presumably 489) of the Code then in force (corresponding with section 106) referred only to offences against the public tranquillity. But the former, like the latter provision, refers to the breach of the peace only generally and the judgment gives no reasons for restricting the application of the terms used. In *Muthurakka Thevan, In re* (3) Spencer, J., without distinguishing between breaches of the public and other peace, held that robbery was not an offence involving a breach of the peace; but he also gave no reasons for his conclusion and apart from the distinction referred to, which he did not mention, I am respectfully unable to follow him. When, as is the case, that distinction is supported by no clearer authority and is not required by the wording of the section, it should not, in my opinion, be recognized. That the conduct of persons who enter on premises where their enemy is, use violence to him, cut and tear his ears and deprive him of his jwellery involves a breach of the peace in the wider sense of the expression needs no demonstration. The order was, in my

(1) 29 M. 190; 3 Cr. L. J. 461.
(2) 4 N. W. P. H. C. R. 154.
(3) 30 Ind. Cas. 435; 2 L. W. 631; 16 Cr. L. J. 611; 18 M. L. T. 121.

opinion, proper and must stand as part of the sentence.

The criminal revision petition is allowed to the extent stated as regards the sentence of rigorous imprisonment and is dismissed in other respects.

M. C. P. *Petition partly allowed.*

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 44 OF 1918.

April 2, 1918.

Present:—Mr. Justice Chevis.

RAJ BAHADUR AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 71—Offence falling under two sections—Procedure—Jurisdiction of British Courts—Abetment out of British India of offence committed in British India—Penal Code (Act XLV of 1860), ss. 372, 420—Cheating—Selling married girl as virgin.

Where one act constitutes offences under two different sections of the Penal Code, the proper procedure is to frame charges under both sections in one and the same trial and to award a sentence under either of the sections. [p. 448, col. 1.]

Courts in British India have no jurisdiction to try a person who is not a British subject for abetting out of British India an offence committed by another in British India. [p. 447, col. 2.]

Accused sold a minor married girl to the complainant representing her to be a virgin:

Held, that the accused were guilty of cheating. [p. 448, col. 2.]

Appeal from the order of the Magistrate, 1st Class, with enhanced powers under section 30 of the Criminal Procedure Code, Hissar, dated the 24th October 1917, convicting the appellants.

Lala *Hargopal* for Mr. *N. C. Pandit*, for the Appellants.

Mr. *C. Bevan Petman* (Government Advocate), for the Crown and Mr. *C. L. Gulati*, for the Complainant.

JUDGMENT.—This is a case which is peculiar in several respects. Eight persons have been convicted of cheating Biru Mal of Surtia, District Hissar, by selling to him a young married Rajput girl as a Mahajan virgin and thus getting Rs. 4,000 from him. In a separate trial the same eight have been convicted under section 372 of selling the same girl to Biru Mal. I have before me an appeal of Suraj Singh, one of the eight convicts, in which he appeals jointly from both the convictions. This Appeal No. 153 of 1918 was sent by Jail to the Sessions Judge, but has been transferred to this Court. I have also before me the present appeal, lodged by Pleader on behalf of all the eight convicts in the section 372 case. Lala Hargopal tells me that this appeal does not relate to the conviction under section 420. I understand from him that an appeal of seven of the convicts against the conviction under section 420 has been dismissed by the Sessions Judge as time-barred.

The facts are stated in the judgment of the learned Magistrate and need not be repeated. That some of the convicts came with the girl from Indore and misrepresenting her to be a Mahajan virgin sold her as a bride to Biru Mal for Rs. 4,000 is clear enough. Others of the convicts assisted from Indore by affirming to persons sent by Biru Mal to make enquiries that the girl was really a Mahajan virgin. But these latter persons, *viz.*, Basi Lal, Unkar Mahajan and *Musammat* Ganga Bai, never left Indore, and granting that they abetted the act of cheating which was actually committed in Hissar, the question still is whether any Court in British India has jurisdiction over them. They are not British subjects, and whatever offence they committed was committed out of British India, and I do not think that the fact that the offence which they abetted out of British India was committed by others in British India gives the Courts in British India jurisdiction. In this connection I would refer to *Reg.* v. *Pirtai* (1).

The above, however, relates to three only of the convicts. But as regards all the eight I have this further difficulty. The offence of cheating and the offence of selling the girl seem to me to lie in exactly the same acts, and I am doubtful whether after having been convicted of one offence they can be convicted of the other. I have carefully considered section 71, Indian Penal Code, and it seems to me that it is a case of an offence falling "within two or more separate definitions of any law in force for the time being by which offences are defined or punished." The section goes on to lay down that in such a case the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one

(1) 10 B. H. C. R 356.

of such offences. Offences under section 372 are punishable with a severer sentence than offences under section 420. It would, I think, have been perfectly right to frame charges under both sections in one and the same trial, and to award a sentence not exceeding that allowed by section 372. But I cannot find any authority for trying and convicting a man in two separate trials for the same offence, even though that offence may be one falling within two different sections of the Penal Code. In some cases a man commits two different offences by different acts, *e g.*, a man may commit an offence under section 457 by breaking into a house at night in order to commit theft. Having so broken in he may commit a separate subsequent offence by committing theft. But in the present case I am unable to see that the selling of the girl and the cheating of the purchaser are different acts. In some cases no doubt a sale is legally complete even before the sale money has been paid or the property handed over, but in such a case as the present, it seems clear that the offenders did not part with the girl and never intended to part with her until the price had been paid, and had the price not been paid the bargain would have been off. So I am quite unable to separate the *factum* of the sale from the *factum* of the cheating, and I am of opinion that the appellants should not have been tried twice for the same act, even though that act constitutes an offence under two different sections of the Penal Code. This is sufficient to dispose of the appeal. I may add that the learned Pleader for the appellants has cited *Mula* v. *Empress* (2) as authority for the proposition that the selling of a girl to a man who intends to marry her is not an offence falling within the purview of section 372, Indian Penal Code, even though the seller be aware of the fact that the girl is already married. This is the view which was held by Plowden, J., though Powell, J., doubted. But it is unnecessary to consider whether this view is correct or not, as I have already held that the appellants should not have been tried twice over for the same act.

(2) 13 P. R. 1888 Cr.

It remains to dispose of Suraj Singh's appeal from the conviction under section 420. The story for the prosecution is that the girl was brought to Giddarwah by Suraj Singh and others in order to sell her in marriage to Chamba Mal. That plan for some reason or another fell through, but Biru Mal got news of the girl and went over to Giddarwah and negotiations commenced, which, after certain enquiries had been made by Biru Mal in Indore, led to the girl's being taken off to Surtia where she was sold as a bride to Biru Mal for Rs. 4,000. Suraj Singh, though a *sowar* in the Indore State, is according to the record aged only 17, and evidently played a minor part in the whole affair. He is son of *Musammat* Nathi, and so brother-in-law of *Musammat* Gajjo Bai who is married to his brother. So it is hard to believe that he was not in the plot to sell his sister-in-law. But I have searched the record in vain for any evidence to the effect that he joined in making any misrepresentations to Biru Mal when the latter went to Giddarwah. Biru Mal himself says: "I put no particular enquiries to Suraj Singh." As to what took place later on at Surtia it is clear that Suraj Singh did not even go there. Biru Mal also says: "Raj Bahadur and Suraj Singh said they were brothers and that they had come to receive money which was due to Basi Lal from Ganeshi." But I do not see how any such statement would assist in persuading Biru Mal to pay money for *Musammat* Gajjo Bai under the mistaken idea that she was a Mahajan virgin. I hold the case, therefore, not proved against Suraj Singh.

The result is that I accept both these appeals and reverse the conviction and sentences against all the appellants under section 372 and acquit them. The fines inflicted under that section, if paid, will be refunded. I also reverse the conviction and sentence under section 420 in the case of Suraj Singh and acquit him and order him to be released, and the fine, if paid, to be refunded.

I do not order release in the case of the other convicts as they have to undergo their sentence under section 420, Indian Penal Code.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 25 OF 1917.

November 5, 1917.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, Mr. Justice Beaman and Mr. Justice Marten.

SURAJMAL B. MEHTA—PLAINTIFF—APPELLANT

versus

B. G. HORNIMAN AND OTHER—DEFENDANTS—RESPONDENTS.

Defamation—Fair comment, plea of—Solicitor, conduct of, whether matter of public interest—Journalist, duty of.

The conduct of a Solicitor of the High Court, as disclosed in proceedings in the High Court, is a topic of public interest and importance. [p. 469, col. 1.]

While a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement, where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the Court must decide what impression would be produced on the mind of an unprejudiced reader, who, knowing nothing of the matter beforehand, read the article straight through. [p. 470, col. 2.]

Comment to be fair must be comment on facts truly stated, though later they may turn out not to be true at all. [p. 475, col. 2.]

It is no part of the law of fair comment that the comment must be the writer's own: he is as much entitled to publish derivative as original comment if it be fair, and he chooses to adopt the former and make it his own. [p. 481, col. 1.]

Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that the inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences. [p. 483, col. 2.]

It is doubtful whether the standard to be applied in determining, whether comment is fair or not, varies according to the station of the plaintiff, and the degree of personality in the libel. All that is essential in this connection is, whether the subject-matter of the libel is of public importance. If it is, it can make no difference whether the person complaining of it is an author, a statesman, or an attorney; once that point is settled against the plaintiff the resultant comment has to be justified upon exactly the same loose general principles, and sentimental considerations ought to have no play. [p. 491, col. 1.]

This was a suit for damages for libel.

FACTS appear sufficiently from the following judgment of

MACLEOD, J.—**This is a suit for damages filed by Surajmal B. Mehta, a Solicitor of the High Court, against the Editor, Printer** and Proprietor of the *Bombay Chronicle* for alleged defamation contained in two articles which appeared in that paper on the 7th and 15th March last respectively.*

ARTICLES*.

A SOLICITOR AND HIS CLIENTS.

Certain circumstances connected with a suit in the Bombay High Court, which came to an abrupt termination last week, seem to us to call for further investigation and elucidation at the hands in whose care the preservation of propriety of conduct in the legal profession rests. In this case a Muhammadan gentleman named Haji Ahmed Haji Hassan Dada was sued by one Bhugwandas Goculdas Gandhi on a promissory note for Rs. 3,000. The plaintiff alleged that he was joint with his brother Sambhuprasad, and that the promissory note in question was passed in favour of the latter, who advanced the money to the defendant out of the joint family property. After Sambhuprasad's death, the plaintiff applied for Letters of Administration to the estate of his deceased brother. He had repeatedly called upon the defendant to pay the amount advanced but the latter had failed to do so. The defendant on the other hand denied that he had borrowed any sum whatever from the plaintiff. He was a rich man with an income of about Rs 8,000 per month, and a large property owner, whereas the defendant was a poor man, a clerk on a small monthly income. He admitted the passing of the promissory note, however, and alleged the following remarkable circumstances in connection therewith.

In 1912, the defendant entered into an agreement to purchase a bungalow on Nepean Sea Road from Tatia Saheb Holkar. Tatia Saheb was unable to carry out the agreement because he had previously agreed to sell the bungalow in question to a Mr. Khambatta, who successfully sued him for a specific performance of the contract. In that suit Messrs. Surajmal & Co. were the Solicitors for Tatia Saheb. Messrs. Surajmal and Company were also the defendant's Solicitors. The defendant alleged that after the suit Mr. Surajmal thereupon instigated him, the defendant, to file a suit against Tatia Saheb, his own client, for damages for failure to fulfil his contract for sale of the bungalow. Mr. Surajmal, it was again alleged, further persuaded the defendant that he would use his influence with Tatia Saheb to pay to the defendant Rs. 20,000 to Rs. 25,000 as damages. It was further agreed between them that if Mr. Surajmal were successful in obtaining not less than Rs. 20,000 for the defendant, the latter was to pay to him the sum of Rs. 3,000. As a sort of security for this he induced the defendant to pass a promissory note for Rs. 3,000 in the name of his clerk Sambhuprasad, explaining that under the circumstances it was not proper for the note to be in his (Mr. Surajmal's) name. As a matter of fact Mr. Surajmal only succeeded in obtaining Rs. 9,000 as damages for the defendant from Tatia Saheb and the defendant, therefore, refused to pay him the Rs. 3,000. Mr. Surajmal afterwards put up the plaintiff, Sambhuprasad having in the meantime died, to bring a suit against the defendant. This bare recital of

SURAJMAL v. HORNIMAN.

In 1912, Tatia Saheb Holkar entered into an agreement with one Ashidbai to sell to her his bungalow at Nepean Sea Road for Rs. 66,000. Ashidbai was the nominee of her son, Haji Ahmed Haji Hassan Dada (hereinafter called Dada). The plaintiff acted as common Solicitor and when the usual advertisement for

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the main allegations of the defendant in the case is sufficient to reveal very grave misconduct on the part of a Solicitor, if the allegations were well-founded. As to that, after the first day's hearing and while Mr. Surajmal was still under a severe cross-examination, in which he suffered from some lapses of memory, the case was suddenly withdrawn, the Judge, Sir Dinshaw Davar, appropriately remarking that the plaintiff had adopted a very wise course That the plaintiff was merely the creature of Mr. Surajmal admits of little doubt, in view of the circumstances revealed. And that Mr. Surajmal should have thus been content to have the case withdrawn and the very ugly allegations made against him left unrefuted is a matter which demands further inquiry. If the charge that he deliberately instigated one of his clients to bring an action for damages against another of his clients, sending him to another Solicitor for the purpose, and then arranging a settlement over that Solicitor's head, were true, then it is perfectly clear that Mr. Surajmal would not be a suitable person for the practice of the honourable profession of a Solicitor.

As regards the last named point it may be as well to elucidate the matter a little further, on the basis of the defendant's allegations, though the matter was not fully revealed in Court. It is alleged that in spite of the fact that the defendant was represented in his suit against Tatia Saheb by another firm of Solicitors, Mr. Surajmal settled the whole matter direct with him and then wrote to the other Solicitors stating: "We are informed by our client's agent that the above suit has been settled by the parties out of Court.....We are informed that your client has written to you accordingly." As a matter of fact there was no intervention on the part of any "agent" at all. The matter was settled between Mr. Dada and Mr. Surajmal direct and the latter wrote this letter, it is alleged, to prevent it being known that he had communicated with or seen Dada in the absence of his Solicitor. That, again, is conduct which requires explanation, and we trust that Mr. Surajmal will be called upon to give such explanation, as well as that of other allegations made against him by the Chief Justice or the Law Society.

A Matter for Investigation.

We referred last week to the case of *Gandhi v. Dada* which was part heard in the Bombay High Court and then incontinently withdrawn by the plaintiff, and we suggested that the facts disclosed during the hearing called for very strict inquiry, in respect of the conduct of Mr. Surajmal B. Mehta, a Solicitor, who was one of the witnesses. But there is a good deal more yet to be said, and which ought to be said, about the whole affair. It was roundly alleged that the plaintiff in the case was merely a puppet who had been instigated by Mr. Mehta to bring the suit, that the promissory note on which he sued had been given without any consideration, and at the instance of Mr. Mehta, to secure his promise of a commission of Rs. 3,000 from defendant, which was to be paid in consideration of his obtaining from his client, Tatia Saheb Holkar, Rs 20,000 or Rs. 25,000 as damages in a suit which Mr. Surajmal Mehta had instigated Mr. Dada to bring against Tatia Saheb, and that Mr. Surajmal Mehta settled this suit for Rs. 9,000 over the head of the Solicitor who was acting for Mr. Dada, dealing with the latter direct and paying to him his own cheque, while he afterwards wrote to Mr. Dada's Solicitor a letter stating that his (Surajmal's) firm had been informed by the Tatia Saheb's agent that the suit had been settled by the parties out of Court, whereas, as a matter of fact, there was no intervention by the agent and the cheque was given by Mr. Surajmal Mehta himself. The allegations of the defendant were largely developed in the cross-examination of Mr. Surajmal Mehta by Mr. Davar and he was still under cross-examination when the case was adjourned on the first day. When it was resumed on the 2nd day the plaintiff withdrew and the allegations remained unanswered. In regard to these grave allegations Mr. Surajmal was unable to remember whether the version of the defence put to him was true or not. He did not remember whether the defendant went to the other Solicitor, Mr. D'Cunha, at his suggestion or not, nor did he remember whether a draft of the notice sent by the defendant to Tatia Saheb was written by him and given to the defendant to be taken to Mr. D'Cunha. Other matters of importance he had also forgotten. Since it is to be presumed that these questions were not put without the existence of evidence in the possession of the defendant to back them up, it seems to us undesirable in the public interest that the matter should be left at a stage it had reached when the plaintiff thought fit to withdraw the case. There are other features of the case, moreover, which require further investigation. One witness for the plaintiff said that the promissory note was executed in his office at his table and in his presence by the defendant, who was paid Rs 3,000 in currency notes, and further that the defendant used the same ink and pen when he put his signature to the note. Another witness said the note was written in his room, and not in the room of the previous witness and that different pen and ink was used for the signatures. When an action is brought on such a document to recover a sum, which, it is stated in evidence, was actually paid over to the defendant, which the latter denies, and having been supported by evidence of the character indicated above, is suddenly withdrawn without explanation, it is clear that the matter cannot be allowed to rest there. Not only the conduct of the Solicitor concerned requires to be investigated, for his own sake as well as that of the public interest, but also the remarkable circumstances revealed by the evidence of the two witnesses we have mentioned. We trust that the attention of the Chief Justice and the Advocate-General as well as that of the Law Society and other authorities will be drawn to the matter.

claims had been published, one Khambatta gave notice that Tatia Saheb had already agreed to sell the bungalow to him. Eventually Khambatta had to file a suit for specific performance which was decided in his favour on the 6th September 1912. Thereafter Dada filed a Suit (No. 907 of 1912) against Tatia Saheb for damages for breach of his contract; D'Cunha acted as his Solicitor in that suit while the plaintiff acted for Tatia Saheb. The suit was settled by Tatia Saheb paying Rs. 9,000 to Dada. In 1915, one Bhagwandas Gordhandas filed a suit against Dada to recover Rs. 3,000 on a promissory note.

That suit came on for hearing before Davar, J., on the 26th March 1916, and was part-heard at the close of the day. For some reason which is not apparent, the plaintiff chose to call his witnesses, though the onus lay on the defendant to prove his defence as soon as the promissory note was admitted in evidence. The following Monday, the 28th, the plaintiff did not appear and the suit was dismissed with costs.

A report of the case was brought to the notice of the first defendant, who considered that owing to the nature of the allegations made by Dada in his defence and the cross-examination of the plaintiff's witnesses, it might be desirable to get further information. He sent for Nanabhai Cowasji Engineer and from the papers given to him by Nanabhai he evolved the articles which are now complained of. The first article began by setting out the contents of the pleadings. Briefly stated, it may be said that Dada admitted signing the note in favour of Shambhuprasad, the brother of Bhagwandas. Shambhuprasad was dead and Bhagwandas brought the suit either as survivor of two co-owners or as representative of his brother. Dada, however, contended that Shambhuprasad, who was a clerk in Surajmal's employ, was Surajmal's nominee under the following circumstances. Surajmal had instigated him to file the suit in his mother's name for damages against Tatia Saheb promising that he would secure to Dada from Rs. 20,000 to Rs. 25,000 as damages and in consideration for that Dada was to pay him Rs. 3,000. Dada was made to execute the promissory note as evidence of the bargain and it was made out in the name of Shambhuprasad, as it was thought it would not look well if Surajmal's name appeared on it. After the suit was settled Surajmal asked him for Rs. 3,000, but as he had only received Rs. 9,000 instead of the larger amount promised, Dada refused to pay. Thereupon Surajmal put up Bhagwandas, Shambhuprasad having died, to file the suit.

Then follows the passage complained of in the plaint. The writer remarks that 'the bare recital of the main allegations of Dada was sufficient to reveal very grave misconduct on the part of the Solicitor if the charges were well-founded,' and proceeds to comment on these allegations. In the second article the writer, after again setting out what he considered to be the allegations of Dada in his defence, states that these allegations were largely developed in the cross-examination of Surajmal and that when the plaintiff withdrew on the second day, these allegations remained unanswered. After commenting on Surajmal's cross-examination he concluded:—"It seems to us undesirable in the public interest that the matter should be left at the stage it had reached when the plaintiff thought fit to withdraw from the case."

Paragraph 7 of the plaint sets out the innuendo that the words in the passages complained of meant, and were understood to mean, that the plaintiff had been guilty of dishonourable and unprofessional conduct in his practice as a Solicitor, that the plaintiff had cheated and defrauded his client, Tatia Saheb, that he was a dishonest witness and an unscrupulous Solicitor.

The first defendant in his written statement denies the innuendo set out in paragarph 7 of the plaint.

He says that the words, in so far as they consist of statements of facts, are a fair and accurate report of the facts put in evidence at the trial of Suit No. 837 of 1915 published *bona fide* and without malice and, in so far as they consist of expressions of opinion, they are fair and honest comments made in good faith and without malice upon the said facts which are matters of public interest.

That is a defence of fair comment and not a justification: *Digby* v. *Financial News*,

Limited (1). But paragraph 6 states "as to such portion of the said words, if any, as are not facts put in evidence at the trial of the said suit the same is true in substance and in fact."

It is unfortunate that the plaintiff did not ask for particulars of the statements referred to in this paragraph.

For the articles profess to comment only on what was made public at the trial, and, if in the articles there were no statements of facts which were not made public, there was no necessity for that paragraph.

Mr. Bahadurji, however, had to admit that the articles did contain statements of such facts but as far as I could gather, his case was that there was nothing which it was necessary for him to justify.

The law as to what is fair comment and what it is sufficient to prove to justify fair comment has been very clearly stated in *Digby* v. *Financial News, Limited* (1). The plaintiff had issued an advertisement for a partner to complete the formation of a syndicate. One Carruthers wrote asking particulars, which were given to him together with certain reports and other documents. Carruthers handed these to the defendant, who wrote an article commenting satirically on the advertisement and upon the particulars and documents sent by the plaintiff to Carruthers. The defendant pleaded that the facts on which the comment was based were true, and the case came before the Court on a summons taken out by the plaintiff for further particulars of the statements said to be true. In allowing an appeal from an order for further particulars Cozens-Hardy, L. J., said:—

"It is essential that the defendants...must show that the documents sent by the plaintiff to Carruthers really contained the statements which the newspaper article stated they contained. That, I think, is all that is meant by paragraph 8 of the defence, when it says that 'in so far as the said words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact.' I cannot read that paragraph as in any way raising the issue whether the statements made in the documents were true."

And Collins, M. R., said:—

"Comment, in order to be fair, must be based upon facts, and if a defendant cannot show that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. The usual way to begin such a plea is by asserting that the facts on which the comment is based are true, that is, that the defendant has made no misstatements in formulating the materials upon which he has commented. If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair."

In *Hunt* v. *Star Newspaper Co.* (2), Fletcher Moulton, L. J., said:—

"In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment...The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him."

And Cozens-Hardy, M. R, said:—

"But there still remains the question whether, if, and only if, the facts are substantially true, the comment made by the defendants, based upon those true facts, was fair and such as might, in the opinion of the Jury, be reasonably made. I cannot do better than adopt the language of Kennedy, J., in *Joynt* v. *Cycle Trade Publishing Co.* (3). 'The comment must...not misstate facts, because a comment cannot be fair

(1) (1907) 1 K. B. 502 at pp. 507, 509; 76 L. J. K. B. 321; 96 L. T. 172; 23 T. L. R. 117.

(2) (1908) 2 K. B. 309 at pp. 317, 319; 77 L. J. K. B. 732; 98 L. T. 629; 24 T. L. R. 452.

(3) (1904) 2 K. B. 292; 73 L. J. K. B. 752; 91 L. T. 155.

which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation.' And in *Dakhyl* v. *Labouchere* (4) Lord Atkinson said: 'A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the Judge,...but if he should rule that this inference is capable of being reasonably drawn, it is for the Jury to determine whether in that particular case it ought to be drawn.'"

Lastly, comment may sometimes consist in the statement of a fact and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the writer from other facts stated or referred to by him or in the common knowledge of the person writing and those to whom the words are addressed and from which his conclusion may reasonably be inferred : see *O'Brien* v. *Marquis of Salisbury* (5).

Now I come to the evidence of the circumstances under which these articles came to be written.

When the first defendant after reading the report of the trial came to the conclusion that there should be a further inquiry, he asked his Sub-Editor to procure the attendance of Nanabhoy.

Surajmal was reported to have said in his evidence : "His managing clerk then (1909) was Nanabhoy Cowasji Engineer. He had remained with him for five years. Now he had dispensed with his services and he was on hostile terms with him." With that evidence before him to send for Nanabhoy was a very indiscreet step on the part of the 1st defendant, if he wanted to write a fair comment on the report of the trial, for it is difficult to escape from thinking that the first defendant must have expected to hear from Nanabhoy something to Surajmal's detriment. All the necessary materials for an article he could have obtained from Messrs. Ardeshir, Hormusji, Dinshaw & Co., defendants' Solicitors. Though the first defendant was probably not aware of it, there was ample justification for Surajmal's statement regarding his late managing clerk. Nanabhoy left his service at the end of November 1914 and went to Mr. Vachha, Solicitor. He took Dada with him as a client for Mr. Vachha, and, immediately after correspondence was opened by Mr. Vachha with Surajmal which resulted in Suit No. 1499 of 1914 being filed by Dada against Surajmal for an account. Nanabhoy attended to that suit. A reference to the Commissioner was directed and to the account filed by Surajmal, Nanabhoy drew up objections and surcharges, totalling about Rs. 73,000. He also instigated Dada, during the pendency of the suit, to call upon the Police to institute an enquiry regarding one of the items in the account and he was looking after Dada's defence in the suit filed against him by Bhagwandas.

By February 1916, Dada seems to have got tired of Vachha as his Solicitor, for he discharged him and signed warrants in both suits in favour of Messrs. Ardeshir, Hormusji, Dinshaw & Co. The immediate result was a consent decree in Suit No. 1499 of 1914, whereby this suit was dismissed and a decree was passed in favour of Surajmal on his counter claim for over Rs. 1,300. Nanabhoy's advice cost Dada over Rs. 5,000 in costs. Nanabhoy also was disappointed at not having received a larger bonus than Rs. 5,000 from Surajmal for the business procured by him. He wrote a letter to one Laxmidas in which he said he was asking for Rs. 30,000.

On the first occasion when Nanabhoy saw the first defendant he was asked if he could procure the record of the case. On the second occasion he brought a copy of the plaint and proceedings and observations for defendant's Counsel. First defendant knew that Nanabhoy was with Mr. Vachha and he understood when he got these observations that they had been drawn in Mr. Vachha's office. It has now been proved that they were drawn by Mr.

(4) (1908) 2 K. B. 325 *Note*; 77 L. J. K. B. 728; 96 L. T. 399; 23 T. L. R. 364.

(5) (1889) 6 T. L. R. 133.

Vachha and read without correction by Nanabhoy. Nanabhoy did say they were drawn by another clerk Thakurdas and approved by him, but I must believe Mr. Vachha. When Dada changed his Attorneys Mr. Vachha kept all the papers and Messrs. Ardeshir, Hormusji, Dinshaw & Co. had to get copies of the proceedings from the plaintiff's Solicitors. They did not draw any fresh observations from Dada's instructions for some reason not apparent, and Counsel at the hearing had nothing in their briefs except copies of the pleadings with the documents annexed thereto. Unfortunately for himself the 1st defendant read Mr. Vachha's observations, and, though it is denied, I think he probably had some conversation with Nanabhoy about them. Since the first defendant was thirsting for information it seems very improbable that Nanabhoy should have handed over the papers and then departed. It may be noted here that these observations contained a virulent attack against Surajmal's conduct as a Solicitor, though the writer conceded that had nothing to do with the merits of the case he was dealing with. First defendant must also have obtained before he wrote the second article some notes of the evidence given by the first two witnesses at the trial, which was not set out at length in the *Chronicle's* report.

I now come to the articles of the 7th and 15th March.

There can be no doubt, I think, that reading the articles as a whole, the passages complained of contain the innuendoes set out in paragraph 7 of the plaint. The first defendant candidly admitted that in his opinion the legitimate inference to be drawn from the report of the case was that Bhagwandas was the nominee of Surajmal in the suit filed by him and the comment in the passages complained of certainly amounts to this, that in the opinion of the writer Dada's defence was a true one and Surajmal was deliberately evading answering questions which he was able to answer, by pretending that his memory had failed him. Was then the first defendant's comment on the report of the trial fair comment tested by the rules to which I have referred above? In the first place, was it based upon facts truly stated or were there misstatements of facts, and in this letter there must be included the omission of important facts, for unless a report which is being commented on is fairly set out the comment cannot possibly be fair.

It cannot be said that the report of the case was properly set out before the comment began. True, the effect of the pleadings is set out but pleadings are very different from evidence, and nothing is said about the evidence given on oath by Surajmal in examination-in-chief, denying the allegations made against him by Dada. His cross-examination is referred to in language which leads the reader to infer that he completely broke down, and the first defendant writes, 'the case was suddenly withdrawn, the Judge appropriately remarking that the plaintiff had adopted a very wise course.' The Judge used those words for reasons only known to himself; they certainly are not apparent from the report, but the addition of the word 'appropriately' by the first defendant cannot be commended under the circumstances, and gives a clue to the state of his mind when commencing his comments. It is obvious that saturated with Mr. Vachha's observations he was ready to pass judgment on a case the trial of which had only just commenced. His first remark is, "that the plaintiff was merely the creature of Mr. Surajmal admits of little doubt in view of the circumstances revealed." The word "little" is evidently equivalent to "no." He continues, "and that Mr. Surajmal should have thus been content to have the case withdrawn and the very ugly allegations made against him left unrefuted is a matter which demands further inquiry."

Of course, if Bhagwandas was Surajmal's nominee, then Surajmal was the person who gave the word for the plaintiff to withdraw, but the recorded circumstances nowhere point inevitably to the conclusion; and if 'unrefuted' means 'disproved by the decisions of the Court,' then Surajmal was content that the allegation against him should go unrefuted. No doubt 'not disproved' may be the dictionary meaning of unrefuted, but in the second article the first defendant writes that 'the allegations remained unanswered', and it can hardly be contested that 'unanswered' ordinarily means 'uncontradicted'; 'answer' means a reply to a charge, a defence, so the denial of an

allegation is an answer to the making of it and not only does it seem clear that the first defendant used the word 'unrefuted' as equivalent to 'unanswered,' but I fancy that most men would read it in the same sense. The point, however, is not very material, as I have already observed that the fact that Surajmal denied on oath these allegations should have been stated before the comment commenced.

The passage proceeds, "if the charge that he deliberately instigated one of his clients to bring an action for damages against another of his clients, sending him to another Solicitor for the purpose and then arranging a settlement over that Solicitor's head, were true, then it is perfectly clear that Mr. Surajmal would not be a suitable person for the practice of the honourable profession of a Solicitor."

Then follow the words containing a very remarkable admission: "As regards the last named point it may be as well to elucidate the matter a little further on the basis of the defendant's allegations *though the matter was not fully revealed in Court.*"

"It is alleged that, in spite of the fact that the defendant was represented in this suit against Tatia Saheb by another firm of Solicitors, Mr. Surajmal settled the whole matter direct with him and then wrote to the other Solicitors stating: 'We are informed by our client's agent that the above suit has been settled by the parties out of Court . . . We are informed that your client has written to you accordingly.' As a matter of fact there was no intervention on the part of any 'agent' at all. The matter was settled between Mr. Dada and Mr. Surajmal direct and the latter wrote this letter, it is alleged, to prevent it being known that he had communicated with or seen Dada in the absence of his Solicitor."

The allegations are that Surajmal, after instigating Dada to file a suit against his own client, Tatia Saheb, sends him to another Solicitor to file the suit, but after that had been done, arranged the settlement of the suit with Dada without letting Dada's Solicitor know what was happening.

Truly the matter was not revealed in Court nor in any of the proceedings; it was revealed solely in the observations in possession of the first defendant, which no one had seen except Mr. Vachha and Nanabhoy. A very lame attempt was made to show that the matter was revealed in this passage in paragraph 4 of the written statement of Dada:

"The said suit against the said Tatia Saheb Holkar was settled by Mr. Surajmal with the defendant for Rs. 9,000 damages. When Mr. Surajmal gave the defendant a cheque in payment of Rs. 9,000 he damanded payment for himself of Rs. 3,000 under the said promissory note, but the defendant declined to pay the same as Mr. Surajmal's promise was to get this defendant at least Rs. 20,000 by way of damages."

Strictly speaking, it is a breach of professional etiquette for a Solicitor appearing for one party to have any conversation or any dealing with the opposite party except through his Solicitor, if he has one. According to Mr Surajmal this rule is not always observed in Bombay, as he seemed to think there was nothing wrong in settling direct with the opposing party provided his Solicitor's costs were secured. But how can any reasonable person spell out of the passage in the written statement which I have just quoted a charge by Dada against Surajmal of having broken this rule of professional etiquette, and I may note here that there is nothing in the written statement about Surajmal sending Dada to Mr. D'Cunha. Now, it is transparently clear that whatever the first defendant may say now as to the meaning he read out of that passage, he would never have said a word in his article on this matter if it had not been that he had these observations before him, and it is purely an afterthought to say that the passage in the written statement contained the charge made in the observations. It is obvious that Counsel, when drawing the written statement from these observations, deliberately and rightly refrained from reproducing this charge, considering Mr. Vachha's remark, 'it is submitted that this act of Mr. Surajmal to hold communication with Dada in the absence of Dada's Solicitor, Mr. D'Cunha, was highly improper, *but we think we are not concerned with that here.*'

But the first defendant made a worse blunder. Even if it can be said that it was alleged in the proceedings that Mr. Surajmal settled the whole matter direct with Dada

it certainly was never alleged anywhere that Surajmal then wrote to the other Solicitor stating: "We are informed by our client's agent that the above suit has been settled by the parties out of Court... We are informed that your client has written to you accordingly."

This was taken direct from the observations and what is more startling, the comment is also taken direct from the observations. What justification was there for the first defendant stating that the contents of Surajmal's letters which he got from the observations were not only untrue, but were so written deliberately in order to screen the breach of etiquette committed by him?

This brings me to the second article, where these allegations from the observations are again repeated with the further fact added that Surajmal paid Dada with his own cheque. That statement has now been proved to be false by the production of Tatia Saheb's cheque. It is difficult to see what object the first defendant would have had in laying such extraordinary stress on these facts which he had gathered from the observations, unless he wished whilst making a personal attack on Surajmal on a matter outside the case to drive home the inference he drew from the circumstances actually revealed that Bhagwandas was the nominee of Surajmal and that all Dada's allegations against him were true.

For, after referring to the allegations of the defendant including those which were never made, he goes on to tell his readers that they were largely developed in the cross-examination of Surajmal by Mr. Davar, which was unfinished at the close of the day.

As a matter of fact the cross-examination on the allegation actually made had hardly begun as Mr. Davar had practically no instructions, and the first defendant's remarks as regards Surajmal's memory were singularly unfortunate.

Surajmal could not remember what he said to Dada when Dada heard of Khambatta's agreement and asked Surajmal what he should do or whether he told Dada to go to other Attorneys. He could hardly be expected to remember the first, but if he told Dada to go to other Attorneys, as he was acting for Tatia Saheb, that was the right thing to say.

The only suspicious failure of memory as appearing from the report was as regards the draft of the notice to be sent to Tatia Saheb claiming damages. First defendant might well presume that the questions put to Surajmal were founded on evidence in possession of Dada's legal advisers. As a matter of fact they had no such evidence, it was never suggested in the observations and these questions were scandalous questions which, under the rules which govern Counsel's duties in cross-examining a witness, should never have been put. Mr. Vachha had been subpœnaed to produce two drafts prepared by Surajmal when the suit was settled. He came to Court with these and showed them to Dada's Counsel. According to the statement made to me by Mr. Davar, Mr. Vachha, who had nothing to do with the case, said to him, "ask the witness whether he drafted the notice to Tatia Saheb, he won't deny it." So Mr. Davar put the question, and although Surajmal first denied it, the question was persisted in and he was bullied into going so far as to say he could not remember whether he had drafted the notice. His explanation now given here is that he was flustered by Counsel's persistent questions and seeing papers in Counsel's hands which were the drafts referred to above, he got frightened and said he could not remember. This is an excellent example of the abuse of the powers of cross-examination (*see note at end*), though of course first defendant was entitled to draw his inference from what he read, and was entitled to assume that there was some foundation for the questions. This, however, only shows the danger of commenting on evidence which has remained incomplete owing to a case having come to a premature end. If this case had gone on it would have been proved, as it has now been proved, that Mr. D'Cunha drafted the notice on Dada's instructions.

As to the words "other matters of importance he had also forgotten," they were grossly unfair and the first defendant's attempt to explain them was ludicrous.

It is obvious, therefore, that following the rulings I have cited I must hold that the first defendant has misstated the facts on which his comment was based. He

has laid the greatest stress on allegations which were never revealed to the public to support the conclusions he arrived at and has, moreover, accepted those allegations as true. The defence of fair comment must, therefore, inevitably fail. I must also find that from the report of the case before the public, as far as it went, it could not reasonably be inferred that Bhugwandas was the nominee of Surajmal, that is to say, using the word 'infer' in its strongest sense.

'Infer' is a general term for drawing a logical conclusion from given data or premises, it is rarely used in the sense of 'conclude', it generally denotes a step in the process of reasoning, though it frequently implies little more than surmise. It is necessary, therefore, to consider the form of the inferences arrived at by the first defendant in order to see whether they are reasonable, and it is obvious that they are definite conclusions. It would have been reasonable to infer from the fact that Bhagwandas withdrew his case that he was apprehensive that Dada would be able to succeed in his defence and prove that Bhagwandas was the nominee of Surajmal, or that it was possible that Bhugwandas was the nominee of Surajmal, it was not reasonable to infer that Bhugwandas was the nominee of Surajmal. The former are true inferences. The latter is a conclusion. The first defendant has confused inference with assumption, he has accepted as true anything that was suggested by the one side and discarded as untrue anything that was said by the other side, without any discrimination and without any attempt to weigh the merits of the respective cases.

On the given data it was impossible for any one to draw an inference in the nature of a conclusion.

If the inference had been of a less conclusive character, I might have held it reasonable, and performing the functions of a Jury I might have held that it ought to have been made. Though when more than one reasonable inference can be drawn from given data, it would hardly be fair comment to draw the most unfavourable one without pointing out that others more favourable could be drawn.

The suggestions made more than once that the facts revealed necessitated a further inquiry were superfluous. What need of further inquiry? Mr. Horniman had conducted the inquiry. The accused had been convicted *in absentia*.

On the question of damages I must take into account the fact that a most virulent attack has been made upon the plaintiff in his professional capacity and that no attempt has been made by the defendants to express regret for having published a libel when it had become obvious that conclusions had been come to on data insufficient by themselves, apart from the fact that some of them were not legally available.

This is a flagrant instance of trial by newspaper under the guise of fair comment. The limits which are set to the rights of newspapers to comment on matters of public interest are extremely wide and there is, therefore, all the more necessity for caution to see that they are not overstepped, and that the fundamental principle that none should be condemned unheard is adhered to.

There will be a decree for the plaintiff for Rs. 3,000 and costs.

NOTE.—Since this judgment was delivered, it has been brought to my notice that my remarks regarding the cross-examination of Surajmal by Mr. Davar may give rise to some misapprehension as I did not mention the particular rules which govern Counsel's duties in cross-examining a witness which I had then in my mind, and I, therefore, think it desirable that this should be done.

Counsel takes his instructions for conducting a case from the Solicitor instructing him, and from none else. He is not entitled to rely on facts within his own knowledge. Nor is he entitled to put questions unless there be some foundation for asking them. If he is instructed by his Solicitor to put a certain question he may assume that the Solicitor has some foundation for so instructing him, but if it is such a question as is referred to in section 148 of the Indian Evidence Act, he must observe the provisions of section 149.

The question put by Mr. Davar, whether Surajmal had drafted the notice, was not put on instructions from Mr. Nariman,

the Solicitor in the case instructing him, but was put at the suggestion of Mr. Vachha, an outsider, and was without foundation. My criticism of Mr. Davar's cross-examination was confined solely to this point. I should have had no fault to find with the form of it if he had relied on well founded instructions from Mr. Nariman.

The defendants appealed and the Court (Scott, C. J., and Heaton, J.) delivered the following

JUDGMENT.

SCOTT, C. J.—The question is whether the 1st defendant, in writing two articles in the *Bombay Chronicle* upon certain proceedings in the High Court which had just terminated, exceeded the limits of fair comment. The articles were headed, one of the 7th March, "A Solicitor and his clients," and the other of the 15th March, "A matter for investigation."

The plaintiff is a Solicitor of the High Court.

In a suit filed by him as Solicitor for one Bhugwandas upon a promissory note for Rs. 3,000, made in favour of Shambhuprasad deceased, the brother of Bhugwandas, against Dada, the maker of the note, the defendant pleaded that the suit was instigated by Surajmal (the present plaintiff) and that the note was really passed to secure to Surajmal, who was the employer of Shambhuprasad, the sum of Rs. 3,000 as his reward in the event of his settling for Rs. 20,000 or upwards a suit filed in the name of Dada's mother against Surajmal's client, Tatia Saheb Holkar. Dada pleaded hat though a settlement was effected by Surajmal it was for Rs. 9,000 only and therefore the promissory note was without consideration. Dada's case was set out in detail in paragraph 4 of his written statement, which is as follows :—

"4. The defendant says that he received no consideration for the said promissory note and that the same was passed by him in the name of the said Shambhuprasad Goculdas as the nominee of Mr. Surajmal with whom the said deceased was serving as a clerk, under the following circumstances.

"On the 27th February 1912, the defendant had entered into an agreement with one Tatia Saheb Holkar for the purchase from the latter of his bungalow situate at Napean Sea Road at the price of Rs. 66,000. The agreement was entered into by the defendant in the name of his mother Hajiani Ashidbai. The said Tatia Saheb Holkar was unable to carry out the said agreement as he had, prior thereto, entered into another agreement for the sale of the same property to one M. C. Khambatta, who obtained a decree for specific performance of his contract in uit No. 443 of 1912 filed in this Honourable Court against the said Tatia Saheb Holkar. In the said suit the said Tatya Saheb Holkar was represented by Messrs. Surajmal & Co. After the decision in the said suit Mr. Surajmal instigated this defendant to file a suit against the said Tatia Saheb Holkar for breach of his contract with this defendant for the sale to him of the said property. This defendant was unwilling to file any such suit as the said Tatia Saheb Holkar was willing to repay this defendant the amount of earnest money with interest, but Mr. Surajmal advised this defendant that he was entitled to damages for breach of the said contract and said that he (Mr. Surajmal) would use his influence with his client, the said Tatia Saheb Holkar, and get him to pay this defendant the sum of Rs. 20,000 to Rs. 25,000 by way of damages. Accordingly this defendant filed a suit against the said Tatia Saheb Holkar in this Honourable Court claiming Rs. 30,000 as damages. During the pendency of this suit it was arranged that if the defendant obtained Rs. 20,000 to Rs. 25,000 by way of damages, Surajmal was to be paid Rs. 3,000 by the defendant, and in consequence of the said arrangement the promissory note sued on was passed in favour of the said Shambhuprasad G. Gandhi as the latter said that it would not look good for the note to be in the name of Mr. Surajmal.

"The said suit against the said Tatia Saheb Holkar was settled by Mr. Surajmal with this defendant for Rs. 9,000 for damages. When Mr. Surajmal gave this defendant a cheque in payment for Rs. 9,000 he demanded payment for himself of Rs. 3,000 under the said promissory note, but the defendant declined to pay the same as Mr. Surajmal's promise was to get this defendant at least Rs. 20,000 by way of damages.

"For over seven years past the defendant

used to entrust large sums of money to Mr. Surajmal for the purpose of being invested on mortgages and purchase of immoveable properties. As Mr. Surajmal from time to time evaded rendering an account of his moneys to the defendant, the latter filed a suit against him, being Suit No. 1499 of 1914, for accounts. The said suit is still pending."

By paragraph 5 Dada submitted that Surajmal was a necessary party to the suit. The parties went to trial and the case came on before Davar, J., on the 26th February 1916. The issues raised at the hearing were:—

"(1) Whether the plaintiff has any interest in the promissory note?

(2) Whether Rs. 3,000 were advanced to the defendant by Shambhuprasad as alleged in the plaint?

(3) Whether the promissory note was not executed under circumstances mentioned in paragraph 4 of the written statement.

(4) Whether the said Shambhuprasad was not the nominee of Mr. Surajmal?

(5) If so, whether Mr. Surajmal is not a necessary party to the suit?

(6) Whether the defendant is entitled to a decree for his counter-claim?"

The plaintiff called two witnesses as to the making of the note and the payment of consideration in cash and called Surajmal to deny the allegations of the defendant as to the circumstances under which the note was passed in order perhaps to show that Surajmal was not a necessary party, for the onus of proving the allegations in paragraph 4 of the written statement was on the defendant. Surajmal's cross-examination commenced on the first day of the hearing, but was not concluded when the Court rose in the evening and the case stood over for further hearing on Monday the 28th. It had been elicited in the cross-examination that Tatia Saheb Holkar and Dada were both at the date of the note profitable clients of Surajmal. That Holkar after agreeing to sell to Dada or his mother a property at Nepean Sea Road was sued by one Khambatta for specific performance of an earlier contract for sale of the same property. That Surajmal had conducted the defence of Holkar in that suit after having advertised for Dada or his mother, the purchaser of the property. That after Khambatta had filed his suit for specific performance Dada had sent a notice of claim for damages for breach of contract to Holkar. The last answers of Surajmal in his cross-examination were as follows:—

"I don't remember if Dada consulted me before sending the notice. I did not write the notice on behalf of the defendant. I think D'Cunha did. Defendant asked me what to do when he heard of Tatia Saheb's agreement with Khambatta. I don't remember what I told him. I don't remember if I drafted a notice on behalf of the defendant. I will not swear that I did not. I did not send defendant to D'Cunha. I don't remember if I gave a draft of a notice to be taken to D'Cunha to be written by him and addressed to me. I can't say whether I did it or did not. I do not remember if I told the defendant to go to some other Solicitor, saying that I would act for Holkar."

When the Court rose the cross-examining Counsel had not reached the question of the alleged settlement by Surajmal of Dada's mother's suit against Tatia Saheb Holkar. The cross-examination, however, was not continued for when the Court sat again on the 28th February, the plaintiff Bhugwandas consented to a decree dismissing the suit with costs.

Reports of the proceedings, which are substantially accurate, appeared in the *Bombay Chronicle*, of which the 1st defendant Horniman is Editor, on the 28th and 29th February, and these reports were brought to the notice of the latter by the Sub-Editor. Upon those reports, with an exception to be mentioned hereafter, were based the articles complained of as libellous by the plaintiff and defended by the defendants as fair comment made in good faith on facts put in evidence being matters of public interest. The defendants plead that such portions of the articles, if any, as are neither facts put in evidence at the trial nor fair comment the same were true in substance and in fact.

The plea "of facts put in evidence" has been taken throughout the trial of this libel action to include the allegations of the defendant in his written statement.

The learned trial Judge decided the case in favour of the plaintiff and awarded him Rs. 3,000 as damages.

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The matters principally complained of are the following passages in the first article:—

(*a*) "That the plaintiff was merely the creature of Mr. Surajmal admits of very little doubt in view of the circumstances revealed."

(*b*) "That Mr. Surajmal should have been thus content to have the case withdrawn and the very ugly allegations made against him left *unrefuted* is a matter which demands further inquiry."

(*c*) "If the charge that he deliberately instigated one of his clients to bring an action for damages against another of his clients, sending him to another Solicitor for the purpose and then arranging a settlement over that Solicitor's head, were true, then it is perfectly clear that Mr. Surajmal would not be a suitable person for the practice of the honourable profession of a Solicitor."

"As regards the last named point it may be well to elucidate the matter a little further, on the basis of the defendant's allegations, though the matter was not fully revealed in Court. It is alleged that in spite of the fact that the defendant was represented in his suit against Tatia Seheb by another firm of Solicitors, Mr. Surajmal settled the whole matter direct with him and then wrote to the other Solicitors stating: 'We are informed by our client's agent that the above suit has been settled by the parties out of Court....We are informed that your client has written to you accordingly.' As a matter of fact there was no intervention on the part of any 'agent' at all. The matter was settled between Mr. Dada and Mr. Surajmal direct and the latter wrote this letter, it is alleged, to prevent it being known that he had communicated with or seen Dada in the absence of his Solicitor. That, again, is conduct which requires explanation, and we trust that Mr. Surajmal will be called upon to give such explanation, as well as that of the other allegations made against him, by the Chief Justice or the Law Society."

In the second article:

"(*a*) That Mr. Surajmal settled this suit for Rs. 9,000 over the head of the Solicitor who was acting for Mr. Dada, dealing with the latter direct and paying to him his own cheque while he afterwards wrote to Mr. Dada's Solicitor a letter stating that his (Surajmal's) firm had been informed by the Tatia Saheb's agent that the suit had been settled by the parties out of Court, whereas, as a matter of fact, there was no intervention by the agent and the cheque was given by Mr. Surajmal Mehta himself."

"(*b*) The allegations of the defendant were largely developed in the cross-examination of Mr. Surajmal Mehta by Mr. Davar and he was still under cross examination when the case was adjourned on the first day. When it was resumed on the second day the plaintiff withdrew and the allegations remained unanswered. In regard to these grave allegations Mr. Surajmal was unable to remember whether, etc."

It is urged for the plaintiff that no comment can be fair which is not built on facts truly stated and that here we have facts not truly stated: Per Cozens-Hardy, M. R., in *Hunt* v. *Star Newspaper Company* (2). In qualification of this general observation other *dicta* must be borne in mind:—

"It is only, as was said by Bowen, L. J., in *Merivale* v. *Carson* (6), when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. It is for the Jury to consider what impression would be produced in the mind of an unprejudiced reader who reads the report straight through knowing nothing about the case beforehand. They must not dwell too much on isolated passages, they must consider the report as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they must find for the plaintiff; but, if there are no such deviations, or the deviation is minute and within the latitude of fair discussion, and within the region of that diversity of opinion which may be fairly and reasonably entertained by different persons upon the same subject matter, they should find for the defendant." [See *South Hetton Coal Company* v. *North Eastern News Association* (7).]

(6) (1888) 20 Q. B. D. 275 at p. 283; 58 L. T. 331; 36 W. R. 231; 52 J. P. 261.

(7) (1894) 1 Q. B. 133 at pp. 143, 144; 63 L. J. Q. B. 293; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196,

"It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the Jury to say whether the mode of expression exceeds the reasonable limits of fair criticism." [*Merivale* v. *Carson* (6).]

The matter commented on must be actual fact. "The very statement, however,.... assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented, in what would be a fair and *bona fide* manner on the supposition that the facts were true... If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails." [*Lefroy* v. *Burnside* (8).]

The defendant will not, however, be liable for trivial mistakes made accidentally, for it is not to be expected that a public journalist will always be infallible. [*Woodgate* v. *Ridout* (9).]

The facts in the present case are of two classes : (1) the pleadings in the promissory note suit ; the evidence recorded therein and the result of the trial ; (2) copies of certain documents which came to the hands of the defendant contained in observations for Counsel for Dada, which defendant did not know had not in fact reached the hands of Counsel.

No exception is taken on the plaintiff's behalf to the materials falling under group (1) but as I understood there was a suggestion, but nothing more, that the materials in group (2) could not properly form the subject of fair comment. It is, however, certain that the document referred to under group (2), namely, the letter of Surajmal & Co. to D'Cunha was in fact written and sent by the plaintiff to D'Cunha. It is, therefore, not only a fact in the sense of materials but an unimpeachable fact. It is not invented. It did exist, and was true; therefore, it was an ascertained fact within *Lefroy* v. *Burnside* (8).

The learned Judge, as to the first passage complained of, was of opinion that though there was some foundation for the inference that the plaintiff Bhugwandas was the creature of Surajmal, the inference was stated in too positive a manner to entitle the defendant Horniman to the protection of fair comment.

In this connection the following observations by Lord Chief Justice Cockburn to the Jury in *Risk Allah Bey* v. *Whitehurst* (10) (a case of comment on the proceedings at a trial of the plaintiff for murder) are in point:—

"If a public writer in the press should write that which turns out not to be founded upon the inference he draws, and is unable to justify the conclusion he has arrived at, yet if he has acted in good faith in the discharge of his duty, bringing to it the amount of care, reason, and judgment which a man who takes upon himself to discuss public questions is bound to bring, so that the Jury is of opinion that he has acted reasonably and properly, he will be protected by that privilege, although he may turn out to have been in error."

So also in *Hunter* v. *Sharpe* (11) (a case of medical advertisement), it was laid down that a writer, in commenting upon matters of public interest, is protected and excused if in writing honestly and with reasonable moderation and self-control he makes, through mistaken inferences on the matters of fact involved, defamatory statements the truth of which he cannot substantiate.

In *Lefroy* v. *Burnside* (8), already referred to, Palles, C. B., said: "It was contended during the argument that the statement of one fact cannot be excused as fair comment upon another fact. That proposition is, in my opinion, far too wide, and I cannot concur in it ; but I think that when a matter of fact is to be excused as comment upon another fact, the fact alleged and sought to be excused must be a reasonable inference from the facts alleged, and upon which it is a comment. Whether the fact averred be *capable* of being reasonably inferred from such other facts is a matter of law...If...it be capable of being inferred, whether in

(8) (1879) 4 Ir. 556 at pp. 565, 566.
(9) (1865) 4 F. & F. 202 at p. 217; 142 R. R. 657.
(10) (1869) 18 L. T. 615 at p. 620.
(11) (1866) 4 F. and F. 983; 15 L. T, 421.

the particular case it *ought* to be inferred is for the Jury".

I can find nothing in the articles to indicate that the writer was not discussing the position of Surajmal, as disclosed in the materials available, in perfect good faith and with such care, reason and judgment as a man is bound to bring to the discussion of matters of public interest. He had before him the allegations of Dada which denied consideration for the note and alleged Shambhuprasad to be the nominee of Surajmal. He had the hopelessly contradictory evidence of the two witnesses called to prove the making of the note and the payment to Dada. He had the statements in the evidence of Surajmal that he did not remember his acts with regard to certain matters connected with the recent litigation between his two clients Dada and Tatia Saheb Holkar. The writer also knew that plaintiff's agreement to the dismissal of the suit with costs was equivalent to an admission that his case could not be substantiated and was very suggestive of the conclusion that the defendant's case was true.

Under these circumstances it was, in my opinion, a fair inference that the plaintiff was the creature of Surajmal.

As to the second passage complained of, it is contended that to say that Surajmal left allegations against him "unrefuted" is false and an unfair mis statement. I do not agree with this contention. I think "unrefuted" means "not disproved" or "left standing as matters in controversy", not merely "undenied." That this was the meaning of the writer is evident from the second passage complained of in the second article: "The allegations of defendant were largely developed, etc."

As regards the third passage complained of, the question turns on the interpretation put by the writer upon an admitted letter of Surajmal in which it is said: "We are informed by our client's agent that the above suit has been settled... We are informed that our client has written to you accordingly". Counsel for the plaintiff contends that the writer's comment that as a matter of fact there was no intervention on the part of any agent at all is false as Tatia Saheb's agent Vinayakrao had taken part in the settlement of the suit. The defendant's Counsel contends that the statement that there was no intervention on the part of any agent refers to "we are informed by our client's agent," and does not amount to an allegation that the agent had no hand in the settlement, but only that the knowledge of the settlement was not derived from the agent as Surajmal had himself a direct hand in it. I think the passage is fairly open to the interpretation suggested for the defence, though the comprehensive form of the denial of the agent's intervention might lead to the inference contended for by the plaintiff's Counsel. The further passage that Surajmal wrote the letter "to prevent it being known that he had communicated with or seen Dada in the absence of his Solicitor" is a statement of one of the defendant's allegations gathered from the brief which had been shown to the writer. The writer's own comment is that Surajmal's conduct in the matter requires explanation, a comment which, it seems to me, is not unreasonable.

As regards the first passage complained of in the second article, it is complained that the writer has invented the statement that Surajmal gave Dada his own cheque for the cheque given was in fact Tatia Saheb Holkar's. The first defendant says he so interpreted paragraph 4 of the written statement of Dada. Though the reading was mistaken I see no reason for holding it was not Mr. Horniman's honest understanding of the passage. It was an accidental mistake: infallibility cannot be expected of a journalist.

The objections to the second passage complained of in the second article have already been to some extent dealt with in the discussion of the expression 'unrefuted'. Objection is also taken to the statement that "other matters of importance he had also forgotten." Mr. Horniman mentions three matters which Surajmal had forgotten which he (Horniman) thought of importance then. I should say the forgetfulness as to the advice given to Dada, when the latter asked what he should do on hearing of Tatia's agreement with Khambatta, was important and that the other matters were unimportant, but Horni-

man may have honestly thought them important.

I think the defence of fair comment has in the present case been obscured by the evidence that the plaintiff was allowed without objection to give on the matters left undecided in the promissory note suit. Strictly speaking, such evidence was irrelevant for the Court was only concerned with the materials upon which the comment was based and whether such comment was fair.

In the case of *Woodgate* v. *Riaout* (9), where a Solicitor—the plaintiff—being charged in a newspaper article with professional misconduct appearing in proceedings then pending and unfinished gave evidence in disproof of the comments and facts alleged, his evidence was not objected to, though the note of the reporters suggests it could have been excluded. There, however, the legal proceedings, on which the comment complained of was made, were in progress and unfinished. The matter is different here, the comment was largely suggested by the manner in which the proceedings terminated, and I venture to think that if Surajmal's evidence had not been taken, the trial Court might have arrived at the same conclusion as I have come to, namely, that the articles complained of are fair and honest comment on a matter of much public importance.

HEATON, J.—This is an appeal by Mr. Horniman, the Editor of the *Bombay Chronicle*, against a decree awarding to the plaintiff, Mr. Surajmal, a Solicitor of this Court, Rs. 3,000 as damages for libel. The libel is contained in two articles which appeared in the *Bombay Chronicle*. These articles were comments on a suit which had recently been heard before the late Mr. Justice Davar. It was a suit on a promissory note passed by a certain Mr. Dada, a former client of Mr. Surajmal, in favour of one Shambhuprasad, a clerk of that same gentleman. Shambhuprasad died and his brother Bhugwandas brought the suit, alleging that the promissory note evidenced an actual loan of Rs. 3,000 to Mr. Dada. Mr. Surajmal filed the plaint on behalf of Bhugwandas and though before the suit came to trial he had ceased to be Bhugwandas' attorney, what has been written might suggest the possibility that Mr. Surajmal had something to do with the affair. When Mr. Dada came to put in his written statement, it became apparent that Mr. Surajmal was alleged to have a very intimate connection with the matter, for Mr. Dada alleged that the real holder of the promissory note was Mr. Surajmal himself, that there had not been any loan at all but that Mr. Dada had signed the promissory note as a guarantee that he would pay Mr. Surajmal Rs. 3,000 if he recovered Rs. 20,000 or more as damages in the suit then pending The precise terms of Mr. Dada's defence on this point are as follows:—

"The defendant says that he received no consideration for the said promissory note and that the same was passed by him in the name of the said Shambhuprasad Gokaldas as the nominee of Mr. Surajmal, with whom the said deceased was serving as a clerk under the following circumstances.

On the 27th February 1912, the defendant had entered into an agreement with one Tatia Saheb Holkar for the purchase from the latter of his bungalow situated at Nepean Sea Road at the price of Rs. 66,000. The agreement was entered into by the defendant in the name of his mother Hajiani Ashidbai. The said Tatia Saheb Holkar was unable to carry out the said agreement, as he had prior thereto entered into another agreement for the sale of the same property to one M. C. Khambatta, who obtained a decree for specific performance of his contract in Suit No. 443 of 1912 filed in this Honourable Court against the said Tatia Saheb Holkar. In the said suit the said Tatia Saheb Holkar was represented by Messrs. Surajmal and Co. After the decision of the said suit Mr. Surajmal instigated this defendant to file a suit against the said Tatia Saheb Holkar for breach of his contract with this defendant for the sale to him of the said property. This defendant was unwilling to file any such suit as the said Tatia Saheb Holkar was willing to repay this defendant the amount of earnest money with interest, but Mr. Surajmal advised this defendant that he was entitled to damages for breach of the said contract and said that he (Mr.

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Surajmal) would use his influence with his client the said Tatia Saheb Holkar and get him to pay this defendant the sum of Rs. 20,000 to Rs. 25,000 by way of damages. Accordingly this defendant filed a suit against the said Tatia Saheb Holkar in this Honourable Court claiming Rs. 30,000 as damages. During the pendency of this suit it was arranged that if the defendant obtained Rs. 20,000 to Rs. 25,000 by way of damages Mr. Surajmal was to be paid Rs. 3,000 by the defendant, and in consequence of the said arrangement the promissory note sued on was passed in favour of the said Shambhuprasad G. Gandhi as the latter said that it would not look good for the note to be in the name of Mr. Surajmal.

"The said suit against the said Tatia Saheb Holkar was settled by Mr. Surajmal with this defendant for Rs. 9,000 for damages. When Mr. Surajmal gave this defendant a cheque in payment of Rs. 9,000 he demanded payment for himself of Rs. 3,000 under the said promissory note, but the defendant declined to pay the same as Mr. Surajmal's promise was to get this defendant at least Rs. 20,000 by way of damages."

It is material here to note that in effect Mr. Dada charged two matters (1) that the person really bringing the suit was Mr. Surajmal and not Bhugwandas and that the claim as made was a false claim; and (2) that Mr. Surajmal as a Solicitor had behaved in a very questionable manner in the matter of the suit between Mr. Dada and Tatia Saheb Holkar.

The suit on the promissory note duly came on for hearing but by that time Mr. Surajmal had ceased to be Bhugwandas' Attorney. Two witnesses were called to prove the loan of Rs. 3,000 and under cross examination apparently presented a sorry appearance. Then Mr. Surajmal appeared as a witness, but not to prove the loan. He appeared as a witness to refute Mr. Dada's attack on himself, and he did this early in the case though he might have waited until the defendant had given evidence and secured the advantage of exposing the defendant to cross-examination before he himself appeared as a witness. He did not appear to say that there was a loan or to speak to the promissory note sued on. He deposed that he had nothing to do with that promissory note and on that part of the case was, as events happened, never cross-examined. He was cross-examined, however, as to his part in the suit between Mr. Dada and Tatia Saheb Holkar and undoubtedly he did not acquit himself very well; for he professed himself unable to remember certain matters which he might fairly be expected to recollect. There the case ended for the day and on the following Monday when the case was called on, the plaintiff Bhugwandas consented to the claim being dismissed with costs and the Judge observed that he had adopted a wise course. Mr. Dada consequently did not appear as a witness and was not examined or cross-examined.

The articles complained of by the plaintiff Mr. Surajmal have been quoted from fully by my Lord the Chief Justice and I need not repeat the quotations. On the facts appearing, I think the writer would have been within the limits of fair comment had he said that the claim made by Bhugwandas was extremely suspicious, indeed probably false, and that the allegations against Mr. Surajmal, both as to professional misconduct and as to his part in Bhugwandas' suit, had not, owing to the collapse of the case, been satisfactorily met and that they demanded further and fuller enquiry. That would have been legitimate comment. But Mr. Horniman went further than this. He wrote: "That the plaintiff (Bhugwandas) was merely the creature of Mr. Surajmal admits of little doubt in view of the circumstances revealed". This, when taken with the rest of the article in which it appears, amounts to saying that Mr. Surajmal, there was little doubt, had committed the serious criminal offence of engineering a false claim. It is a grievous thing to say of any man, an atrocious thing to say of a Solicitor, unless it is true or unless there are the strongest grounds for saying it. It is not true: Mr. Horniman does not contend that it is true. Then were there strong grounds for saying it? I think the grounds were not strong enough. What were they?

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(1) Mr. Dada alleged in his written statement that the claim on the promissory note was false and that it was engineered by Mr. Surajmal, and described in detail how this was so because of Mr. Surajmal's intimate connection with the suit between Mr. Dada and Tatia Saheb Holkar.

(2) The claim on the promissory note was probably a false claim, for it had completely broken down.

(3) Mr. Surajmal had undoubtedly been intimately connected with Tatia Saheb Holkar's suit.

(4) The promissory note was in favour of a person who at the time it was made was Mr. Surajmal's clerk.

(5) Mr. Surajmal had presented the plaint in the suit on the promissory note.

(6) He had given evidence in that suit on the side of the plaintiff and had apparently not acquitted himself satisfactorily.

What were the circumstances on the other side?

(1) There was no ostensible connection between Tatia Saheb's suit and the promissory note or the suit on it.

(7) Everything that Mr. Dada asserted, except this connection, might be perfectly true and yet would not indicate that Mr. Surajmal was the real owner of the promissory note; apart from Mr. Dada's allegations, there was no ostensible or inherently probable connection between the two suits.

(3) Mr. Surajmal had not directly supported the claim on the promissory note.

(4) He had appeared as a witness in circumstances which placed him at a greater disadvantage than there was any need for; in other words, he had adopted the earliest and most courageous method of clearing his character.

(5) He was not cross-examined as to his direct connection with the promissory note, so any inferences as to what would have transpired had he been so cross-examined were absolutely conjectural.

(6) He had failed, in so far as he failed under cross-examination, merely on matters concerning the suit between Mr. Dada and Tatia Saheb Holkar.

(7) Mr. Dada had not been examined or cross-examined, so his story remained untested.

Treating myself as a Jury I should hold on these circumstances that it was not fair comment to write as Mr. Horniman wrote. It was, of course, apparently quite possible that what Mr. Dada alleged was true; it was a view which undoubtedly a reasonable man might have adopted. But it was a very conjectural view; especially as Mr. Surajmal had not been cross-examined about the promissory note and as Mr. Dada had not given evidence. To adopt that view meant reliance to far too great an extent on the untested assertions of Mr. Dada, not supported by anything in the cross-examination of Mr. Surajmal which bore directly on the making of the promissory note or the question who was its real owner. It is not to my thinking fair comment on so conjectural a foundation to write in a newspaper of a person by name that probably he has committed what is in effect a serious criminal offence.

In writing as he did, it is quite plain to my mind that Mr. Horniman eschewed impartiality; he took sides and became a partisan. This is natural enough when we become aware of the kind of enquiry Mr. Horniman made before writing the articles. He not only had before him the pleadings in the suit and the evidence as reported in the *Bombay Chronicle*, but he saw a Mr. Engineer about the case. Mr. Engineer knew a great deal about it. He was a former clerk of Mr. Surajmal and at the time the articles were written was on bad terms with him. Mr. Engineer also had had to do with preparing Mr. Dada's defence and supplied Mr. Horniman with a copy of observations prepared for Mr. Dada's Counsel. These observations had not in fact been given to or read by the Counsel for Mr. Dada at or before the hearing of the suit; but they had been prepared and they described the whole matter in the most unfavourable light for Mr. Surajmal. It is unlikely that Mr. Horniman would be led to an impartial view of the case by seeing Mr. Engineer or by reading the observations. Now a journalist or an Editor is not bound to be impartial, but when he becomes a partisan he takes greater risks, though no doubt he writes more interesting matter than when he remains impartial. This is more especially so when the writing gives currency to charges reflecting very seriously on the honestly and pro-

fessional conduct of an individual. I do not use the word 'partisan' in any derogatory sense but according to its true meaning. We are almost all of us partisans when we take to criticism, and the law allows a great latitude to partisan criticism of the public utterances and doings of public men; of persons who advertise themselves; of books, plays, works of art and so forth; but not so much latitude to criticism of the honesty and reputation of individuals. Public policy encourages freedom of speech in the one case, not in the other, and the standard of fair comment is different in the two classes of cases.

The question before us is almost, if not quite entirely, one of fact and not of law; what is fair comment never has been, and presumably never will be, defined. It is a matter for a Judge of facts to determine in each particular case in the light of the circumstances of the case. But I have said that the standard of fair comment when a person's personal character is assailed is different from the standard where there is merely criticism of public matters. That may appear to be a statement of law, though personally I think it is not, but merely an indication of the frame of mind in which as a Judge of facts I approach the case. But if it is a statement of law there is, it seems to me, excellent authority for it. I rely on the concluding part of the judgment in *Wason* v. *Walter*(12), especially this passage:—

"As to the latter, the Jury were told that they must be satisfied that the article was an honest and fair comment on the facts,—in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and to condemn the conduct or motives of another must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a Jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure."

Also on Fletcher-Moulton, L. J.'s judgment in the case of *Hunt* v. *Star Newspaper Company* (2) and especially on this passage at page 321:

"Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English Law."

As compared with the accusation of a serious criminal offence, the further accusation of unprofessional conduct is less important; though it has occupied a large share of the attention of the Judges both here and in the trial Court. Taken by themselves the portions of the articles relating to the professional misconduct are certainly less unfair than the portions relating to the criminal offence; but they are so mingled together and so interrelated that it is impossible to say what would be the character of the articles had they been confined to the case of professional misconduct.

It is enough to sustain the decree of the trial Court that the comments on the accusation of a criminal offence are found not to be fair comment and I think that decree should be sustained. But I do not think that Macleod, J.'s judgment on the libel regarding professional misconduct is shown to be wrong. The writer set out one absolute misstatement of fact about the cheque; and one assertion that "it is alleged," whereas it was not so alleged anywhere in the proceedings before the Court. Whether these were excusable misstatements, and if so whether the general effect of the allegations justified the articles, are questions of fact and I am far from sure that Macleod, J.'s conclusions were wrong on those questions of fact.

SCOTT, C. J.—In this case the appeal from the Original Side was heard by this Bench of two Judges, and upon their differing, the question is whether the appeal should be decided in accordance with the majority of the Judges who heard the case, including the trial Judge, or in accordance with the opinion of the senior Judge of the Court. The first result would follow if section 98 of the Civil Procedure Code applied; the second result would follow if clause 36 of the Letters Patent applied. It can hardly be said that there is any long-standing practice in regard to such appeals from

(12) (1869) 4 Q. B. 73 at p. 96; 8 B. & S. 671; 38 L. J. Q. B. 34; 19 L. T. 409; 17 W. R. 169.

the Original Side where there is a difference of opinion in this Court. Until this year, I am only aware of one case in which the Judges have differed in a case of appeal from the Original Side. That was the case of *Jehangir* v. *Secretary of State* (13). There the provisions of section 575 of the Code were applied: the differing Judges referred the point to a third Judge, and the decision was given in accordance with the view of the majority. There was no argument upon the point, and the question was not raised whether clause 36 of the Letters Patent should not be preferred. A few weeks ago the members of this Bench differed in another case from the Original Side, and the point of law upon which they differed was, following the precedent in *Jehangir's case* (13), referred to two other Judges for decision. So far as I know, these are the only cases in this Court in which the point might have been argued, but it was not argued in either case.

We have now heard full argument upon the question, and we are of opinion that clause 36 of the Letters Patent applies. Section 4, clause (1), of the Civil Procedure Code lays down that: "In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any...special form of procedure prescribed, by or under any other law for the time being in force"; and clause (2) of that section shows that clause (1) was intended to be of general application. There can be no doubt that the provisions of the Letters Patent have prescribed special forms of procedure in certain cases, *inter alia*, where Judges of the same Bench have differed. That the Letters Patent in all cases is paramount with regard to Original Side matters appears to us to be clear from the provisions of section 129 of the Code, which says that:—

"Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

(13) 6 Bom. L. R. 230.

The Original Side Rules are concerned not only with the trial of cases by the trial Judge, but also with the trial of appeals arising in the original jurisdiction, and here we have an indication that in such cases nothing should be done which is inconsistent with the Letters Patent.

It has been urged that if the sections of the Civil Procedure Code in relation to appeals and the rules enacted thereunder do not apply, there is nothing which will apply to the trial of appeals from the Original Side in the High Court. Section 4, however, does not prevent the application of the Code except where special forms of procedure are prescribed by the Letters Patent and the rules made under the High Courts Act and Letters Patent. It is only in the cases thus specially provided for that the provisions of the Code are excluded.

It is to be noted that in a somewhat analogous case the Privy Council, in their judgment in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (14), held that section 588 of the Code of 1882 did not apply, and as a consequence, clause 15 of the Letters Patent relating to judgments was applied. Again, in two other High Courts, in Madras, as reported in *Roop Laul* v. *Lakshmi Doss* (15) and in Allahabad, as reported in *Lachman Singh* v. *Ram Lagan Singh* (16), the Judges of those Courts have come to the same conclusion as we now arrive at.

The result will be that the decision of the Senior Judge will prevail, the decree will be reversed and the suit dismissed, but without costs as two Judges have decided in favour of the plaintiff and only one in favour of the defendant.

HEATON, J.—I concur.

The plaintiff appealed under clause 15 of the Letters Patent, and the Court after hearing Mr. *Strangman*, Advocate-General, (with him Mr. *Mulla*), for the Appellant, and Mr. *Setalvad* (with him Messrs. *Bahadurji* and *B. J. Desai*), for Respondents Nos. 1 and 2, delivered the following

JUDGMENT.

BATCHELOR, ACTING C. J.—This is an appeal under clause 15 of the Letters Patent from

(14) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. s.) 970.

(15) 29 M. 1.

(16) 26 A. 10; A. W. N. (1903) 162.

a decree of a Bench of this Court consisting of the Chief Justice and Heaton, J. These learned Judges having differed in opinion, it was held that the judgment of the Chief Justice must prevail, *i.e.*, that the suit must be dismissed. The plaintiff consequently brings the present appeal.

The plaintiff is a Solicitor of this Court and the suit was filed to obtain damages for libel alleged to be contained in two articles which appeared in *The Bombay Chronicle* and were admittedly written by the Editor of that journal, the first defendant. To him I shall refer in future as the defendant, as the substantial defence is made on his behalf.

The circumstances in which the articles complained of came to be written are as follows: Among the plaintiff's clients were two well-to-do men, one Dada and one Tatia Saheb Holkar. In 1912, Dada, in the name of his mother, Ashidbai, entered into an agreement with Holkar for the purchase of a valuable house, the property of Holkar. But Holkar was unable to carry out this agreement as he had already agreed to sell the house to one Khambatta, who obtained against him a decree for specific performance. Dada then instituted a suit against Holkar claiming damages for breach of the contract of sale, and this suit was ultimately settled in January 1914 by the payment of Rs. 3,000 by Holkar to Dada. At this time there was in the service of the plaintiff a clerk named Shambhuprasad, who died in June 1914, leaving a brother named Bhugwandas. In July 1915, Bhugwandas, through his Solicitor, the plaintiff, filed a suit on a promissory note for Rs. 3,000, executed by Dada in favour of Shambhuprasad. The suit was instituted as a short cause, but, a written statement being filed by Dada in August, the plaintiff was discharged as Solicitor on the record on 9th September 1915. Stated shortly, Dada's defence to this suit was that the promissory note had been passed without consideration, that Shamuprasad was the mere nominee or *prete nom* of the plaintiff, and that the note was passed on an understanding with the plaintiff that he was to be paid Rs. 3,000 if, as he promised, he succeeded in obtaining for Dada a sum exceeding Rs. 20,000 as damages in Dada's suit against Holkar. Dada went on to plead that, as he had received only Rs. 9,000 in his suit against Holkar, he had refused to honour the promissory note, and hence the suit brought against him by the plaintiff in the name of Bhugwandas. Bhugwandas's suit came on for hearing before the late Davar, J., on Saturday the 26th February 1916. Issues were raised, among them being the issue whether, as Dada contended, the plaintiff was a necessary party. On the Saturday two witnesses were called by Bhugwandas as to the promissory note, but admittedly these witnesses' evidence was not such as any Court could accept. Then the plaintiff went into the witness-box, being an indispensable witness for Bhugwandas, and denied generally the truth of the allegations made against him in Dada's written statement. At this hearing a beginning was made of the cross-examination of the plaintiff, but this cross-examination was far from being finished when the Court rose for the day, and the case stood over till the following Monday, the 28th February. On the case being called on on the Monday, Bhugwandas, through his Counsel, immediately submitted to a decree dismissing the suit with costs, the learned Judge observing that in taking this course Bhugwandas had acted very wisely. The present plaintiff made no intervention either by way of protest or by way of application to the learned udge for an enquiry into the charges made in the written statement ; he acquiesced in the dismissal of the suit with costs, and there matters rested for the time. A week later, that is, on 7th March, appeared the first of the two articles now complained of, but again the plaintiff made no sign. On the 15th March, the newspaper published the second of the two articles, and on the 18th March the plaintiff filed the present suit.

The question is, whether these articles libelled the plaintiff, in other words, whether the defendant in these articles has transgressed the limits of fair comment allowed to a journalist. I agree with the Chief Justice in thinking that this question must be answered in the defendant's favour. I find that all material facts are truly stated in the articles, though it may be that there are one or two small deviations from absolute accuracy on minor points which are of no influence on the conclusions, and

I find that the conclusions are such as ought to be drawn from the premises by a critic bringing to his work the amount of care, reason and judgment which is required of a journalist.

In the first place, it is not alleged that there was any pre-existing malice or ill-will between the parties, and it is not denied that the subject-matter of the articles, the conduct of a Solicitor of this Court, as disclosed in proceedings in this Court, is a topic of public interest and importance. Then I must give it as my own opinion, after a careful reading of the articles, that the real object of them is, not to condemn the plaintiff out of hand, but to pray for further investigation into serious allegations which had been made on solemn affirmation against his integrity, and which were still left in the region of controversy.

I now read the material passages from the articles complained of, as those passages are set out in paragraphs 5 and 6 of the plaint:—

"This bare recital of the main allegations of the defendant in the case is sufficient to reveal very grave misconduct on the part of a Solicitor, if the allegations were well-founded. As to that, after the first day's hearing and while Mr. Surajmal was still under a severe cross-examination, in which he suffered from some lapses of memory, the case was suddenly withdrawn, the Judge, Sir Dinshaw Davar, appropriately remarking that the plaintiff had adopted a very wise course. That the plaintiff was merely the creature of Mr. Surajmal admits of little doubt, in view of the circumstances revealed. And that Mr. Surajmal should have thus been content to have the case withdrawn and the very ugly allegations made against him left unrefuted is a matter which demands further inquiry. If the charge that he deliberately instigated one of his clients to bring an action for damages against another of his clients, sending him to another Solicitor for the purpose, and then arranging a settlement over that Solicitor's head, were true then it is perfectly clear that Mr. Surajmal would not be a suitable person for the practice of the honourable profession of a Solicitor."

"As regards the last named point it may be as well to elucidate the matter a little further, on the basis of the defendant's allegations, though the matter was not fully revealed in Court. It is alleged that in spite of the fact that the defendant was represented in his suit against Tatia Saheb by another firm of Solicitors, Mr. Surajmal settled the whole matter direct with him and then wrote to the other Solicitors stating: 'We are informed by our client's agent that the above suit has been settled by the parties out of Court.....We are informed that your client has written to you accordingly.' As a matter of fact there was no intervention on the part of any "agent" at all The matter was settled between Mr. Dada and Mr. Surajmal direct and the latter wrote this letter, it is alleged, to prevent it being known that he had communicated with or seen Dada in the absence of his Solicitor. That, again, is conduct which requires explanation, and we trust that Mr. Surajmal will be called upon to give such explanation, as well as that of other allegations made against him, by the Chief Justice or the Law Society."

"That Mr. Surajmal Mehta settled this suit for Rs. 9,000 over the head of the Solicitor who was acting for Mr. Dada, dealing with the latter direct and paying to him his own cheque while he afterwards wrote to Mr. Dada's Soilicitor a letter stating that his (Surajmal's) firm had been informed by the Tatia Saheb's agent that the suit had been settled by the parties out of Court, whereas, as a matter of fact, there was no intervention by the agent and the cheque was given by Mr. Surajmal Mehta himself. The allegations of the defendant were largely developed in the cross-examination of Mr. Surajmal Mehta by Mr. Davar and he was still under cross-examination when the case was adjourned on the first day. When it was resumed on the 2nd day the plaintiff withdrew and the allegations remained unanswered. In regard to these grave allegations Mr. Surajmal was unable to remember whether the version of the defence put to him was true or not. He did not remember whether the defendant went to the other Solicitor, Mr. D'Cunha, at his suggestion or not, nor did he remember whether a draft of the notice sent by the defendant to Tatia Saheb was written by him and given to the defendant

to be taken to Mr. D'Cunha. Other matters of importance he had also forgotten. Since it is to be presumed that these questions were not put without the existence of evidence in the possession of the defendant to back them up, it seems to us undesirable in the public interest that the matter should be left at a stage it had reached when the plaintiff thought fit to withdraw the case."

As the case has been argued before us by the learned Advocate-General for the plaintiff, the imputations complained of as libellous fall into two classes and may conveniently be summarised as follows:—

(*a*) the imputation that in bringing an unsustainable suit against Dada, Bhugwandas was acting merely as the creature of the plaintiff, who acquiesced in the dismissal of the suit, though Dada's charges against him were thus left unrefuted and unanswered;

(*b*) the imputation that the plaintiff was guilty of grossly unprofessional conduct in the manner in which he settled Dada's suit against Holkar and in writing an untrue letter with the object of disguising that misconduct.

In regard to point (*a*) the defendant pleaded fair comment: in regard to (*b*) the defence was justification *quoad* the facts stated, and, for the rest, fair comment.

So far as concerns the law, the principal authorities bearing upon the question of libel by a journalist are cited and considered in the judgments of the Chief Justice and Heaton, J.

In the view I take of the case no useful purpose would be served by any further discussion of these authorities. So far as the question of law concerns this appeal, I do not think we need travel far beyond the decision of the Court of Appeal in *Hunt* v. *Star Newspaper Company* (2), where Cozens-Hardy, M. R., said:—"The defence of fair comment only arises in the event of the plea of justification failing, but the plea of justification may fail by reason of the facts stated not being substantially true." Here, of course, on the first charge the plea of fair comment is the only point for consideration, for there is no plea of justification; but I quote the passage to show that the Master of the Rolls required only that the statement of facts should be, not absolutely, but substantially, true. It is true that the adverb is not repeated in the judgments of the Lords Justices, but the learned Advocate-General admits that he cannot demand more than that the facts stated should be substantially true. In the same case Fletcher Moulton, L. J., as he then was, lays down the law in the words used by Lord Atkinson in *Dakhyl* v. *Labouchere* (4), pointing out that where a Judge has ruled that a personal attack can reasonably be inferred from the truly stated facts, "it is for the Jury to determine whether in that particular case the inference ought to be drawn." "In other words", the learned Lord Justice continues, "a libellous imputation is not warranted by the facts unless the Jury hold that it is a conclusion which ought to be drawn from those facts."

The only other cases to which I think it may be of advantage to refer are *South Hetton Coal Company* v. *North-Eastern News Association* (7) and *Risk Allah Bey* v. *Whitehurst* (10). I need not discuss these cases. I refer to them only as establishing propositions which, in my judgment, are not now open to controversy. These propositions are that while the defendant is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight, unimportant deviations from absolute accuracy of statement, where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the Jury—where there is a Jury—in our case the Judges—must decide what impression would be produced on the mind of an unprejudiced reader, who, knowing nothing of the matter beforehand, read the articles straight through.

These, in my judgment, are the material propositions of law, and on the understanding that those propositions are correct, I am of opinion that the defence should prevail.

On the first imputation, which I have marked (*a*) above, the defendant's case appears to me particularly strong, and it is to be noticed that this is the real gravamen of the articles, the imputation marked (*b*) being far less serious. For professional misconduct in settling a case over the head of the

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Solicitor on the record is venial indeed, compared with instigating one's clerk's brother to institute a false suit. It is now admitted that, as to this first imputation, the defendant is entitled to be judged by the facts properly available to him at the time when the articles were written, without regard to facts which the plaintiff subsequently has established or sought to establish. The critical question, therefore, is: what were the facts then known to the defendant?

First, he knew that the antecedent probabilities were in favour of Dada's version, for it was obviously unlikely that Dada, a rich man, would have borrowed Rs. 3,000 from a Solicitor's clerk of very limited means. *Secondly*, he knew that Shambhuprasad, to whom the note purported to be passed, was at the time the plaintiff's clerk. *Thirdly*, he knew that, practically from the first, Dada had put forward one and the same answer to the claim, an answer which, in the circumstances, bore on the face of it, to any one familiar with Indian methods, a fair appearance of being true. *Fourthly*, and above all, he knew the fate of Bhugwandas's suit, a circumstance which spoke eloquently in favour of Dada and was difficult of reconcilement with the plaintiff's denials. Indeed, if I had been on a Jury appointed to try this issue, I should have said without any doubt that the conclusion here drawn by the defendant ought to have been drawn, and was, in fact, the only reasonable conclusion open to a disinterested mind. For, how stood the suit when the Court rose on the Saturday evening? The two witnesses called to prove the making of the note had contradicted each other beyond hope of reconcilement. And the plaintiff himself, so far forth as his cross-examination had gone, had, in my judgment, cut a pitiable figure. On this point I will content myself with quoting the passage where his cross-examination had to be broken off for the day. These are his words:—

"Dada sent a notice of claim to Holkar. I don't remember if Dada consulted me before sending the notice. I did not write the notice on behalf of defendant. I think D'Cunha did. Defendant asked me what to do when he heard of Tatia Saheb's agreement with Khambatta. I don't remember what I told him. I don't remember if I drafted a notice on behalf of the defendant. I will not swear that I did not. I did not send defendant to D'Cunha I don't remember if I gave a draft of a notice to be taken to D'Cunha to be written by him and addressed to me. I can't say whether I did it or did not. I do not remember if I told the defendant to go to some other Solicitor saying that I would act for Holkar."

In plain English, when directly questioned whether he did not do certain thoroughly unprofessional and dishonourable things, plaintiff's only answer is that he cannot remember. Had his conscience been easy, there could have been no tax on his memory. As to the excuse that he was "frightened by Counsel," I do not believe it. That would be a good argument in the case of an illiterate villager, but is very unlikely to be true of a Bombay Solicitor.

With this cloud resting upon him on the Saturday evening, one would expect to find the plaintiff anxious to dispel it on the Monday morning. What we do find, however, is that plaintiff is spared from any further cross-examination as Bhugwandas consents to the suit being dismissed with costs, the learned Judge observing that in so doing Bhugwandas was acting very wisely. What that meant must have been manifest to all in Court. But the plaintiff stands by, acquiesces in the dismissal, and makes no sign or protest or application that the charges against him should be withdrawn or investigated. As a juryman, I should not hesitate to draw the inference that his main anxiety was to escape further cross-examination, hoping that it would be nobody's business to investigate the charges now that Dada was satisfied. There were the two cases before the Court, that of Bhugwandas and that of Dada; Bhugwandas submitted to defeat, lest worse should happen, and it was a fair inference that Dada's account was probably true. In all this the plaintiff quietly acquiesced, and his present reasons for that acquiescence may be stated. It is enough to state them, for they carry their own comment: "On the 28th, the following Monday I was prepared," he says, "to continue my evidence, when Mr. Bhadurji, plaintiff's Counsel, informed the Court

that the suit was going to be dismissed. I was not surprised. I was quite indifferent, as I was not concerned." And he remained unconcerned, and continued unconcerned even after the appearance of the first alleged libel on the 7th March. When the second article appeared on the 15th March, and it was clear that the attitude of unconcern was not likely to evade the charges, then the suit was brought on the 18th March.

It is true that, as the learned Advocate-General has urged, the plaintiff had on solemn affirmation formally denied that Bhugwandas was his nominee, and I agree that this fact ought not to have been withheld, but ought to have been stated for whatever it is worth. But the omission cannot, I think, serve as a set-off against all the evidence on the other side. I do not think it can be said that defendant designedly suppressed all reference to plaintiff's denial. I think rather he took it for granted that his readers would assume that the Solicitor charged with fraud would deny the fraud, for, except upon that implication, no further inquiry would be needed, and the gist of the articles is to demand inquiry.

On two small points of verbal criticism I think it will be enough to state my opinion summarily. As to the phrase "little doubt," the defendant is entitled to say that it means what it says, and does not mean "no doubt." As to "unrefuted," I think that "refuted" means disproved, satisfactorily met, put out of controversy; and the word 'unanswered' in its context seems to me to bear the same meaning as 'unrefuted.' On both points, therefore, I accept the interpretation offered for the defendant.

Upon this first imputation there is one misstatement of fact. According to the article it was plaintiff who explained that it would not look well if the note were taken in the Solicitor's name, whereas in fact Dada's case was that it was Shambhuprasad who offered this explanation. This inaccuracy appears to me of no consequence for three reasons: *first*, the plaintiff, who should know where he is libelled, has never complained of it, nor was the point ever taken till in this second appeal it was suggested by my brother Marten; *secondly*, it is obvious on Dada's case, that even though the actual speaker may have been Shambhuprasad, he was the mere mouthpiece of his master, the plaintiff, and, *thirdly*, in the fourth paragraph of Dada's written statement it was expressly asserted that the demand for Rs. 3,000 was made by the plaintiff in person.

With regard to the argument that the defendant was not justified in using the "observations" brought to him, at his request, by Engineer, the discharged clerk and avowed enemy of the plaintiff, I entirely agree that in seeking help from Engineer the defendant acted very indiscreetly, and ran very grave risks. But this circumstance will not affect the result if I am right in holding that all substantial matters of fact are truly stated, and all comments on the facts are fair within the meaning of the law as already explained. In justice to the defendant it must also be remarked that all that he acted upon was, not any verbal assurances or statements of Engineer, but three official papers which, though produced by Engineer, would naturally be assumed by the defendant to be above reproach. Indeed the present objection is confined to one of the papers, *viz.*, the observations for Counsel, and it is the fact that these observations had never been submitted to Counsel But the defendant did not know that, and I do not think that he is obnoxious to very grave censure if he supposed that these formal observations for Counsel had a foundation in truth. All this, however, is not, in my view, very material, because my exoneration of the defendant is based on the opinion that his facts are true and his comments fair.

I have now discussed all the arguments which were addressed to us on imputation (*a*), and for the reasons given I find that the defence of fair comment must succeed.

The second imputation, that which I have marked (*b*) above, is, as I have said, of a far less serious character, and, may, I think, be dealt with more summarily. The gist of it is that the plaintiff settled Dada's suit against Holkar in a manner contrary to professional rules or etiquette, and then,—this is "the sting of it", says the learned Advocate General—wrote an untrue letter in order to conceal the professional misconduct. The letter in question, admittedly written

by plaintiff to the other Solicitor, is in these terms:

"We are informed by our client's agent that the above suit has been settled by the parties out of Court...We are informed that your client has written to you accordingly."

The question really turns on the meaning to be put upon this letter. But before that is considered, it will be convenient to notice the argument of the Advocate-General that the defendant must fail here because he is guilty of two misstatements of fact. These misstatements are, it is said, *first*, that, according to the article, plaintiff gave his own cheque to Dada, whereas the fact is that plaintiff gave Holkar's cheque; and, *secondly*, that, according to the article, there was no intervention of any agent at all, whereas the fact is that, on behalf of Holkar, his agent, Vinayakrao, took part in the settlement.

As to the first of these statements, it is admitted that it is a misstatement, and that in fact the cheque was Holkar's, and not plaintiff's. But the inaccuracy appears to me to be immaterial and to fall within the slight margin of error allowed by law because it signifies nothing, and never did signify anything, whether the cheque was the plaintiff's or Holkar's: nobody had ever suggested that the money was plaintiff's and it was common ground that it came from the pocket of Holkar. Moreover, I feel sure that the inaccuracy was a *bona fide* slip due to a not unnatural reading of a passage in Dada's written statement. The passage runs:—

"The said suit against Tatia Saheb Holkar was settled by Mr. Surajmal with this defendant for Rs. 9,000 for damages. When Mr. Surajmal gave this defendant a cheque in payment of Rs. 9,000, etc."

In my opinion this passage would suggest to many readers that Surajmal gave his own cheque.

As to the second alleged misstatement of fact, that brings me to a consideration of the meaning of the letter, for the question whether there is, or is not, a misstatement turns upon the meaning of the passage which I have cited from the letter. The defendant's assertion is;—

"As a matter of fact, there was no intervention on the part of any 'agent' at all. The matter was settled between Mr. Dada and Mr Surajmal direct, and the latter wrote this letter, it is alleged, to prevent it being known that he had communicated with or seen Dada in the absence of his Solicitor."

The passage which I last quoted from Dada's written statement is, I think, sufficient answer to the contention that for these allegations the defendant had no better authority than the 'Observations". And as I read the present excerpt from the alleged libel, what it imputes is that plaintiff settled with Holkar (or his agent) and Dada over the head of Dada's Solicitor, D'Cunha, and that there was no intermediary between plaintiff and Dada. I do not think the imputation is that Holkar was not represented at the settlement, nor would there have been any point in making such an assertion. The point is, as I understand it, that here again (according to Dada's version) the whole business was really plaintiff's though Dada was put up to file the suit, and consequently when the suit came to be settled, we find plaintiff settling on behalf of Dada without reference to Dada's then Solicitor, D'Cunha. I must say candidly that that is what the passage means to me after all the argument we have heard, so that I feel safe in saying that, at least, that is what the words may have conveyed to a fair, unprejudiced reader. But upon that meaning I find that the defence is established. For there was no reference to D'Cunha, and the letter commented on was in fact written by plaintiff.

In the present suit, no doubt, the plaintiff asserts that the settlement was made by Engineer and Vinayak without consulting him. Engineer, on the contrary, says that plaintiff took part in the settlement and that is intrinsically so much the more probable story that I believe it, though Engineer is a poor witness, and on their merits, I see little to chose between him and the plaintiff. In the suit of Bhugwandas all that the plaintiff said upon this point was: "The arrangement was brought about by Nanabhoy Cowasjee Engineer who was lately managing clerk." Further corroboration of this view is, I think, supplied by

the admitted fact that plaintiff himself drafted the letter, Exhibit 2, a letter from Dada (in the name of his mother Ashidbai) to D'Cunha apprising the latter that the suit had been settled. I cannot doubt that plaintiff was himself instrumental in making this settlement with Holkar, and admittedly this was done "over the head of" *i.e.*, without reference to Dada's Solicitor. When, therefore, we find the plaintiff writing to the other Solicitor that the plaintiff is merely "informed" of the settlement by Vinayak, I think it is perfectly fair comment to say that this is *suggestio falsi*, intended to conceal the fact that the settlement was made by the plaintiff himself.

On these grounds I am of opinion that on the second imputation also the defence must be allowed, in other words, the appeal fails, and this Court's order should be that the plaintiff's suit be dismissed and plaintiff should pay all costs throughout.

BEAMAN, J.—In my opinion there is no libel. Before going into the details of this case I think it desirable to get, and keep, clearly in view, some distinctions between the principal defences to a libel action, which are often confused, both in argument and in judicial pronouncement.

(1) A defendant may contend that the facts complained of are not libellous; or

(2) a defendant may claim privilege; or

(3) defend upon the ground of fair comment; or

(4) he may justify, that is, plead the truth of the facts complained of.

The first of these defences may be neglected. It always was, and still is, to some extent, a matter of law for a Judge and not of fact for a Jury. Privilege and fair comment are frequently confounded even in the dicta of most eminent English Judges. Yet they have nothing in common. Privilege implies that the matter complained of is a libel, but, in the circumstances of its publication, and more especially in the relation of the parties, is protected. Fair comment never is libel. Speaking generally, the defence of privilege is particular to the defendant seeking to avail himself of it, while fair comment is common to everybody. The defence of truth implies that the matter complained of is libellous, but if true, there is a complete answer. Fair comment may be true or it may not. The language of the law always seems to me very loose and inexact in treating of these topics Any statement in positive form is pounced upon as a statement of fact, going beyond comment proper, and, therefore, outside the protection which the law gives to fair comment. But it is clear that if by comment is meant inference from facts truly stated, the process of inference legitimately leads to a conclusion which may be stated in positive form without losing its essential character.

Thus, that which in form is a statement of fact, may, on examination, turn out to be no more than what English Judges have called a deduction from the facts, and so, itself "fair comment" in no need of justification. Analysing logically, I should prefer the term induction to deduction, but the reasoning of the law, in comparison with the far more rigorous reasoning of logic and metaphysic, is blunt edged, and tends to conform to the notion that the law ought to be, if it is not always, the expression of the average common sense of society. It is, therefore, usually couched in the loose and general terminology of average men of average reasoning power, and while here and there it seems to aim at, seldom reaches verbal precision. These obervations are not merely academic prompted by pedantry. This trial affords striking illustration both in the judgments before us, and in the arguments we have heard, of the urgent need of a preliminary and very exact analysis of the law in general, and the materials in the case to which that law is to be applied. I have carefully studied the leading English cases cited in the judgments of the trial and appeal Court, and I do not propose to refer to any of them because that study has convinced me that the attempts at definition which they contain are of very little definitive value. The most famous and now perhaps the most popular for example is that, where the defence of fair comment is set up, the Judge is first to determine, as pure matter of law, whether the inferences complained of can reasonably be drawn from the true facts and that being done in favour

of the defendant, the Jury is next to determine whether the inferences ought to be drawn. Thus the final judgment is suddenly transferred, if not altogether, very largely, from the intellectual to the moral domain. It is, I think, obvious that any inference which can reasonably be drawn is to that extent a fair inference. It may not be the right inference, but that is not the point. From any given group of facts it is almost always possible to draw more than one perfectly reasonable inference. Only one of them can be the true inference, but the others may be just as fair. And for all purposes of this limited defence it is the fairness, or reasonableness of the inference or comment which is decisive, not its ultimate proved truth. The latter will often depend upon further disclosure and the disproof of the truth of the facts from which the inference was drawn. All such considerations ought to be rigorously excluded in handling a defence of fair comment.

What then is meant by "ought to be drawn?" Nothing more, I suppose, than that the average common sense of the people either accepts or rejects the inference as, although reasonable, not reasonable enough, or as appears from two of the judgments before us, that the conclusion reached by the inferential process is too positively expressed, and had much better have been stated in terms of probability. But here again it is clear that we are really deciding upon the reasonableness of the inference and nothing else. All judgments of that kind are probably influenced to a greater or less degree by the then known fact that the inference was untrue. I must pause here for a moment upon the term "inference." Inference is strictly a process from fact A to conclusion B. But the subtlest reasoning is baffled when it tries to separate the process from the conclusion, and the law, which is not subtle at all, carelessly identifies the inference with the conclusion.

For all practical purposes the use of inference for that which is reached by inference must be accepted, and will be found to raise no real difficulty. I find, then, in this dictum, no real light or guidance. For it all comes to this, that any comment or inference which the Judge thinks the facts admit, must go to the Jury and they are to say whether it is fair, that is, reasonable or not. In doing so, however, they would be affected in all probability by a sense of fair play, and allow the entrance of many factors into the verdict which a more rigorous logic would exclude. Remembering that fair comment never is libel, it is hopeless to attempt definitions of what is and what is not libel in that large class of cases. For the plain truth is that the only criterion is the verdict of the Jury in each case. If twelve honest butchers, bakers, grocers and cheesemongers say that the matter is a libel, it is, and if they say it is not, it is not, and there is the beginning and end of it. Unfortunately Judges in this country are deprived of that flexible, but, on the whole, very satisfactory, criterion, deliberately adopted by the common sense of the English people to correct the nice refinements and excessive technicality of the trained judicial mind. How necessary some such rude corrective and standard is, the divergence of judicial opinion, and the reasons which have led to it in the course of this trial amply prove. Another highly prized rule laid down in the English cases is that comment, to be fair, must be comment on facts truly stated. The wide play given to this principle in spite of its apparent rigidity will be seen later when I deal with the actual materials upon which I base my own conclusions. Sufficient to say here that, as a rule, it is almost meaningless. Fair comment is comment upon facts. In this connection only true facts are facts at all. If a "fact" be untruly stated, it ceases to be a "fact", and cannot, therefore, be a ground of inference. As commonly applied in argument, and sometimes in judgments, this rule then is pure tautology, and repeats as something new and added what is necessarily implied in the proposition of fair comment. But what was really meant, I think, was that the "facts" upon which the comment is founded, must be truly stated, though later they may turn out not to be true at all. For all purposes of this defence a fact may be truly stated and may yet be utterly untrue. In the case we are considering some facts may be of that kind, while others may not, and these must be proved to be true, if they have formed any material part of the ground of inference, or if they are

libellous in themselves. Slurring over these distinctions, or possibly, allowing the final judgment to be swayed by the knowledge that the facts truly stated were after all untrue, accounts, I think, very largely for the conflict of judicial opinion before us. Much the most difficult part of the case turns upon a right understanding and a correct application of this factor in the law of fair comment. First, it is necessary to keep clearly apart the classes of facts I have just mentioned. Here the comment, alleged to be fair, is comment upon a trial. All the materials put in evidence at that trial, the plaint, the written statement, the evidence, and the trying Judge's comment in dismissing the suit with costs at the instance of the plaintiff are facts the truth or otherwise of which the defendant was under no legal obligation to prove. He could take them as he found them and comment upon them. It is quite irrelevant to enquire now whether they were true or false. The defendant had to state them truly, that is all. The comment went a little further, and touched upon an intimately related matter, which, as the writer said, was not fully revealed at the trial. Here the plaintiff charges him with having stated a fact which is untrue, and was not put in evidence at the trial, that is to say, a fact which the defendant himself adduced and first brought to the notice of the public. Any fact of that kind must be shown (*a*) to be true; or (*b*) to be no more than an induction from the truly stated facts; or (*c*) not libellous in itself; or (*d*) immaterial in the sense that the comment complained of is in no way strengthened by such fact, and will not be weakened by its dismissal from the ground of inference. It is only in the latter connection that I have introduced the qualification that the untrue fact stated must not be libellous in itself.

Although both Macleod and Heaton, JJ., have held that the statement, "that Bhugwandas was the creature of Surajmal admits of little doubt," went beyond the limit of fair comment, the greatest difficulty in the case, and by far the greater part of the argument before us, centres upon the plaintiff's contention that the defendant has invented two untrue facts at least, and made them ground of inference against the plaintiff. It appears to me that whatever hope of success the plaintiff and his legal advisers could have had from the beginning to the end of the trial was rooted in their confidence that they could easily prove the untruth of these facts, and so, as was said repeatedly by the Advocate-General in his argument, the plaintiff *must* succeed. But at no time during the ten or eleven hours he was addressing us did the Advocate-General appear to me to realise certain qualifications, both upon what was actually stated in the impugned writing, and the rule he relied on with so much assurance. I tried over and over again to bring these possible dangers before his mind, but, as far as I was able to judge, wholly without success. If the facts which were thus declared by the plaintiff to have been untruly stated, to have needed justification and not to have been justified, were eliminated from the case, there would have been very little argument before us upon the isolated question whether the comment was fair or not. I shall presently show that in my opinion no fact was untruly stated that was in any sense material to the comment, and that upon the facts truly stated the comment was fair, and, therefore, no libel. Before sorting the materials I am going to deal with, on the foregoing principles, I must advert to one point which arose for the first time at this late stage. Although the plaintiff has so strenuously relied throughout upon the untrue statement of facts, those upon which the first and most serious comment was made went virtually unchallenged. It is true that in Macleod, J.'s judgment we find him of opinion that there was a material omission, and here and there a misstatement. But such misstatements will, I believe, turn out on examination not to be so much misstatements of facts, as themselves comment. If we begin with the plaint and enquire what was the libel of which the plaintiff complained, we shall find that it does not include the point I am now dealing with. No one should know better than the plaintiff in a libel action what the libel is by which he feels himself aggrieved. He knows exactly where the shoe pinches. Apart from all other considerations I should be disposed to neglect

anything in the writing as a whole which the plaintiff himself did not allege to be a libel. Now in the group of facts which had to be truly stated as ground of inference; before the defendant could contend that his conclusion that the plaintiff in *Bhagwandas* v. *Dada* was really Surajmal himself was fair comment, there *is* one misstatement. The written statement says that it was Shambhuprasad who suggested that the promissory note should be in his, and not in Surajmal's name, as it would not look well were it made out in favour of Surajmal. In the articles the writer says that this was Surajmal's suggestion. I believe myself that this was a purely accidental slip. It makes little or no difference whether in fact the suggestion came from Shambhuprasad, Surajmal's clerk, or from Surajmal himself, if it were made at a meeting at which Surajmal was present, or even were it made later, in his absence, with his knowledge and approval. No grievance was made of this slip at the trial or in the Appeal Court. It is not mentioned in the plaint. It had never occurred to the plaintiff or his legal advisers at any time. But towards the close of the Advocate-General's opening, this point was given him from the Bench and he eagerly availed himself of it. If we turn to the judgment of the learned Chief Justice, it is apparent that it had not at that time been taken by anybody. There the facts to be dealt with are placed in two groups, and the first in which this misstated fact would be included was said to be virtually unchallenged. I do not think we ought, now that the case has reached its final stage here, to pay any attention to this trifling error. I shall treat all the material facts upon which the inference that Bhugwandas was Surajmal's nominee was based as having been correctly stated, subject to any criticism or qualification which a close examination of Macleod, J.'s judgment may evoke.

There remain, then, (1) an alleged material omission in the group of facts upon which the inference that Bhugwandas was Surajmal's nominee was based; (2) two alleged misstatements of fact in the second group of facts, the general gist of the comment upon which was that Surajmal had been guilty of writing a letter which was, to say the least, a calculated *suppressio veri*, and generally of professional misconduct. These two facts are: (1) that Surajmal paid Dada his own cheque for Rs. 9,000 in settlement of the suit (*Dada* v. *Tatia Saheb Holkar*); and (2) that "as a matter of fact there was no intervention on the part of any agent," etc. It is admitted that the defendant made a mistake when he wrote that Surajmal paid Dada his own cheque. The cheque given by Surajmal to Dada was Tatia Saheb Holkar's cheque. But even were the mistake material, and later on I will show why in my opinion it was not, it was a very natural mistake. In the written statement, a fact upon which the defendant had every right to make any fair comment he chose, it is stated that "Surajmal gave me a cheque." Now, in everyday ordinary parlance, if *A* were to say "I had an account with *B*, which he settled with me personally on the basis of a reduction of ten per cent. and gave me a cheque for the amount," I suppose that ninety-nine men out of a hundred would take it for granted that *B* gave *A* his own cheque for the amount. It might turn out that he had a cheque of *C* for the amount, which he handed to *A*, but that would be an exceptional case, and anyone writing with only the information before him which was then before Horniman, might very well have written in perfect good faith that Surajmal paid Dada his own cheque. The second of the two facts alleged to be untruly stated will need a little more detailed examination and analysis in its proper place.

I think the plaintiff's case is put at its highest, and is supported by the strongest reasoning by which it could be supported, in the judgment of Macleod, J. I do not recollect that anything was added to that judgment, which could have been of any service to the plaintiff, in the Advocate-General's argument before us. Indeed, by far the weightiest consideration I have been able to discover in support of the conclusion that Horniman's first and most serious inference went beyond the limits of fair comment lies in the fact that two learned Judges, Macleod and Heaton, have been of that opinion. I think, then, that the best way of explaining why I have come to a contrary conclusion and giving my own reasons

against those on the other side, will be to take these judgments and analyse them critically. I may premise that the libels complained of are really two, and distinct. The first is that Surajmal was the real plaintiff in the suit of *Bhagwandas* v. *Dada* and that that suit was, as brought, an utterly false claim to Surajmal's knowledge. The second is that Surajmal instigated Dada to file a suit against Surajmal's own client Tatia Saheb Holkar, on the understanding that Surajmal would use his influence with Holkar to settle the suit for a sum not less than Rs. 20,000 and that in consideration of Surajmal's procurring such a settlement, Dada would pay him a sum of Rs. 3,000. Further, that not only was Surajmal guilty of gross misconduct in thus setting one of his clients against another, and agreeing to take a secret commission, but that when the settlement was made, although Dada was in the hands of another Attorney—D'Cunha—Surajmal settled with him direct, and then wrote a letter to D'Cunha, conveying the idea that the settlement had been made by the parties as much behind his (Surajmal's) back as behind D'Chuna's. That Surajmal had thus been guilty of a breach of professional etiquette in settling with the client of another Attorney behind that other Attorney's back, and had been guilty of something much worse morally, in writing to that Attorney in a strain calculated to cover up this breach of professional etiquette.

In the plaint I find the plaintiff setting forth the innuendoes of which he complains, and among them that he is accused of having cheated his client, Holkar. There is nothing in the articles or the comments which goes, or, as far as I can see, could go, that length. It was grossly improper, if true, for Surajmal to have instigated Dada to file a suit against Holkar. At that time both were his clients. But on the facts as they appear in this suit, it was a perfectly good suit, and, seemingly Holkar had no defence at all. The only question would have been the quantum of damages. If Dada had gone of his own accord to another Attorney to file that suit, and had claimed Rs. 25,000 damages and Surajmal acting for Holkar had settled for Rs. 9,000 even without Holkar's knowledge in the first instance, provided that Holkar approved of the settlement on those terms, I cannot see that Surajmal would have done anything unprofessional, or anything which could possibly have been included logically in the attack which Horniman made upon him in these two articles. It would have been, I believe, an impropriety, though a very venial one, were it true that Surajmal, when the suit had been brought, settled on behalf of his client Holkar with D'Cunha's client Dada, "over the head' of D'Cunha. But there is nothing in all this which is, or comes anywhere near, cheating Holkar. This much the Advocate-General conceded when I put it to him in the course of his argument. It is very necessary, it is indeed essential, to keep all this in proper focus, and very clearly before the mind, when we have to deal with the alleged misstatement of fact contained in the passage: "As a matter of fact there was no intervention on the part of any agent, etc." For the whole argument there went upon the ground that Holkar *had* an agent representing him with Surajmal, and, therefore, it was untrue to say that there was no intervention on the part of any agent. Keeping these two alleged libels apart, for the present, it is to be noted that, so far as its reasoning goes, Heaton, J.'s judgment is confined to the first. There he came to the conclusion that it was not fair comment to say that there was little doubt but that Bhugwandas was Surajmal's creature, and after that, as the learned Judge very rightly said, it was unnecessary to go into the less serious charges. It is unfortunate, I venture to think, that we have thus not had the assistance of Heaton, J.'s clear practical mind upon the natural meaning in its proper context, and as a whole, of the passage in which the sentence "as a matter of fact, etc.," occurs. And I may add that while for purposes of clarity I have separated the libels, which the articles are said to contain, I do not mean to say that, except possibly in assessing damages, it matters whether both or only one are or is proved.

On a first view it might be thought that the facts out of which this suit has arisen are extremely complicated. They really are not. It would be better to lay out of

the case at once and altogether the suit for account brought by Dada against Surajmal and the criminal prosecution in respect of one of its items which he set on foot against Surajmal. It may be conceded, as far as I am concerned in this judgment, that both these proceedings were instigated by Nanabhoy. It may be conceded that Nanabhoy was hostile to Surajmal. No one denies it. But a great deal of capital seems to have been made out of the fact, partly by way of prejudice, and partly to break down Nanabhoy's credit as a witness. Nanabhoy's evidence is only valuable to prove that Surajmal did in fact settle direct with Dada, and that this settlement was not effected behind the back of Surajmal, and without his knowledge. Later on, I hope to show that the defendant was not bound to "justify" here at all. I cannot help feeling, after reading the trial before Macleod, J., that the defendant's case was jeopardized by his Counsel's scrupulosity, in avoiding all semblance of justification. The defendant elected to defend upon the ground of fair comment. That is a much easier defence as a rule in such cases as this than justification. Once committed to it, defendant's Counsel fought shy of anything that might seem, however remotely, to approach justification. He did not even cross-examine Surajmal upon the fact which, owing to a step taken later by defendant's legal advisers, it is now contended, he knew very well that he must justify. It certainly was in my opinion a serious tactical blunder, first, to omit all cross-examination of Surajmal, and, then, at the closing stage of the case, to put in an application for a commission to examine Vinayak and Holkar on this very point. Either it needed justification or it did not. If it did, then most surely Surajmal ought to have been cross-examined upon it. If it did not, there was no reason at all for examining Vinayak and Holkar about it. Probably defendant's Counsel believed that he must succeed on the ground of fair comment and did not wish to take the risk of enhanced damages, should that expectation after all be falsified by anything that looked like indirect justification. It does not follow that because a defendant stakes his case upon fair comment, the conclusion so reached must be false. All that such a defence means is that the defendant does not care whether the conclusion be true or false, provided only he can show that it is a fairly reached conclusion from the premises available to him at the time he drew it. And he is in a somewhat delicate position when the plaintiff, as in all such cases he must, goes into the box and denies and denies not only the conclusions but many of the premises. Here the defendant's position was peculiarly embarassing, since the worst conclusion he drew against the plaintiff was no more than a repetition of the defendant Dada's allegation in his written statement. When the plaintiff swore that it was quite untrue that he was the real plaintiff in Bhugwandas's suit, and that in effect, Dada's written statement was false from beginning to end, what was the defendant to do? If he had cross-examined on these points the Judge would, in all probability, have stopped him, pointing out that he had not chosen to justify. If he kept silent, as he did, the record would indicate that his conclusion was false, and that Surajmal had been grievously wronged by his inference. All that is really irrelevant, but there can be no doubt, I think, that it exercised a very great influence upon the minds of both Macleod, J., and Heaton, J. But as to this particular statement which finds no place among the facts put in evidence before Davar, J., if it were a new fact, and not an induction from such facts duly put in evidence, the defendant would clearly have been obliged to prove it. It is regrettable, then, that he made no attempt to cross-examine Surajmal on the point. The reason is probably discoverable in the uncertainty of his Counsel's mind as to his position at the time. There is a sentence in Macleod, J.'s judgment which seems to me to support this conjecture. He says that as far as he could gather, defendant's Counsel did not admit that there was any fact which he had to justify. If that were so, then a passage in the defendant's written statement had better have been wholly omitted or differently worded. In paragraph 6 the defendant says: "as to such portions of the said words, if any, as are not facts

put in evidence at the trial, etc., the same is true in substance and in fact." That certainly suggests that the defendant thought some such portion there might be, and that *it*, at any rate, would need justification. If it was not to justify this passage in the article that Nanabhoy was called as a witness for the defence, it is not easy to understand why he *was* called. Then three other witnesses appear to have been examined before Macleod, J., to prove that Surajmal was really responsible for the withdrawal of Bhugwandas's suit, and after they had been examined, and Strangman for the plaintiff wanted to call evidence in rebuttal, Bahadurji for defendant said that all this evidence might be struck out, as he was not justifying. Strangman, however, on being given an option (presumably of having the evidence struck out at once, or of leaving it on record and calling evidence in rebuttal), elected to call evidence, and seems to have been allowed to do so. It is not easy in these circumstances to know whether this evidence was, in the understanding of the learned trial Judge, on the record or not at the end of the trial. I merely mention this to indicate the uncertainty and confusion which marked the conduct of the defendant's case before Macleod, J., and doubtless contributed in no small measure to the conclusion reached by that learned Judge. Heaton, J., puts it quite plainly that the inference which Horniman drew was not only of a most serious and damaging nature, but was not true. It was not contended, the learned Judge adds, that it *was* true. But that is surely laying too much stress on the form of the defence, and looking at the result of the trial where Surajmal, on this ground, was allowed to have it all his own way. I preface, what immediately follows, thus. It is admitted that the subject matter of these articles is of public interest. It is admitted that Horniman bore no malice to Surajmal. Nanabhoy did not go to Horniman of his own accord, Hroniman sent for him because he wanted further information. He knew from the record of the case before Davar, J., that Namabhoy had been Surajmal's managing clerk throughout the transactions which led up to the suit of *Bhugwandas* v. *Dada*. I doubt, whether, where the defence is fair comment, malice or no malice is of much importance. But where it becomes necessary to compute the fairness or unfairness of comment and the scales are fairly evenly balanced, it would be hard indeed to exclude the influence of such a factor as malice, were it proved in the writer. And there are passages in the judgment of Macleod, J., which indicate, to say no more, a feeling against the defendant on the supposition that he was actuated by something very like a malicious desire to discredit Surajmal. I think it is perfectly clear, too, that both Heaton and Macleod, JJ., were influenced to some extent by what came out at the trial before Macleod, J. This is suggested by the learned Chief Justice, and I think that the suggestion is well-founded. Yet it is quite clear that every consideration of that kind has to be banished from our minds in deciding whether, at the time the articles were written and on the facts then before the defendant, Horniman, they were or were not fair comment.

It is needless for me to say that I have a very high respect for any considered judgment of Macleod, J. Where I find that I am not able to agree with him, that sentiment compels me to state, if only as a matter of courtesy, my reasons at length. I have read Macleod, J.'s judgment several times since the hearing of this appeal came on. And I will begin my examination of his judgment in detail by saying that I believe he was much influenced by two dominant notions. First, his sense of fair play was affronted by Horniman's method of supplementing the information he had before him in the reports of the trial. Evidently, Macleod, J., thought that had Horniman been anxious solely to see this matter laid before the public in the justest light, he ought to have invited Surajmal's own explanations in the first instance. Instead of doing so he sends for Surajmal's enemy. Was that an honest way, was it a fair way of approaching the elucidation of a matter of public interest? Such I take to have been what was uppermost in Macleod, J.'s mind in more than one part of his judgment. Yet, if it means anything, it means that Horniman was acting maliciously, and this is nobody's case now. The second dominating influence easily distinguishable in Macleod, J.'s judgment was that Horniman

took some of his facts and some of his comments from the observations prepared by Mr. Vatcha for Counsel in the suit of *Bhagwandas* v. *Dada*. Now I want to say here once and for all that I see no magic in the use of "Observations." No one denies that Horniman had recourse to the "Observations." No one asserts that in doing so he could claim any protection. If he stated a fact from the "Observations" which was not put in evidence at the trial, he did so at his own risk, and if it were challenged he would have to prove it. If he took comments from the "Observations" and published them *verbatim*, he made them his own, and they would have to be judged fair or unfair on that footing and that footing alone. It is no part of the law of fair comment that the comment must be the writer's own: he is as much entitled to publish derivative as original comment if it be fair, and he chooses to adopt the former and make it his own. But throughout his argument before us the Advocate-General appeared to think that he clinched his contention that comment was unfair, or that a fact was not true, by showing that it came *literatim* and, by Horniman's own admission, from the "Observations." This is very strange. Suppose that there had been no observatians at all in this case, but that Nanabhoy had told Horniman orally what was stated in them. Suppose Nanabhoy had said: "Here is a letter of Surajmal. You see it suggests that he did not settle the suit with Dada direct, and did not even know that the parties had settled the suit till he was told so by an agent of his client Holkar. Now turn to Dada's written statement, and you find him swearing there that Surajmal did settle with him direct. Turn again to Surajmal's sworn testimony before Davar, J., and you don't find a word about the intervention of any agent of Holkar, but a statement that Surajmal's own managing clerk settled the case with Dada direct. My suggestion on that is that this letter is a calculated lie, intended to conceal from D'Cunha that Surajmal had settled the case behind D'Cunha's back with D'Cunha's client."

Horniman compares the letter with what appears on the record of the case, and agrees that this is the only reasonable construction which could be put upon it. Would he not then be entitled to adopt the suggestion made to him, and express it as his own comment? Would it make the slightest difference that it *had* been suggested to him, and might never have, else, occurred to him? None whatever that I can see. These observations presumably *would* have been acted on had the suit of *Bhagwandas* v. *Dada* gone on. There can be little doubt that this letter of Surajmal to D'Cunha would have been put to Surajmal, and if Dada's version were true, I do not see what other inference could possibly have been drawn from it than that which the defendant Horniman drew. Observations of this kind, I suppose, contain facts and comments, which Counsel are intended to use. It may be that the Attorney who drew these observations did not think that this part of them would be relevant or at any rate material in the suit. But there they were and read in the light of what had happened at the trial before Davar, J., I do not see why Horniman should not have used them if he believed that any fact they stated or any comment they made was true and fair. It is upon that basis that I discuss the question we have to answer and I cannot help thinking it a pity that the learned Judge, who tried the action, and the Advocate-General, who argued the appeal for Surajmal before us, should have been under what appears to me so grave a misapprehension of the significance and weight of a fact which no one denies, that Horniman did draw upon these observations in writing parts of the impugned articles. I will now go over Macleod, J.'s judgment, noting only those passages which, in my opinion, lead to wrong conclusions. I need not delay over the facts leading up to the suit of Bhugwandas and Surajmal. On the pleadings, Macleod, J., observes:—

"It is unfortunate that plaintiff did not ask for particulars of the statements referred to in this paragraph (paragraph 6 of the written statement). For the articles profess to comment only on what was made public at the trial."

Is that quite correct? The most debated part of the alleged libel is introduced by the writer's statement: "As regards the last named point, it may be as well to elucidate the matter a little further on the basis of the defendant's allegations, though

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the matter was not fully revealed in Court." When the learned Judge comes to deal with the evidence, he remarks :—

"With that evidence before him (defendant) to send for Nanabhoy was a very indiscreet step on the part of the defendant, if he wanted to write a fair comment on the report of the trial, for it is difficult to escape from thinking that the defendant must have expected to hear from Nanabhoy something to Surajmal's detriment."

Undoubtedly he did. The impression left on his, or for that matter anybody's mind, by the report of the trial before Davar, J., must have been most unfavourable to Surajmal. The Judge goes on to say that defendant might have obtained all the necessary information for an article from Messrs. Ardeshir, Hormusji, Dinshaw & Co. Then follows a long passage showing that Surajmal had every right to regard Nanabhoy as a bitter enemy. Later the Judge says :—

"Unfortunately for himself, defendant read Mr. Vatcha's observations and though it is denied, I think it is probable that he had some conversation with Nanabhoy about them."

Observe the word "unfortunately." Certainly it has proved unfortunate for the defendant that these observations ever came under his notice, but I doubt very much whether this should have been so, beyond, of course, this, that if defendant took any fact from these observations, he would lie under the obligation of proving it. Then the learned Judge asks:—

"Was then the defendant's comment on the report of the trial fair comment, tested by the rule to which I have referred above? In the first place, was it based upon facts truly stated, or were there misstatements of facts, and in this latter must be included the omission of important facts. For unless a report which is being commented on is fairly set out the comment cannot possibly be fair. It cannot be said that the report of the case was properly set out before the comment began."

It is to be remembered that the *Chronicle* had published a report of the case, and no exception has been taken to that report that I know of. It is, of course, true that that report is not reproduced in full in the articles, but it had been laid before the readers of the paper, and the articles appear to me to give a fairly accurate *resume* of it. The judgment continues: "True, the effect of the pleadings is set out, but pleadings are very different from evidence and nothing is said about the evidence given on oath by Surajmal in examination-in-chief, denying the allegations made against him by Dada. His cross-examination is referred to in language which leads the reader to infer that he completely broke down and the defendant writes, 'the case was suddenly withdrawn, the Judge appropriately remarking that the plaintiff had adopted a very wise course.' The Judge used those words for reasons only known to himself. They certainly are not apparent from the report but the addition of the word 'appropriately' by the 1st defendant cannot be commended." I shall later resume for myself what appear to me to be the salient features of the case tried by Davar, J. Here it is enough to say that what Macleod, J., imputes to the defendant as unjustifiable, is that he did not set forth Surajmal's examination-in-chief ; and that he uses the word "appropriately" in recording Davar, J.'s remark upon the termination of the case. I think that the reasons which Macleod, J., says were known only to the learned Judge himself, and certainly do not appear on the record, are obvious enough. As to the omission to include in the articles what Surajmal said in examination-in-chief or a *resume* of it, all I need say here is that any one who had read the report of the case, or who had the information on record there before him, would have understood perfectly why Surajmal was called as a witness for the plaintiff and what he certainly must have said in his examination-in-chief. His cross-examination indicates that pretty clearly, and it is upon his breakdown under cross-examination and the sudden collapse of the suit while that cross-examination was in progress, that the writer wants to concentrate public attention. Then the Judge goes on: "It is obvious that saturated with Mr. Vatcha's observations he was ready to pass judgment on a case the *trial* of which had only just commenced." That is a curious phrase

to use about a case which had ended, but of course the learned Judge meant that the trial of it had barely commenced before the plaintiff withdrew it and consented to a decree against him with costs. The judgment continues:

"His first remark is, 'that the plaintiff was merely the creature of Surajmal admits of little doubt in view of the circumstances revealed' 'and that Mr. Surajmal should have been thus content to have the case withdrawn and the very ugly allegations made against him left unrefuted, is a matter which demands further inquiry'."

It must be borne in mind in dealing with 'all this part of the alleged libel that Horniman inferred from the pleadings, the evidence, the nature, and the end of the suit that the defendant's version was true. The defendant had stated without reservation that Surajmal was the real plaintiff, and Bhugwandas merely his nominee. In the circumstances revealed by the trial, as the writer says, he believed that the defendant's declaration to that extent was true, and, therefore, he merely reiterates it in the sentence which Macleod, J., calls his first remark. No serious exception, I believe, could possibly be taken to the next sentence. Doubtless, the writer has already concluded that the suit was Surajmal's suit; therefore, if that is fair comment, it follows that the withdrawal of the suit was Surajmal's withdrawal, and the whole sentence goes no further than saying that Surajmal's conduct in allowing the suit to be thus withdrawn, while the ugly allegations against him were left unrefuted, certainly was a matter which demanded further inquiry. Even were Surajmal not the real plaintiff, as inferred by the writer, still he was as much interested in the suit as the plaintiff, Bhugwandas, regard being had to the written statement and the issues, and the part he had taken in it up to the time of its withdrawal, and it surely was fair comment to say that his conduct in allowing the suit to be thus withdrawn without making any protest called for further inquiry. Macleod, J., concedes that if Surajmal were the real plaintiff, then it was he who gave the word to withdraw; but he adds that "the recorded circumstances nowhere point inevitably to the conclusion, and, if 'unrefuted,' means 'disproved by the decision of the Court,' then Surajmal was content that the allegations against him should go unrefuted." Now here the learned Judge certainly adopts the view that comment, to be fair, must take the form of an inevitable inference. In my judgment that is not the law. I do not like the use of such a word as "inevitable" in such a connection. Fair comment, with which alone we are dealing, impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that the inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences. If out of three or four inferences one was inevitable in the strict sense, then all the others would cease to be reasonable inferences at all, and would not fall to be considered under the defence of fair comment. What *was* the inevitable inference from the facts before Horniman? If the inference he drew was not the inevitable inference, and, therefore, not fair comment, it could only be because there was an inevitable inference which excluded all others, and, speaking logically, deprived them of any semblance of reasonableness. Dare any one say that there was such an inevitable inference here, unless indeed it were the very inference Horniman drew? I will here, without quoting, dispose of Macleod, J.'s treatment of the two words "unrefuted" and "unanswered." I regret that I cannot agree with the learned Judge in saying that the use of these words by the defendant in their respective contexts necessarily means that Surajmal did not even deny Dada's allegations. So far from that being so, I think anyone would understand that the writer meant that notwithstanding any denial Surajmal may have given, the breakdown of the case in the middle of his cross-examination just at a point where he was plainly getting into deep water, and putting himself in a very compromising light, left Dada's allegations still virtually in possession of the field. Merely denying an accusation is certainly not "answering" it in the sense of the writer. Every prisoner who pleads *not* guilty denies the charge, but would

any one understand that his mere plea had "answered" it? I think not. The learned Judge then sets forth the next two passages on which the plaintiff relies. He sums them up thus:—

"The allegations are that Surajmal, after instigating Dada to file a suit against his own client Tatia Saheb, sends him to another Solicitor to file the suit, but after that had been done, arranged the settlement of the suit with Dada without letting Dada's Solicitor know what was happening. Truly the matter was not revealed in Court, nor in any of the proceedings. It was revealed solely in the observations... which no one had seen except Mr. Vatcha and Nanabhoy."

Now much of this at any rate *was* revealed, as immediately appears in what the learned Judge next says, in the written statement of Dada. It is true that there is no mention there of Surajmal having sent him, Dada, to D'Cunha, but he does most distinctly say that Surajmal instigated him to file the suit against Holkar, and it is hardly necessary to add that Surajmal could not very well have acted for both plaintiff and defendant in such a suit. If he really instigated Dada to bring this suit against Holkar in the manner alleged by Dada it is certain that by implication he "sent" Dada to another Solicitor, formally to conduct that suit. The written statement of Dada again does most expressly aver that Surajmal settled the suit with him. Macleod, J., comments upon this as follows:

"But how can any reasonable person spell out of the passage in the written statement which I have just quoted a charge by Dada against Surajmal of having broken this rule of professional etiquette? And I may note here that there is nothing in the written statement about Surajmal having sent Dada to D'Cunha."

I have commented on this in anticipation. I own I find it rather difficult to follow the learned Judge in the first part of the sentences last quoted. No one ever supposed that Dada had accused Surajmal of having committed this breach of professional etiquette. It was no concern of Dada's. But he certainly did accuse Surajmal of having instigated him to bring the suit against Holkar, and he certainly did say that Surajmal settled that suit with him. Then when Surajmal's letter to D'Cunha was laid before Horniman, he comments on it in the manner above described. It is, as the writer makes pretty clear, I think, a new allegation not revealed in the proceedings before Davar, J., but connected with them, and one which might have been revealed or refuted had that trial run its course. That is all the passage in the article seems to me to mean, and if Dada's allegations were true, a conclusion already inferentially reached by the defendant, then it would follow almost of necessity that this letter was of the character imputed to it. Then the learned Judge concludes that defendant would never have written a word of this portion of the articles, if he had not had the "Observations" before him. I agree that he would not, unless the man who wrote the observations had given him the same matter to use if he chose. But as I have said, the mere fact that the observations were defendant's source of information is of no consequence or relevance whatever. The sole question is whether the fact upon which the writer is commenting now, is a fact, and, if so, whether the comments are fair. There are seemingly two facts, one, Surajmal's letter, the other, the assertion that as a matter of fact there was no intervention on the part of any agent at all. Both came out of the observations. The one *as* a fact, the other, I should say, as a comment upon it, fully justified by the contents of Dada's written statement, provided, of course, that statement was substantially true. Of course, as the learned Judge says, the charge made in the article is not taken direct from the written statement of Dada, but from the letter of Surajmal along with the contents of the written statement. But if it be substantially true or at any rate if it were eminently fair comment upon the materials before the writer, what can it matter that he did not take it bodily out of the written statement? The judgment proceeds:

"But the defendant made a worse blunder. Even if it can be said that it was alleged in the proceedings that Surajmal settled the whole matter direct with

Dada, it certainly was never alleged any where that Surajmal then wrote to the other Solicitor stating, etc. This was taken direct from the observations, and what is more startling the comment is also taken direct from the observations. What justification was there then for the defendant stating that the contents of Surajmal's letter which he got from the observations were not only untrue but were so written deliberately, in order to screen the breach of etiquette committed by him?"

The whole passage illustrates perfectly the point of view of the learned Judge, and, in my judgment, the true cause of his having come to what I feel was a wrong conclusion upon the case. He admits, or, to be more accurate, hypothetically half admits, though with reluctance, that one part of the comment might have been upon facts put in evidence at the trial. But prefacing his next observations with the statement that the defendant committed a worse blunder, he dwells upon what nobody denies, that it was not alleged at the trial that Surajmal wrote the letter to D'Cunha and that it was false, and deliberately written to screen his professional breach of etiquette. What justification, he asks, could there be of that? And the answer is simple. Fair comment on a true fact. If it be assumed that this was a blunder on the part of the defendant, the question is prejudged. But was it? The letter, alleged or not alleged, is a fact. It is not denied. It was before the defendant, and it appears to me that he had a perfect right to comment on it in the way he did. Its truth was flatly denied by the defendant in the suit before Davar, J., in his written statement. From the course, what was elicited in, and the end of that trial defendant had inferred, and I believe we all agree that the inference was upon these materials fair inference, that the written statement was substantially true. If it was, this letter was false. Not only that but the defendant had the sworn evidence of Surajmal himself, and who should have known better that it was false? When Surajmal gave that evidence he had probably forgotten all about this letter. When it had become a prominent feature in the libel suit before Macleod, J., he materially modified the evidence he had first given, so as to explain the letter as best he could. But when defendant wrote he had only the record of the trial before Davar, J., to work upon. And had nothing ever been added to that, is there any one who could deny that the inference that the letter was false, to the extent of, at any rate, being a *suppressio veri*, was a fair inference? If so far the inference was not only fair, but, to use Macleod, J.'s own term, "inevitable," the reason assigned by the writer of the article for Surajmal having written this false letter, whether alleged or not, seems to me to be as clearly fair comment. It is the obvious reason, some reason there must have been, and this feature in the settlement of the suit of *Dada* v. *Holkar* is so intimately connected with the truth as a whole of the defendant's version of the facts in *Bhagwandas* v *Dada*, that although not elicited in that trial, it became fair matter for comment upon the whole case. The learned Judge appears to have held from first to last that nothing which was not put in evidence at the trial before Davar, J., could possibly be ground of inference, in commenting upon the character of that case. I do not agree. What was put in evidence there was closely related to the former suit, and any highly suspicious feature in that suit, if true, lent support to the main conclusion, which the defendant had formed, that Dada's defence was substantially true. This breach of etiquette, standing alone, was relatively unimportant, but the reason for it was sinister in the light of Dada's allegations.

Almost all the Advocate-General's force of argument was concentrated upon this much of the impugned article. It was pressed upon us, over and over again, as though in that form the point was difficult, instead of being of the simplest, that the fact stated, namely, that there was no intervention on the part of any agent was untrue, and that the innuendo that the letter was false was wholly unwarranted, because at the trial of the libel action Surajmal swore that the suit was settled by Holkar's agent, and the defendant failed to prove by Nanabhoy's evidence that it was not, and, therefore, the plaintiff must succeed. This is very crude reasoning. In the first place, it assumes that there *was* intervention on the part of an agent in the only

sense in which that was denied as a fact in the article ; in the next place, it assumes this to be an independent statement of fact by the writer of the article, which as a fact not put in evidence at the trial before Davar, J., he had to " justify ", and last, it wholly overlooks the important need of keeping distinct what was before the critic when he wrote from anything that may or may not have been proved at the subsquent trial. If it can easily be shown that this apparent statement of a fact, *viz.*, that no agent intervened in the settlement between Surajmal and Dada, was not only a fair inference, but by far the most probable and, therefore, the fairest inference to be drawn from the materials the writer had to comment upon, the whole of this argument falls to pieces, and becomes virtually irrelevant. Let me suppose that the sentence, instead of being worded compendiously as it is, had been thus cast: " But from the written statement of Dada, and the evidence of Surajmal himself on oath, it is clear that no agent intervened in the settlement between Surajmal and Dada, " could any exception have been taken to it? I do not think so. And yet that is exactly what the sentence, taken in its context, really means as is made perfectly clear from what immediately follows.

The point of the passage is to show that Surajmal's letter was in essence false, and so written to conceal from D'Cunha his own direct communication with D'Cunha's client. If we had not had the evidence taken at the trial of the libel action before us, I make bold to say we should all unhesitatingly have come to the same conclusion. While I do not think that later evidence, material or even in strictness, relevant, I may add that, speaking for myself, it does not satisfy me that the letter was true. Macleod, J., is said to have believed Surajmal implicitly and to have disbelieved totally the evidence of Nanabhoy. I am not concerned really with that evidence taken at that time I admit that it is usually unwise to interfere with the estimate of so experienced and able a trial Judge as Macleod, J., of the value of evidence given before him. But I should say that even were our judgment upon this point to depend upon, or even to be influenced by, that evidence, its whole tenor leaves no doubt on my mind but that Surajmal knew perfectly well of the settlement with Dada before it was completed. He was in no need of being informed of it by Holkar's agent as his letter certainly suggests that he was. And, lastly, I think it almost absurd to insist that even if Holkar's agent did not intervene, that is to say, go to Dada behind Surajmal's back in effecting this settlement, yet there certainly was an agent of Holkar representing him in his dealings with Surajmal. That might have been taken for granted. There is nothing improper in it. The object of the writer was to show up an impropriety in Surajmal's method of doing business. His remarks must be read in connetion with, and strictly confined to, that object. It is no answer to his statement that as a matter of fact there was no intervention on the part of any agent to reply that, between Holkar and Surajmal, the former was represented by an agent. The learned Judge then proceeds to deal with the second article in which he remarks that "these allegations taken from the observations are repeated, with a further fact added that Surajmal paid Dada with his own cheque." That was admittedly a mistake as I have already said, but I think it is quite an unimportant slip. The Judge then comments on this in these words: "It is difficult to see what object the defendant could have had in laying such extraordinary stress on these facts which he had gathered from the observations unless he wished, whilst making a personal attack on Surajmal on a matter outside the case, to drive home the inference he drew from the circumstances actually revealed, that Bhugwandas was the nominee of Surajmal and that all Dada's allegations against him were true." Precisely. That is undoubtedly what the defendant was seeking to do. But does it deprive him of his rights to comment fairly on these materials too? When the learned Judge used the word 'personal', it is plain that he suggested that the attack was in some degree malicious. But it has since been admitted that it was not. He then goes on to say that "the defendant after referring to the allegations of the defendant (in Bhugwandas's suit), including those which

were never made, etc." That is putting the case as strongly as it could be put against the defendant. For, while some of the allegations were not made in the written statement of Dada, they certainly were made to Horniman, and he had to judge for himself upon the materials before him whether the allegations were probably true or false. What next follows deals with some of the comments in the article, and, for my part, even after giving the greatest weight to Macleod, J.'s opinion, I am still quite unable to see that they exceed the limits of fair comment. For example, when the learned Judge condemns the writer's comments upon Surajmal's lapses of memory, he says that these were singularly unfortunate and supports that by this process of explanation: "Surajmal could not remember what he had said to Dada when Dada heard of Khambatta's agreement and asked Surajmal what he should do, or whether he told Dada to go to other Attorneys. He could hardly be expected to remember the first, but if he told Dada to go to other Attorneys as he was acting for Tatia Saheb, that was the right thing to say." Does this fairly represent what was in the mind of the writer of the articles? Surely not. In judging Surajmal's evidence before Davar, J., it is to be remembered that he had been fully acquainted for months with the nature of the defence. He knew perfectly well what was being put to him in cross examination and why. He knew that when he was asked what he said to Dada when Dada came to him about Khambatta's prior agreement, it was being suggested that he told Dada to file a suit for damages against Tatia Saheb. With that knowledge in his mind, there was no excuse at all for giving the evasive answers he did. It is impossible, if he really had instigated Dada to do this, that he should have forgotten it or in view of the correspondence preceding the suit of *Bhagwandas* v. *Dada*, and the defendant's written statement therein, that he would not, before going into the witness-box, have searched his memory for what did pass on the occasion referred to. He could not have been taken by surprise on these points. Presumably he was there to clear his character of the aspersions cast upon it in the written statement, and this was one of the most serious of them. He could at least have said: "I do not exactly remember what I said to Dada, after this lapse of time, but I most certainly did *not* instigate him to file a suit for damages against Tatia Saheb." If Dada had come to Surajmal to file a suit for him against Tatia Saheb, then doubtless it would have been right for Surajmal to refuse to act for him and advise him to go to some other Attoney, if, indeed, that could be called advice at all. But that surely is glossing over the real implication of these questions and answers, an implication as well known to Surajmal as to Counsel examining him. The learned Judge admits that Surajmal's inability to remember whether he had drafted the notice to be sent to himself acting as Attorney for Holkar, was suspicious. That is putting it very mildly indeed. The suggestion was not only that Surajmal advised Dada to file a suit against Holkar, in which, of course, Surajmal could not act for him, but that he actually drafted a notice of suit for him and sent him with it to D'Cunha, in order that this notice which he himself had drafted should in due course be sent to him as Holkar's Attorney. I ask without fear of contradiction whether it is, humanly speaking, possible that after months in which to prepare himself for cross-examination upon the salient fact that he had instigated Dada to bring the suit, he should have been in any doubt at all whether he had himself drafted the notice. I say emphatically that it is not. He knew, he must have known, whether he had done such a thing, and if he had not, he could have given an unqalified denial to the suggestion. Why did he not? The explanation again is perfectly obvious. We are told that Counsel was flourishing papers when he put the questions to the witness. If Surajmal had not a clear conscience, if he had really instigated the suit, although he had not in fact drafted the notice, he might not have felt positive that he did not, he might have feared that if he denied having drafted such a notice, Counsel would next moment confront him with it. So he took refuge in the answer that he could not remember whether he had given Dada such a draft or not. Macleod, J., says that it was proved as a fact that Surajmal did not draft any such notice, but

that D'Cunha drafted it under Dada's instructions. This was in the libel action. But how was the defendant to know that at the time he wrote the articles? He might very well have presumed, as Macleod, J., admits, that Counsel had instructions. But whether Counsel had or not appears to me quite immaterial. For Surajmal's inability to remember whether he had drafted the notice for Dada or not, whatever else it may or may not warrant, certainly would warrant an inference that his conscience was very far from being clear at that time, about the part he had taken in launching that suit. And that was quite enough for the defendant. I am not quite sure, whether Macleod, J., meant in the passage I am about to quote to treat the sentence in the article as a statement of fact or as comment on fact. He says: "as to the words 'other matters of importance, he had also forgotten,' they were grossly unfair, and the defendant's attempt to explain them was ludicrous." What precedes the words in the second article certainly resumes compendiously the most important points which Surajmal then swore he had forgotten, but there were minor points of detail at any rate, and one of them might fairly be called important, which Surajmal had also forgotten. As I read the words through, they merely sum up the concluding part of the cross-examination, the gist of which has just been given. It certainly would not have occurred to me on reading the article that the plaintiff could make a special grievance out of this sentence, in view of the substantial truth of what went before, and the general tenor of the passage as a whole. I should have thought that this was too near going over every line and word with a microscope, to find the minutest flaw, a method that no Jury would ever think of adopting. The learned Judge proceeds: "I must hold that the defendant has misstated the fact on which his comment is based. He has laid the greatest stress on allegations which were never revealed to the public, to support the conclusions he arrived at, and has moreover accepted those allegations as true." If by "the fact" here the learned Judge really means the sentence "other matters of importance he had also forgotten," all I can say is that that is on its face comment upon the record. It may go too far, and to that extent it may not be fair comment, but it certainly is not such a fact untruly stated as the learned Judge had in mind.

As to the allegations which were not on the record of the case before Davar, J., I fail altogether to discover more than one which can accurately be so described, and that is the letter which Surajmal wrote to D'Cunha. He did write it. Such other allegations as flow from it will be found on analysis to be no more than inferences from facts put in evidence at the trial. It is true that the writer of the article says that 'it is alleged, etc.', and that 'it is roundly alleged, etc.' and does not make it clear that these allegations were not to be found in the record of the trial before Davar, J. But what was the position? It *was* roundly alleged before Davar, J., that Surajmal had instigated Dada to file the suit against Holkar. It was there, too, alleged that Surajmal had settled the suit with Dada. Then this letter from Surajmal to D'Cunha is unearthed, and comments are made on it in the written statement. It is impossible to say how far this part of what was suggested by the defendant's Attorneys for use in the case might have been brought out and either proved or disproved by evidence, had the case gone on. The note by the compiler of the observations in relation to Surajmal's letter does not conclude the matter. It is almost certain, I think, that had that suit not come to so premature an end, Surajmal would have been cross-examined and pretty rigorously about the part he played in the settlement. And I see no reason to suppose that had he then admitted, as he had admitted in a measure, that the settlement was his own, though brought about by his managing clerk, he would not further have been called on to explain this letter. When the learned Judge says that defendant not only laid the greatest stress on allegations which were never revealed to the public, but accepted them as true, it means no more than, as I have tried to show already in more than one connection, that the defendant took risks of adopting a fact and making it the ground of comment. But

in what immediately follows Macleod, J., went much further, for he said: "I must also find that from the report of the case before the public as far as it went it could not reasonably be inferred that Bhugwandas was the nominee of Surajmal, that is to say, using the word 'infer' in its strongest sense" If the learned Judge held that view, then he would not have allowed this question to go to a Jury at all. I can hardly believe that he really meant that. Surely, whether that conclusion was in the nature of fair comment or not *must* have been left to a Jury. For, with the materials before him at the time, I doubt whether any one could be found to say that the writer's inference was one which could not reasonably be drawn from the facts, although it is possible that a Jury might have thought it one which ought not to have been drawn, nor do I understand what the learned Judge means by "using the term inference in its strongest sense." An inference is always an inference, whether it be a good or a bad inference, and whether an inference could be "reasonably" drawn depends upon the degree of probability in its favour. I cannot wholly agree with Macleod, J.'s definitions, or test of reasonableness. An inference, if we must use exact terminology, is not a surmise. A surmise is rather a guess, if the word has a place at all in logical terminology. What Macleod, J., appears to be distinguishing is a loose from a close inference. He gives, to illustrate his meaning, inferences which might reasonably have been drawn, as, for example, "that it would have been reasonable to infer from the fact that Bhugwandas withdrew his case, that he was apprehensive that Dada would be able to succeed in his defence and prove that Bhugwandas was the nominee of Surajmal, or that it was possible that Bhugwandas was the nominee of Surajmal." It was not reasonable to infer that Bhugwandas was the nominee of Surajmal. Are we not drawing very fine distinctions here? If it were a reasonable inference that Bhugwandas apprehended that Dada would be able to prove that he was the creature of Surajmal, it is very much the same thing as inferring that Bhugwandas was the creature of Surajmal, for if he were not, upon what possible ground could he have apprehended that Dada would be able to prove that he was? Then follows this: "The former are true inferences. The latter is a conclusion." Every inference, as I have said before, ought to reach a conclusion, though that conclusion may be positive and unqualified or merely probable and qualified. But the distinction here drawn is one without a meaning and if I understand the learned Judge aright, what he really means is that the defendant was much too positive in stating the result of his inference, particularly as it turned out not to be true. I do not agree that the defendant has confused inference with assumption. It is in the main correct to say that he has accepted as true most, if not all, that was said on Dada's side in the case before Davar, J., and necessarily, therefore, where what Dada said was in conflict with what Surajmal said, had declined to accept the latter as true. But that position was reached by a process of perfectly legitimate inference from what was revealed at the trial as long as it was restricted to matters there put in evidence. As soon as the comment went outside that group of facts, it depended upon one ascertained and not controverted fact and a comparison of that with the conclusion inferred from the trial and its contents, *viz.*, that Dada's version was substantially true. There, again, I see no confusion between inference and assumption. I do not agree with Macleod, J, that "on the given data it was impossible for any one to draw an inference in the nature of a conclusion." It may have been impossible for any one to come to a true conclusion by way of inference upon the data then available, because some of them turned out later to be false data, but that is quite another matter and one with which, in deciding upon the fairness or otherwise of defendant's comment, I am not concerned. I find the result of this close critical examination of what Macleod, J., really said very instructive in the light of the manner in which the judgment was used before us in argument. The impression left on the mind after a more or less casual reading of Macleod, J.'s judgment is that that learned Judge found that

the defendant had based his comments on one or more material facts untruly stated, and that in one or two particulars, though here the judgment hesitates a little, the writer's comments were not fair. During the argument before us we were told, over and over again, that the sentence in the first article that 'there was no intervention, etc.,' and the corresponding sentence in the second article were utterly false and that this was found by the learned trial Judge, who had disbelieved Nanabhoy and had believed Surajmal on the point. But I have not been able to find anything in Macleod, J.'s judgment which goes that length. Indeed, upon the most careful scrutiny, I cannot find that the learned Judge has definitely found a single fact stated as a fact in the alleged libels to be untrue, except that the cheque was not, as stated, Surajmal's own cheque, but Tatia Saheb's. I have now been over Macleod, J.'s judgement at least six times in order that I may not unwittingly do that learned Judge the least injustice in dealing with his conclusions and the means he has used in coming to them. I gather that the facts which towards the end he says that the defendant untruly stated were: (1) not a positive misstatement, but an omission to state a material fact which he ought to have stated, *viz.*, that Surajmal had in his examination-in-chief denied on oath the defendant Dada's case as a whole; (2) that Surajmal paid Dada Rs. 9,000 by his own cheque; and (3) that the writer said that certain matters were alleged, giving the public to understand that they were alleged in the suit of *Bhagwandas* v. *Dada*, whereas in fact they were only alleged in the observations prepared for the use of Dada's Counsel in that suit. I cannot find that the learned Judge definitely points out a single one of these allegations as untrue. As to the draft notice which Surajmal is now alleged to have written and sent by Dada's hand to D'Cunha, that is not mentioned in the libel at all. We must confine ourselves strictly to the libel complained of, and so confining ourselves, and to Macleod, J.'s judgment upon it, I believe I am right in saying that I have set down every untrue fact which that learned Judge held had been made the ground of comment. It comes to this, then, that there is one untrue fact and one only, and that has been admitted from the first. It was "roundly alleged" in the suit upon which the comment was made that Surajmal had instigated Dada to file a suit against Holkar. It was roundly alleged in that suit that Surajmal settled the suit with Dada and not with Dada's Attorney, and also that at the time of that settlement Surajmal demanded the Rs. 3,000 under the promissory note upon which that suit was brought. It was not alleged specifically, as a breach of professional etiquette on Surajmal's part, that he had settled the suit over the head of D'Cunha. Nor was it alleged that he had written the letter to D'Cunha, conveying a totally false impression of what had really occurred. But these matters were alleged in the observations prepared not by Nanabhoy at all but by Vatcha. And these allegations coming under the notice of the defendant, he believed them to be true and utilized them as the ground of one comment, *viz.*, that there was no intervention on the part of any agent, and one demand, that those in authority should take the matter up and insist upon Surajmal giving satisfactory explanations. The comment, as I have already pointed out, was fair, and, in my opinion, necessary, from the materials before the writer in the suit of *Bhagwandas* v. *Dada*. Under rigorous analysis, then, this elaborate and impressive judgment is shown to be almost void of any relevant and important content.

I will now deal, much more briefly, with Heaton, J.'s judgment in appeal. It is virtually confined to one sentence in the first article, "that the plaintiff was the creature of Surajmal admits of little doubt." Before going further I should like to point out that isolating the sentence thus from its context has given rise to some want of proportion in handling it for the purpose of the plaintiff's libel suit. It is perfectly clear, when the sentences preceding and following it are also read, that what the writer meant was this. The suit had broken down ignominiously after a feeble attempt to prove cash consideration by false evidence, just at the critical point where the cross-examination of Surajmal might have been expected to force upon him disclosures which would have substantiated Dada's defence as a whole. The Judge, in dismissing the suit,

had, according to the writer, "appropriately remarked that the plaintiff had taken a wise course" and then defendant adds, connecting this with the next, which is the really important sentence, "that the plaintiff was the creature of Surajmal, etc.," and goes on "that Surajmal (now substituted for the nominal plaintiff Bhugwandas who has just been ruled out) should have been content, etc." The mere statement standing alone that the plaintiff was the creature of Surajmal, had the suit in all other respects been *bona fide*, would not have been libellous at all. But as soon as it became clear that the suit was Surajmal's, that he was the real plaintiff, then it became a matter of vital importance for him to refute the serious charges brought against him in the written statement, and not to let the matter drop just when that matter was being opened.

He had to prove that, although the promissory note was for his benefit, and for reasons of his own had been made out in the name of his clerk Shambhuprasad, the transaction was in all other respects honest, or, in other words, that there had been cash consideration, and not the consideration alleged by the defendant. A great deal of this judgment deals in generalities upon which I have nothing to say beyond this, that I doubt, with respect to the learned Judge, whether the standard to be applied in determining whether comment is fair or not, varies according to the station of the plaintiff, and the degree of personality in the libel. I doubt, whether there *is* any standard. And I am sure that if there were, it could not vary according to the factors indicated by the learned Judge. All that is essential in this connection is, whether the subject-matter of the libel is of public importance. If it is, it can make no difference, whether the person complaining of it is an author, a statesman, or an Attorney; once that point is settled against the plaintiff, the resultant comment has to be justified upon exactly the same loose general principles, and sentimental considerations ought to have no play.

The learned Judge says: "On the facts appearing I think the writer would have been within the limits of fair comment had he said that the claim made by Bhugwandas was extremely suspicious, indeed probably false, and that the allegations against Surajmal both as to professional misconduct and as to his part in Bhugwandas's suit had not, owing to the collapse of the case, been satisfactorily met, and that they demanded further and fuller inquiry...But Horniman went further than this. He wrote that the plaintiff Bhugwandas was merely the creature of Surajmal admits of little doubt in view of the circumstances revealed...This amounts to saying, that Surajmal, there was little doubt, had committed the serious criminal offence of engineering a false claim. It is a grievous thing to say of any man, an atrocious thing to say of a Solicitor, unless it is true, or unless there are the strongest grounds for saying it. It is not true. Horniman does not contend that it is true."

I pause here to emphasize, what I am afraid I must have already said more than once, that it was Dada who said all this, and Horniman merely adopted that as the truth, by inference from what had occurred at the trial taken along with the pleadings and issues. The learned Judge was evidently greatly influenced by his present conviction that this was all false. But would he have thought so at the time the articles were written and on the materials then available? It does not follow that the conclusion Horniman reached is not true because he prefers to adopt the comparatively easy defence of fair comment than the defence of justification. It is quite clear from what the learned Judge has declared would have been fair comment, that the dividing line, when the article is read in its natural sense, and kept entirely distinct from further information elicited at the trial of the libel suit, is extremely fine. And Heaton, J., at any rate, certainly would not have gone the length, Macleod, J., apparently would, of withholding this altogether from the Jury on the ground that the inference was wholly unreasonable. Indeed in another place he admits that it was quite a reasonable inference, though he thinks that it was too "conjectural," in other words, I suppose, an inference which, while perfectly reasonable, ought not to have been drawn. And he is careful to point out that he is treating himself as a Jury, in coming to his conclusion that the sentence I have so often quoted was not fair comment. He was powerfully influenced again by the gravity

of the charge as it presented itself to him. He says that it amounts to accusing Surajmal of a serious criminal offence. Here he refers to a section of the Indian Penal Code which, as far as I know, has hardly ever been enforced in any such connection as this. But the actual conclusion that Surajmal was the real plaintiff in the suit, standing alone, is quite harmless and, left there, could not be regarded as a libel at all. It only becomes so, as Heaton, J., has perceived, if the rest of Dada's statement were true.

It was, however, an inference that had to be drawn before any part of the articles need have been written. And it was an inference, as I hope to show, which was not only fair on the materials then available, and at the time it was drawn, but by far the most probable inference. It is on this point that I differ entirely from Heaton, J., and still more from Macleod, J., when he finds that it was not even a reasonable inference.

Still treating himself as a Jury, Heaton, J., quite correctly sets forth the grounds upon which this inference, as he believes, rests. He comes to the conclusion that they are not strong enough to support it, because he sets over against these other grounds upon which a different inference and one less unfavourable to Surajmal could have been based and, as he evidently thinks, ought to have been based. It seems to me, speaking with respect, that in this balance-sheet, as it has been called in the argument before us, Heaton, J., has greatly undervalued or omitted factors on what we will call the defendant's credit side, and overvalued factors on the debit side.

The result is a view much too favourable in my opinion to the plaintiff. Heaton, J., has omitted from consideration altogether three items which I consider so important as to be almost decisive. He has paid no attention to the undeniable facts giving rise to antecedent probablities amounting almost to certainty that the claim was a false claim. He has paid no attention to the dramatic and most significant ending of the suit, and he makes no mention of Davar, J.'s comment. Remembering how intimately versed that learned Judge was in all the law's chicaneries, what wide experience he had of the worser sort of Attorneys and their ways, and of false claims of this kind, the few words he is recorded to have spoken when the suit, doubtless to his own surprise, came to an abrupt end, surely deserve much consideration.

On the other side of the account, 1 and 2 are true, as stated. But they seem to me to be quite outside the proper ground of inference, at the time the inference had to be drawn. 3. Of course, Surajmal had not directly supported the claim on the promissory note. How could he possibly have done so after acting as plaintiff's Attorney and drawing his plaint? I assume that what Heaton, J., means is that he had not directly asserted any interest of his own in the consideration. Else the passage is meaningless. 4. Here I come to what clearly influenced the learned Judge much more in my judgment than it should have done in Surajmal's favour, and against Horniman. He believed, although here again I cannot help feeling that this belief had been strengthened by the evidence in the libel suit, that Surajmal was a much injured man who took the earliest opportunity, although it was quite needless for him to have done so, of coming forward courageously to clear his character. If we turn once more to the pleadings, and then to the issues (which have not been noticed at all by Heaton, J.) in Bhugwandas's suit, it is pretty clear that every one concerned in that suit realised that from the first Surajmal was at least as deeply interested in it as the nominal plaintiff, Bhugwandas. Bhugwandas pretended to want Rs. 3,000. Surajmal was virtually on his trial. The most serious charges had been brought against him. It was not seriously contended before us, when I put that point to the Advocate-General, that any inference of the kind Heaton, J., was disposed to draw from Surajmal's appearance in the witness box at that stage of the case, was now contended for. I do not see that any such could fairly be drawn. 5. Here, again, with great respect, I think the learned Judge has diverged so widely from what I conceive to be the true line of approach to a just estimate of reasons for and against defendant's articles having been fair comment, as to have wholly missed the sinister significance of the very fact he is setting down to Surajmal's credit.

Why was he not so cross examined? As Horniman inferred, and as I think most people would have inferred at that time, for the very good reason that he did not care to submit to that ordeal. This, of course, depends upon the truth of Dada's allegations that it was Surajmal's suit. If it was, then, to use Macleod, J.'s words, he gave the word for its withdrawal. Precisely, and if he did, what was the reason? At the time the articles were written only one reason would have occurred to any one. That he had got into deep water already and did not care to risk any further exposure. 6. Much the same criticism applies to this item. And even were it the fact that Surajmal was not the real plaintiff and had no control over Bhugwandas, is it not strange, keeping the pleadings and the issues still clearly in mind, that he should have entered no protest whatever at this summary termination of a suit, in which he was giving evidence as Heaton, J., believed with no other intention than a courageous desire to refute at once and for ever Dada's calumnies against him, just at a point when his evidence was of such a kind as to suggest that the preliminary portion at any rate of these caluminies was true. 7. The point appears to me to be not so much that Dada had not been examined and cross-examined and, therefore, that the account he gave in his written statement had not been tested, as that Surajmal did not insist that it should be tested. Of course if Surajmal had nothing to do with the conduct of the suit, it might be answered that that was not his fault but Bhugwandas's. This again seems to me to beg the really important question as it presented itself when the articles were written. The learned Judge, putting himself in the place of a juryman, then goes on to say that the view taken by the defendant that Dada's version might be true was a view which any reasonable man might have taken, but that in his opinion it was too conjectural. All that immediately follows would have been quite appropriate had the suit run an ordinary course and ended in a verdict for the defendant. But in that case, the reasons given for this view being too conjectural would not have been available, and I find it extremely difficult to follow what was exactly in Heaton, J.'s mind when he wrote this part of his judgment. I do not think that it would be useful to advert further to any particular part of that judgment. It will be simpler and serve my purpose better if I now resume all that has gone before in a statement of my own conclusions and the reasons which have led me to them.

These reasons seem to be so convincing and the conclusions so obvious that I have naturally felt much pressed by the simple fact that two of my learned brethren have come to a contrary conclusion, and I have felt obliged to show that I have given most earnest consideration to their judgments.

Now what were the facts with which the defendant had to deal when he wrote his first article, the whole foundation of which was the belief he had at that time that Bhugwandas was a mere nominee of Surajmal, and that the claim as presented was utterly false, while the defendant Dada's version of it set forth in his written statement was substantially true?

First look at the nature of the claim. Here is a clerk on Rs. 100 a month suing a man worth lacs for a sum of Rs. 3,000 which, he alleges, he, out of his poor means, advanced on a promissory note to this wealthy gentleman. This poor clerk was in the employ of Surajmal. To go no further, I do not see how any Judge of experience could have helped having his attention arrested and his suspicions aroused? I have no doubt but that Davar, J., did not miss these points, and that even before he had had to consider seriously whether the whole of Dada's story set forth in his written statement was true, he must have regarded the suit with grave suspicion. On the very face of it, once the relative positions and wealth of the parties to it became known, it must have almost been prejudged. Then there was the remarkable story contained in the written statement. This story had been suggested from the very first in the correspondence. It was finally given there pretty fully.

And this was not the common kind of defence; the defendant did not deny execution, he did not; while admitting execution, merely

deny that he had received cash consideration. He frankly admitted the promissory note sued on; and proceeded to explain how it came to be made and why he refused to pay. It was an elaborate story. It revealed Surajmal from first to last, as the protagonist in a subtle piece of roguery. It is idle to say that when the case was suddenly dropped, Surajmal had not been examined as to the part he had played in obtaining this promissory note. That had to be introduced by showing the part he had taken in the suit in connection with which, and as a secret commission for his services in which, the amount of Rs. 3,000 was to be paid him by Dada and the promissory note was given for that sum in advance as security. No one, I am sure, doubts but that, had the case gone on, Surajmal would have been examined searchingly on all these points. But on the very threshold he had broken down so badly that no wonder he felt the game was up, and that to press the matter further was only courting inevitable and already foregone defeat. The defendant contended that the nominal plaintiff Bhugwandas (representing his deceased brother Shambhuprasad) had really no interest whatever in this promissory note. The issues raised brought this point of contest out in sharp relief. Every one concerned in the suit must have known that this was the real issue. It is true that the plaintiff made an abortive, almost ridiculous, attempt to prove the payment of cash consideration. This presupposes that Dada was in need of Rs. 3,000 and that he did in fact borrow it from Shambhuprasad. If that were not true, and no one now contends that it was, what alternative explanation of the facts can human ingenuity suggest other than that alleged by Dada? It is very unfortunate that Shambhuprasad died before this suit. Had he been alive he might have been bold enough to bring it, but it is pretty certain that had he tried to support the allegation of cash consideration at the trial, he would have been exposed at once and the utter falsity of the claim in this form it had taken would have been even more clearly proved than it has been. For Bhugwandas may at least say that he knew nothing about the note. It had come to him as part of his brother's property and he took it for granted that it was genuine and in order. That would have been well enough had not Surajmal, who, on the alternative case, knew perfectly well what the real transaction was, been Bhugwandas's Attorney. How Bhugwandas got the witnesses to prove cash payment is not easy to understand unless Surajmal had procured them. Shambhuprasad would have been in a very different position. Even if the suit broke down utterly, Surajmal might have persuaded Bhugwandas that he ran no risk as he could always shelter behind his own personal ignorance of the transaction. It would have been extremely awkward for Shambhuprasad, had he been plaintiff, and gone into the box to swear to the payment of cash, and then the whole story had turned out to be a deliberately false concoction. Even then the question, every one acquainted with the facts would have been asking, would have been: Who is responsible for all this perjury? This much at least is certain, that if Bhugwandas did not know the truth of the note and was persuaded to call in aid false witnesses to prove that his deceased brother paid cash for it, Surajmal must have known. A very rich man does not make out a promissory note in favour of his own Attorney's clerk for Rs 3,000 without receiving a penny in cash, without there being some very strong reason for such an extraordinary act, and a reason which it was necessary in the opinion of one at least of the interested parties to conceal. If there was no cash consideration—and this we may take to have been proved beyond doubt—what consideration was there? None that Shambhuprasad could have given. But a consideration which Surajmal might have given and yet dare not avow. Just such a consideration, in short, as that alleged in Dada's written statement. The only possible escape from his dilemma involving, as it does, the substantial truth of every fact and the complete vindication of every comment in the alleged libels, is that Shambhuprasad, in the absence of his master at Mahableshwar, told Dada the story which is given in Dada's written statement, without Surajmal's knowledge, and so got the note in his own

name intending to dupe both Dada and his own master Surajmal. That is a veritable *tabula in naufragio*. I do not know, whether it ever has been actually suggested, but ingenuity, driven desperate, might invent it. I hardly think it worth serious consideration. It is so extremely improbable that even had Shambhuprasad thought of it, could he have believed himself able to carry it through without Surajmal on the one hand and Dada on the other getting scent of his treachery? I come back, then, to this question. If there was no cash consideration for the note, what *was* the consideration? Dada tells us in his written statement with the utmost candour and abundant circumstantiality of detail. There was no cash consideration; no one has pretended at any stage of this litigation, as far as I have been able to discover, that when this promissory note was made, Dada was in need of money, or that Shambhuprasad had Rs. 3,000 to lend. But if the consideration really was that which is set out in the defendant's case, and that appears to be almost the only possible alternative, it follows that Surajmal knew perfectly well what was the nature of the suit in which he filed the plaint for Bhugwandas, and acted as his Attorney as long as there was any chance of it going through as an uncontested short cause. It is instructive to note Surajmal's conduct in his relation to this suit. I am not sure whether this was or could have been in defendant's knowledge when he wrote the articles, and if it was not, strictly speaking, it ought not to find a place in the reckoning of factors making for or against the defence of fair comment. It was, however, laid before us in argument, and as far as I recollect, no objection was taken. The suit for account brought by Dada against Surajmal was settled by consent ten days before this suit was brought on. The account suit ended thus: Dada withdrew all his objections and surcharges amounting to about Rs. 70,000 and submitted to a decree awarding Surajmal's counter-claim for Rs. 1,300 with costs. All allegations made against Surajmal were withdrawn. It is only upon that last term that I dwell a moment, as possibly explaining the plaintiff's hardihood in persisting in this suit. *Bhagwandas* v. *Dada* was filed as a short cause. Correspondence had already indicated to Surajmal, who was acting as Bhugwandas's Attorney, that Dada meant to repudiate the claim, and, if necessary, fight it on the allegations which were afterwards fully set forth in his written statement. The written statement was only put in at the last moment, when the suit was on for disposal as a short cause. It was then transferred to the long cause list, and very shortly after that Surajmal ceased to act as Attorney for the plaintiff. It is fair argument that he did not like the look of the written statement, and decided that if the suit was going to be fought out, he had better keep out of the contest as much as he could. That was in September, 1915. This may not be such good argument, but it is permissible to doubt whether the suit would have ever come on at all had it not been for the settlement of the account suit. The withdrawal of all allegations in that suit might have heartened Surajmal to go on with this suit. He might have thought that Dada would never persist in these allegations so soon after he had withdrawn a number of other serious allegations in another suit. I say this because I am trying to put myself in the place of a critic about to comment on the suit before Davar, J., just after its dramatic ending. Surely, he would have been asking himself how, if Dada's version was substantially true, as the course and result of the suit seemed to indicate that it was, Surajmal could have had the foolhardiness to press it to a definite issue. Some such explanation as this *may* have suggested itself. That is to say, of course, if the intending critic had really known about the account suit and Surajmal's conduct in Bhugwandas's suit as plaintiff's Attorney.

Be that as it may, the suit did come on in due course. The issues raised at the trial show how deeply Surajmal was implicated. The attempt to prove cash consideration had, as is now conceded all round, failed, and failed ignominiously. If the suit had ended then and there no one need have been surprised, although most people, who took the trouble to read the pleadings and the written state-

ment, would have drawn their own conclusions, and those conclusions would have been uniformly unfavourable to Surajmal. Moreover, he could hardly have supposed that under so vigilant and experienced a Judge his own troubles would have ended with the inglorious collapse of a manifestly false suit, in defending which the most serious charges were brought against himself. The least he could do was to brazen it out as far as he was personally concerned, and by disproving the consideration alleged by defendant indirectly support the tottering case of the plaintiff. Doubtless, he overrated his own ability and resource, as a witness. Members of the legal profession, who are constantly, if Attorneys, suggesting lines of cross-examination, if Counsel, attacking hostile witnesses by that method, usually think themselves very well qualified to face so familiar an ordeal. Experience only too frequently shows what very poor witnesses they make. Surajmal was no brilliant exception. Very soon he began to flounder. His conscience could not possibly have been as clear of offence as he wished the Court to believe. He could only explain his extraordinary answers, months later, by saying that he was frightened. Frightened of what? The point where he broke down most calamitously was upon a chance question whether he had not himself drafted a notice to be sent to himself by Dada's Attorney, D'Cunha. He could not remember. He was frightened. Frightened because he saw papers in Counsel's hands. But if he knew, as he must have known, had this allegation been utterly false, that he had never sent such a notice, that he never would have thought of doing such a thing, there was nothing in a paper flourished before his eyes to frighten him. At this precise moment, just when he must have felt most keenly that he was making a pitiable exhibition of himself, and that there were many worse rocks ahead, the Court rose for the day. On Monday, Surajmal was present in Court. The trial, as everyone thought, was going on and without doubt many were waiting eagerly to hear how Surajmal would acquit himself under further cross-examination. What happens? The plaintiff surrenders unconditionally; consents to a decree dismissing his suit with costs, and the Judge passes it, remarking that the plaintiff had adopted a very wise course. Does Surajmal, who had, in the opinion of one learned Judge, eagerly accepted the first opportunity of vindicating his character, thus displaying the courage of an honest and injured man, raise any protest? Not a word. He lets his character, which his examination so far had certainly not raised, or helped to clear, go at that. When the first of these articles appeared a week later, on the 7th of March, does he protest? He maintains the same cynical indifferent silence which he has the hardihood to explain in the libel action by saying that he did not feel in any way concerned about the suit, or care how it ended. It is only when the second article appears, and he realises that the matter will not be allowed to rest that in sheer desperation, as it seems to me, and self-defence he brings this libel action The first and perhaps the most important question is, whether upon all the facts disclosed in the pleadings and the evidence at the trial before Davar, J., in view of its curious sudden termination, and the Judge's comment, was it a fair inference that, as Dada alleged, Surajmal was the real plaintiff, and the nature of the transaction underlying the promissory note was set out with substantial truth in the written statement? Speaking for myself, I should say unhesitatingly that it was not only fair comment, a reasonable inference, but by far the most probable, and, therefore, the most reasonable inference that could at that time have been drawn. Does any one seriously believe that between Saturday night and Monday morning Surajmal was not consulted? Does any one seriously believe that had he declined to consent to the suit being withdrawn, it would have ended as it did? When I put these questions in this form I mean them to be answered, of course, with reference to the materials before the defendant when he wrote the articles. Remember that the nominal promisee of the promissory note was Surajmal's own clerk. The nominal plaintiff was a man of no substance at all. Presumably whatever information he got for use in supporting his claim he got from his first Attorney, master of his

deceased brother, Surajmal. If such evidence as the plaintiff, thus advised, decided to give was all false, who should have known that better than Surajmal? Who should have known the real truth of the matter better than Surajmal? Who was most interested in refuting the defence set up by Dada, Bhugwandas or Surajmal? With all these considerations before him, would any one have hesitated to conclude that it was Surajmal who decided that the claim had better be dropped before further unpleasant disclosures had to be made? Would any one at that time have hesitated to conclude that in the main at any rate Dada's defence was true? It is common ground throughout all the judgments that it was fair comment to say that the plaintiff's suit was utterly false, and that the withdrawal at the stage when it was withdrawn indicated that the plaintiff knew it, and felt that the defence would, or, at any rate, might, be established, if he persisted. But if the claim as brought was utterly false, and that was a perfectly fair conclusion, it appears to me to be just as fair a conclusion from that that the real plaintiff was Surajmal and not Bhugwandas. Bhugwandas may not have known how the promissory note came to be given to his deceased brother Shambhuprasad, but Shambhuprasad *must* have known. And if it was not given him for cash, as he alleged, he would have had to show what it was given for and what interest he had in it. Does any one suppose that he could have done so after launching the suit on the basis of an ordinary loan transaction, a promissory note for value in cash paid and received? Failing that, what other conclusion was reasonably possible than that defendant's case was substantially true, and that Bhugwandas was the creature of Surajmal, that Surajmal was the only person interested in the consideration for the note, and that the suit was in fact his? It is all very well now to say that had the case gone on Surajmal would have improved under cross-examination, and Dada would have broken down, and failed to prove his defence. That was clearly not the opinion of those in charge of the case. For, had they had any hopes of that kind, it is as certain as anything in human conduct well can be, that the plaintiff would not have been advised to consent to a decree dismissing his suit with all costs. Apart from the charges against Surajmal, what worse fate could have overtaken the plaintiff? True, he might have had to pay costs of one, or, at most, I should think, two more days' hearing. But that was relatively unimportant. As it was, I have since ascertained that his two Attorneys' bills were taxed against him for an aggregate of over Rs. 2,000. So that a few hundreds, more or less, would certainly not have deterred him from fighting to a finish, had it really been his suit, and had he been advised that there was still a fighting chance dependent upon the result of Dada's examination and the conclusion of Surajmal's evidence. And putting myself now in the place of a juryman I feel no doubt whatever what my verdict would have been upon that, now generally conceded to have been by far the most important, part of the libel. There is no question here of any facts untruly stated. There never has been. It is simply a case for a Jury to say whether, upon the facts, it was fair comment to say that the suit was Surajmal's suit and that the case made out by Dada in his written statement was probably true.

I have never felt the least doubt myself that that was perfectly fair comment. As to the rest of the libel I have shown that it contains certainly one fact untruly stated. But whether the cheque was Surajmal's or Tatia Saheb's, is utterly unimportant. I have pointed out that it was a very natural mistake, such a slip as any one might have made. As soon as we dismiss the idea, which pervaded the plaintiff-appellant's argument right up to the end of the hearing, that the defendant was alleging, and had any conceivable reason for alleging, that Surajmal had settled the suit with Dada, without Tatia Saheb's knowledge or consent, the unimportance of the slip is self-evident. Let us suppose that Surajmal had settled the suit for Rs. 9,000 without consulting his principal Tatia Saheb. It would have been a very daring thing to do, and one which Surajmal could not have defended, had Tatia Saheb repudiated the settlement. But he might even then have pleaded that

he so settled in the best interests of his client and in the sure confidence that he would ratify the settlement. Dada's case from the first has been that he expected at least Rs. 20,000 from Tatia Saheb, acting under Surajmal's advice. It is certain, I think, that he would have got some damages. How much was the only question. If Surajmal had ever told Tatia Saheb that Dada meant to insist on a minimum of Rs. 20,000 damages, he might very well have settled for Rs. 9,000, reducing costs proportionately, with the certainty that Tatia Saheb would gladly consent. But I do not believe that it ever entered the head of the defendant to make such an allegation against Surajmal. He was attacking Surajmal. He was holding up his professional conduct to public reprobation. He was pointing out that amongst his tortuous dealings he had first instigated one of his clients, Dada, to file a suit against another of his clients, Holkar, and, then, after, for form's sake, he had sent Dada to another attorney, D'Cunha, he had settled with Dada over the head of D'Cunha. And that he had then written a letter (in this lay the sting of the accusation) to D'Cunha meant to convey a false impression and conceal his unprofessional conduct. There would have been no sense at all that I can see in suggesting that Surajmal had settled this suit without Holkar's knowledge, even supposing any one believed that an Attorney could do anything of the kind. What was charged against him he could do, and as far as I can see, he actually did. Nor was it in itself a very serious matter. No one would have attached any importance to it but for the lying letter which Surajmal next wrote to D'Cunha. To make and bring home that charge two things were necessary: (1) that Surajmal did write the letter. That is admitted. (2) That as between him and Dada no agent of Holkar intervened. In other words, that no agent of Holkar settled the suit with Dada without Surajmal's knowledge, and only after the settlement had been made, informed Surajmal of it. There the defendant had Dada's written statement to go upon; and in addition Surajmal's own evidence given before he realized that any such point was going to be made against him. Both, if true,—and why should the defendant not have believed Surajmal himself upon oath regarding this matter?—conclusively establish the falsity of the letter. It is only by insisting that the sentence "as a matter of fact, etc.", should be wrenched from its context, and read as an isolated statement literally, that the plaintiff can make any show of a grievance out of it. So read and meaning that Holkar never had an agent with Surajmal, it would doubtless be untrue. But I cannot understand how such arguments could be used, in face of the plain meaning of the passage as a whole.

This, again, I consider to be perfectly fair comment. And that disposes of the whole matter, both law and fact. I never was in any doubt, after hearing the Advocate-General's first day's argument, that there was no libel at all. My only anxiety has been to understand how my two learned brethren, Heaton and Macleod, JJ., whose opinions I must respect and acknowldge to be fully as deserving of weight as my own, had come to a contrary conclusion.

I am of opinion that the plaintiff's suit should be dismissed with all costs throughout.

MARTEN, J.—In this libel action the plaintiff, Surajmal, is a Solicitor and the three defendants are or were the editor, printer and proprietor respectively of a newspaper called *The Bombay Chronicle*. The alleged libel relates to Surajmal's professional conduct in two actions, *viz.*, Suit No. 907 of 1912 (*Ashidbai* v. *T. S. Holkar*), which was a suit for damages for breach of contract of sale of real estate; and Suit No. 837 of 1915 (*Bhagwandas* v. *Dada*), which was a suit on a promissory note for Rs. 3,000.

The circumstances giving rise to the alleged libel are as follows: In 1912, Surajmal had two rich clients, *viz*, Tatia Saheb Holkar, whom I will call "Holkar," and Haji Ahmed Haji Hassam Dada, whom I will call "Dada." In that year Holkar sold some land in Nepean Sea Road twice over, *viz.*, *first*, to a purchaser called Khambatta, and, *secondly*, in February 1912, to Ashidbai as Dada's nominee. As regards this second sale which was for Rs. 65,000, Surajmal acted for both the vendor and the purchaser. The first purchaser

Khambatta then brought an action for specific performance against Holkar and obtained a decree therein. In that action Surajmal acted for Holkar.

In August 1912 Dada, by his mother and nominee Ashidbai, brought against Holkar the above Suit No. 907 of 1912 for damages for breach of the contract of February 1912. This suit was settled in January 1914 by Holkar paying Dada Rs. 9,000 as damages. In this suit Surajmal acted for Holkar and a Mr. D'Cunha acted for Dada.

Meanwhile, on the 26th April 1913, Dada had executed a promissory note for Rs. 3,000 in favour of a clerk of Surajmal's, named Shambhuprasad. This clerk died on the 12th June 1914 leaving a brother named Bhugwandas, who claimed the promissory note as a joint family asset to which he was entitled by survivorship.

Subsequently, in July 19 5, Bhugwandas brought against Dada the above suit No. 837 of 1915 to enforce the promissory note. In this suit Surajmal acted for Bhugwandas until September 1915, when there was a change of Solicitors, Messrs. Hiralal, Mehta & Co. thenceforth acting for Bhugwandas. Dada also changed his Solicitors, being represented at first by Vachha & Co. and afterwards, *viz.*, in February 1916, by Ardeshir, Hormusji, Dinsha & Co.

The written statement in that suit was declared on the 17th August 1915 and raised a startling defence, which in effect was as follows:—Dada alleged that Surajmal had instigated him to bring the 1912 suit; that Surajmal promised he would influence his client Holkar to pay Rs. 20,000 to Rs. 25,000 as damages; that Surajmal was to be paid by Dada Rs. 3,000 if such damages were in fact obtained; that the promissory note was in respect of such Rs. 3,000 and was passed in the name of Surajmal's clerk Shambhuprasad as nominee for Surajmal, who, it was submitted, was a necessary party to the suit; that as only Rs. 9,000 had been obtained as damages, Dada was not liable on the promissory note and had received no consideration therefor, and he accordingly counterclaimed for its cancellation and delivery up.

This, then, was the position when the 1915 suit came on for trial before Davar, J., on Saturday, 26th February 1916, and it will be seen that the suit involved issues of a very grave character for Surajmal, although he was not a party to the proceedings and was no longer on the record as Solicitor for the plaintiff. At the trial the plaintiff in that suit proceeded to call his evidence although the onus would appear to have been on his opponent. His first two witnesses claimed to have been present at the execution of the promissory note and the payment of the Rs. 3,000, but appear to have been seriously shaken in cross examination. Then Surajmal was called and after denying in examination-in-chief the allegations made against him was partly cross-examined by Mr. Davar, when he soon showed a somewhat surprising ignorance as to what advice he had given Dada when told of Khambatta's prior contract of sale: and as to whether he had drafted a notice for Dada to send to Holkar: and as to whether he had advised Dada to go to another Solicitor. Stopping here for a moment, I must respectfully dissent from Mr. Justice Macleod's criticism of this cross-examination. In my opinion Mr. Davar was quite entitled to ask the questions he did, and I may further observe that before us the Advocate-General expressly declined to put forward any contention to the contrary. In fact the cross-examination was never finished, as on the Monday morning (28th February 1916) the suit was abruptly withdrawn, and according to the newspaper report, Exhibit S, the Judge observed that it was an extremely wise step to take and ordered that the suit should be dismissed with costs. Surajmal appears to have acquiesced in this, notwithstanding that the Saturday's proceedings had been reported in the public press. At any rate he made no sign. Even the first alleged libel which was published on the 7th March elicited no response from him, and it was not till after the publication on the 15th March of the second alleged libel that an apology was asked for and the present suit instituted. It is also noteworthy that in cross-examination in the present suit, after stating that he was not surprised at Counsel's statement to the Court that

the 1915 suit was going to be dismissed, Surajmal added, "I was quite indifferent as I was not concerned."

As regards the alleged libellous articles, they have been read and re-read several times over and I do not think it necessary to repeat them. It will be seen that they demand an enquiry by the proper authorities into Surajmal's conduct in relation to the 1912 and 1915 suits, and in particular as to (1) the charge that the promissory note for Rs. 3,000 was in effect a secret commission or bribe taken by Surajmal as the price for giving his client Holkar certain advice and that the 1915 suit was a false suit engineered by Surajmal; and (2) the charge that Surajmal settled the 1912 suit over the head of Dada's Solicitor and then by his letter of the 19th January 1914 endeavoured to create the false impression that the parties themselves had settled the suit.

Of these two charges, the first is by far the most serious. The second is little more than an alleged breach of professional etiquete, apart from the interpretation to be put on the letter of 19th January 1914.

The defence is substantially one of fair comment. In particular the defendants do not contend that charge No. 1 is true. As regards charge No. 2 they justify some of the details obtained *aliunde*, and for this purpose rely on paragragh 6 of the written statement.

The legal principles governing a defence of fair comment are set out by Lord Ludlow in *South Hetton Coal Company* v. *North-Eastern News Association* (7), by Lord Cozens-Hardy in *Hunt* v. *Star Newspaper Company, Limited* (2) and by Lord Atkinson in *Dakhyl* v. *Labouchere* (4) and have been cited again in the Court of Appeal in *Walker* v. *Hodgson* (17). I need not repeat them. It is sufficient to say that in the present suit the Advocate-General accepted Lord Cozens-Hardy's view in *Hunt* v. *Star Newspaper Company, Limited* (2) that the statement of facts must be substantially true, and did not rely on the literal interpretation of Lord Collins' judgment in *Digby* v. *Financial News, Limited* (1), which is to the effect that there must be no misstatement of fact whatever.

Turning then to the first charge, there is one clear misstatement of fact, for it was not Surajmal but Shambhuprasad, who was alleged to have said it would not look good for the promissory note to be in Surajmal's name. The misstatement is not, however, pleaded nor was it raised at either the trial or the first appeal; and before us the point was only taken as the result of a remark from the Bench towards the close of the Advocate-General's opening speech. Under all the circumstances I think that the misstatement, even if now admissible, must on the plaintiff's own showing be regarded as too minute or trivial for him to rely on as defeating the plea of fair comment.

The Advocate-General largely relied on the fact that the article omitted to mention Surajmal's denial of the charge in examination-in-chief. The article shows, however, that he was being cross-examined and I think one would infer that he had previously denied the charge. Otherwise why was he called and what need would there be to cross-examine him?

I have carefully considered all the other points raised on Surajmal's behalf, *e.g.*, as to the words "creature," "little doubt," "content to have the case withdrawn," and "the...allegations...left unrefuted." But as Sir Basil Scott pointed out in his judgment, we must consider what the writer of the article knew at the time, and must disregard matters subsequently proved or alleged in the present suit. At that time the writer had not before him Surajmal's evidence in the present suit. But he did have before him Surajmal's conduct on the withdrawal of the 1915 suit. I quite recognise that a lawyer may remember the saying: "No case, abuse the plaintiff's Attorney" and may properly be slow to take offence. But a line must be drawn somewhere and I think it may be drawn at a charge of fraud. Speaking for myself. I regard it as almost inexplicable for any respectable Solicitor to behave like Surajmal did in making no protest or appeal whatever either to the Judge or to the Law Society, so that his character might be cleared of the charges of fraud made against him. Surajmal's own ex-

(17) (1909), 1 K. B. 239; 78 L. J. K. B. 193; 99 L. T. 902.

planation, *viz.*, that he was quite indifferent as he was not concerned, demands in itself an explanation, but this, of course, was said in the present suit and was not before the writer of the article and I, therefore, merely use it as showing that even now no real explanation has been given of Surajmal's silence. In my judgment, therefore, the writer was justified in drawing very adverse inferences from Surajmal's behaviour and from the Judge's comment that it was extremely wise to withdraw the suit.

There is, too, another important consideration. The story as to the cash consideration for the promissory note having broken down at the trial, how came it that Dada signed this promissory note in favour of Surajmal's clerk at a time when he was engaged in litigation with a client of Surajmal's, *viz.*, Holkar? Dada's story is in effect that it was a bribe. There is no other explanation even now of this promissory note, which admittedly is a genuine document. I recognise that Surajmal, if innocent, would not know the real origin of the promissory note, *e.g.*, if it was part of a fraudulent scheme concocted by the deceased clerk alone. But this possibility has to be taken into consideration with the other circumstances of the case, and the unexplained origin of the promissory note is, in my opinion, a matter from which an adverse opinion could fairly be drawn. In saying this I have not overlooked the fact that Dada on his own showing was in effect an accomplice in the attempted fraud on Holkar, and that Nanabhoy from whom the defendants obtained some information was a discharged clerk of Surajmal and on hostile terms with him. A fair critic would, therefore, regard anything these men said with caution, and in fact Dada has never gone into the witness-box and Nanabhoy at the present trial was shown to be an unreliable witness. The case does not, however, depend on whether the statements of these two men were all true.

Looking, then, at the articles as a whole, and after giving my best consideration to the judgments at the trial and on the first appeal, I think the articles did not exceed the bounds of fair comment as regards the first and graver charge I have mentioned.

As regards the second charge, it is true that the defendant Horniman amplified the allegations made in paragraph 4 of the written statement in the 1915 suit and relied on matters contained in "observations for Counsel," which in fact were not before Counsel at the trial. But if in consequence of this it becomes necessary to justify, I think Surajmal did in effect settle the 1912 action over Mr. D'Cunha's head. Even on his own showing his clerk Nanabhoy brought about the settlement in company with Holkar's agent Vinayakrao. Surajmal further admits having drafted the letter, Exhibit 2, which Mr. D'Cunha's client was to send to Mr. D'Cunha informing him of the settlement of the suit. I also think that Surajmal's letter of the 19th January 1914, Exhibit F, was in such terms as to give Mr. D'Cunha the erroneous impression that the parties themselves had settled the suit. Under these circumstances I am not disposed to regard as vital any inaccuracy in the passage "as a matter of fact there was no intervention on the part of any agent at all." It is clear that no agent was acting for Dada in the settlement. It is also clear that Surajmal by himself or his clerk Nanabhoy took part in that settlement, and that Surajmal either knew of the settlement himself or was informed of it by Nanabhoy. That being so, why write to Mr. D'Cunha, "We are informed by our client's agent," meaning thereby Vinayakrao, unless it was to create a wrong impression? Under these circumstances, I think that even if the passage alleges in effect that Vinayakrao gave no information or assistance, it is not of a sufficiently substantial character to defeat either the plea of fair comment or that of justification. So too, as regards the statement that Surajmal gave his own cheque this is not true but is either a fair inference from Dada's written statement or, if not, is unimportant in the view I take of the case.

There are other points in connection with this second charge which have been raised in argument and duly considered by me, including what I have already said about the unreliability of Nanabhoy, but looking again at the articles as a whole

and on a full consideration of the circumstances, I think the defendants succeed on this second charge as well as on the first.

In the result, therefore, I think that the plaintiff's appeal should be dismissed and the defendants' cross-appeal as to costs allowed, the effect being that the action will be dismissed and that the plaintiff will pay the costs of the action and of both appeals and will refund any costs already paid to him.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1707 OF 1916.

April 4, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

SHIB NARAIN HAZRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 15 (2), 29 (1) (b)—Bengal Tenancy Act (VIII B. C. of 1885), ss. 104 H, 184, 185—Civil Procedure Code (Act V of 1908), s. 80—Suit under s. 104H, Bengal Tenancy Act, against Secretary of State—Notice under s. 80, Civil Procedure Code—Limitation—Period of notice, whether can be deducted—Local Act—Interpretation of Statutes.

In computing the period of limitation for a suit instituted under the provisions of section 104H, Bengal Tenancy Act, against the Secretary of State, the plaintiff is not entitled under section 15 (2) of the Limitation Act to deduct the two months in respect of the notice required by section 80, Civil Procedure Code. [p. 505, col. 1.]

The Bengal Tenancy Act is a Local Act to which the saving clause in section 29 (*b*) of the Limitation Act applies. [p. 504, col. 2.]

The Bengal Tenancy Act has always been regarded as a self-contained Act on the subject of limitation even as regards periods of limitation prescribed by it to which sections 184 and 185 are inapplicable. [p. 504, col. 2; p. 505, col. 1.]

In interpreting the plain words of a positive enactment any suggestion of hardship is out of place. [p. 505, col. 1.]

Appeal against the decree of the District Judge of Midnapore, dated the 13th of May 1916, affirming that of the Subordinate Judge, 2nd Court of that district, dated the 25th of February 1915.

Babu *Ram Charan Mitter*, for the Appellant.

Sir *Rash Behari Ghose*, Babus *Sajani Kanta Sinha* and *Saroda Charan Maity*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This is an appeal by the Secretary of State in a suit brought against him by the plaintiffs under the provisions of section 104H of the Bengal Tenancy Act.

As the suit was not instituted within the period of six months prescribed by clause (2) of the section, it is contended for the Secretary of State, and has been contended throughout, that the suit is out of time. The Courts below have overruled this plea of limitation, on the ground that the plaintiffs are entitled under section 15 (2) of the Limitation Act of 1908 to a deduction of two months in respect of the notice which section 80 of the Civil Procedure Code required them to give to the Secretary of State or his representative before they could present their plaint. The question is whether the view so taken is right or wrong.

The precise point which arises was determined in the Secretary of State's favour by the judgment of this Court in Appeal from Appellate Decree No. 405 of 1914 (decided by Mookerjee and Walmsely, JJ., on the 22nd August 1917) and since reported as *Secretary of State* v. *Gangadhar Nanda* (1). The learned Government Pleader relies on that decision. On the other side, it has been strenuously urged by Sir Rash Behari Ghose that the decision is inconsistent with other decisions of the Court said to be in *pari materia* and that it ought to be referred to a Full Bench.

The argument turns on the division of the Limitation Act into parts with separate headings—Part II being headed "Limitation of Suits, Appeals and Applications" and Part III "Computation of Period of Limitation" and on the effect of the saving clause enacted in section 29 (1) (*b*), "Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any

(1) 45 Ind. Cas. 228; 27 C. L. J. 374.

special or local law now or hereafter in force in British India." It is said that that clause applies expressly to the period of limitation and does not necessarily make Part III, relating to computation of the period, inapplicable to a special period of limitation prescribed by a special or local law. It is not suggested that the provisions in Part III can be aptly described as general principles of law, but it is argued that it is a question of construction in each case whether the Legislature intended (without expressly saying so) that the special period of limitation specially prescribed should or should not be subject to those provisions.

Now I confess that I find the argument at the outset somewhat difficult to follow. To my mind the provisions of Part III do affect the periods of limitation prescribed in the Act itself by section 3, which is the first and the enacting section in Part II. Section 3 begins with the words "Subject to the provisions contained in sections 4 to 25 (inclusive)", those sections comprising the remainder of Part II and the whole of Part III. Stopping there, it hardly seems that Part II and Part III can be differentiated in the manner which the argument requires. The section as a whole enacts that subject to the provisions specified, "every suit instituted.....after the period of limitation prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence." It may well be that where a period of limitation is prescribed by a special or local law, a suit need not be dismissed if limitation is not set up as a defence, but I find it difficult to say that the application of the provisions of Part III to such a period would not "affect" it.

We were referred, however, to a number of authorities, decided for the most part under Acts prior to the present Limitation Act. Under Act IX of 1871, the saving clause relating to a period of limitation prescribed by local or special law ran:— "Nothing herein contained shall affect such law." Under Act XV of 1877, it was—"Nothing herein contained shall affect or alter the period so prescribed." Apparently it was held that this change in the language had the effect of making the provisions in the latter Act, relating to the computation of the period of limitation, applicable, in the absence of any reason for holding the contrary, to special and local laws prescribing special periods of limitation. [Compare *Purran Chunder Ghose* v. *Mutty Lall Ghose Jahira* (2), decided under Act IX of 1871, with the following cases decided under Act XV of 1877, *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (3), *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas* (4), *Hossein Ally* v *Donzelle* (5), *Khoshelal Mahton* v. *Gunesh Dutt* (6), *Ni abutoolla* v. *Wazir Ali* (7) and *Khetter Mohun Chuckerbutty* v. *Dina Bashy Shaha* (8).] These cases or some of them have been cited in later cases as authority for the rule of construction which they appear to lay down. But the rule has by no means gone unchallenged.

It was not followed in *Girija Nath Roy Bahadur* v. *Patani Bibee* (9) in regard to suits for arrears of rent under Bengal Act VIII of 1869. In connection, however, with previous cases, a distinction was there suggested between the application of the provision corresponding to that contained in section 4 of the present Limitation Act and the application of other provisions which have the effect of extending the period of limitation in particular circumstances. Section 4 provides for the case where the Court is closed when the period of limitation expires and extends the period to the day when the Court re-opens. The distinction bore fruit and led to what may be roughly called the rule of the *dies non*, laid down in *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (10) and *Peary Mohun Aich* v. *Anunda Charan Biswas* (11). Even this rule has not escaped criticism from high authority [*Ahad Baksh* v. *Babar Ali* (12) and *Sheodas* v. *Narayan Asaji* (13)]. The rule, however, has received legislative recognition in the

(2) 4 C. 50; 2 C. L. R. 543; 2 Ind. Dec. (N. S.) 33.
(3) 5 C. 110; 4 C. L. R. 371; 2 Ind. Dec. (N. S.) 681.
(4) 5 C. 314; 2 Ind. Dec. (N. S.) 811.
(5) 5 C. 906; 6 C. L. R. 239; 2 Ind. Dec. (N. S.) 1185.
(6) 7 C. 690; 3 Ind. Dec. (N. S.) 992.
(7) 8 C. 910; 10 C. L. R. 333; 7 Ind. Jur. 84; 4 Ind. Dec. (N. S.) 587.
(8) 10 C. 265; 5 Ind. Dec. (N. S.) 178.
(9) 17 C. 263; 8 Ind. Dec. (N. S.) 713.
(10) 18 C. 231; 9 Ind. Dec. (N. S) 154.
(11) 18 C. 631; 9 Ind. Dec. (N. S.) 421.
(12) 14 Ind. Cas. 173; 16 C. W. N. 721.
(13) 12 Ind. Cas. 811; 36 B, 268; 13 Bom. L. R, 1153.

General Clauses Act in respect to Acts passed by the Indian Legislative Council since 1887 (section 7, Act I of 1887, section 10 of Act X of 1897: *cf.* also Bengal Act I of 1899, section 12).

In *Nagendra Nath Mullick* v. *Mathura Mahun Parhi* (14), a Full Bench held that section 14 of the Act of 1877, corresponding to the same section of the present Act, had no application to suits for arrears of rent under Act No. X of 1859.

In *Abdul Hakim* v. *Latifunnessa Khatun* (15) it was similarly held that section 14 did not apply to a suit brought under section 77 of the Registration Act (III of 1877). It was said that *Khetter Mohun Chuckerbutty* v. *Dina Bashy Shaha* (8) could not stand beside the Full Bench case of *Nagendra Nath Mullick* v. *Mathura Mahun Parhi* (14). The decision in *Matabbar Mollah* v. *Shoshi Bhushan* (16) is referable like *Nijabutoolla's case* (7) to the rule of the *dies non*.

The rule in the wider form has not fared well at the hands of Full Benches in Madras: see *Venkata* v. *Chengadu* (17), *Veeramma* v. *Abbiah* (18) and *Abu Bakr* v. *Secretary of State* (19). The decision of the learned Judges in *Srinivasa Aiyangar* v. *Secretary of State* (20) seems to me, if I may say so with respect, to be inconsistent with the Full Bench decisions, at any rate, those in the two later cases.

In *Guracharya* v. *President, Belgaum* (21) the earlier Calcutta cases were followed, but in *Queen-Empress* v. *Nageshappa Pai* (22) more sober counsels prevailed. This last case, however, was under the Criminal Procedure Code.

The case of *Moro Sadashiv* v. *Visaji Raghunath* (23) relates to minors. It was not followed in *Rebala Remana Reddi* v. *Rebala Babu Reddi* (24), where the point was more fully considered. Both these were decisions on the Civil Procedure Code.

It is true that in *Dropadi* v. *Hira Lal* (25), where the question arose under the Provincial Insolvency Act (No. III of 1907), a Full Bench of the Allahabad High Court seems to have returned to the earlier cases for guidance. But of the six cases to be found in the Calcutta series from 5 Calcutta to 10 Calcutta, four are referable to the rule of the *dies non*, one [*Nijabutoolla* v. *Wazir Ali* (7)] has been held to be overruled and the remaining one [*Behari Lall Mookerjee* v. *Mungolanath Mookerjee* (3)] also falls in view of the Full Bench decision in *Nagendra Nath Mullick* v. *Mathura Mahun Parhi* (14). Since that decision and the previous decision in *Girija Nath Roy Bahadur* v. *Patani Bibee* (9), the general provisions of the Limitation Act have not been applied to the various Rent Acts which have been in force in Bengal.

Some stress was laid by Sir Rash Behari on the ruling of the Privy Council in *Phoolbas Koonwur* v. *Lalla Jogesh Sahoy* (26). That decision turned on the construction of the Civil Procedure Code of 1859 (Act No. VIII of 1859) in reference to the Limitation Act of the same year (Act No. XIV of 1859). These Acts, of course, were clothed in their own language. The applicability of the general provisions of the present Limitation Act to special periods of limitation prescribed by the present Civil Procedure Code raises another question, which may perhaps depend in some degree on the further question whether the Civil Procedure Code is to be classed as a "special" or "local" law within the meaning of the saving clause in section 29 (*b*) of the present Limitation Act. [*Dropadi* v. *Hira Lal* (25).] In any case the decision relied upon has no bearing on the question before us which arises under the Bengal Tenancy Act. There is no dispute that that is a Local Act to which the saving clause of the Limitation Act applies.

Moreover, whatever may be said about other Acts, in view of sections 184 and 185 and Schedule III, the Bengal Tenancy Act has always been regarded as a self-

(14) 18 C. 368; 9 Ind. Dec. (N. S.) 246 (F. B.).
(15) 30 C. 532; 7 C. W. N. 550.
(16) 12 Ind. Cas. 33; 16 C. W. N. 20.
(17) 12 M. 168; 4 Ind. Dec. (N. S.) 467 (F. B.).
(18) 18 M. 99; 6 Ind. Dec. (N. S.) 418 (F. B.).
(19) 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132; 20 M. L. J. 283 (F. B.)
(20) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.
(21) 8 B. 529; 4 Ind. Dec. (N. S.) 727.
(22) 20 B. 543; 10 Ind. Dec. (N. S.) 927.
(23) 16 B. 556; 8 Ind. Dec. (N. S.) 836.
(24) 18 Ind. Cas. 586; 37 M. 186; 24 M. L. J. 96; 13 M. L. T. 79; (1913) M. W. N. 114.
(25) 16 Ind. Cas. 149; 34 A. 496 at p. 500; 10 A. L. J. 3.
(26) 3 I. A. 7 at p. 24; 1 C. 226 at p. 241; 25 W. R. 285; 3 Sar. P. C. J. 573; 3 Suth. P. C. J. 236; 1 Ind. Dec. (N. S.) 144 (P. C.).

contained Code on the subject of limitation, even as regards periods of limitation prescribed by it to which sections 184 and 185 are inapplicable [*Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (27), *Kamal Krishna Kundu* v. *Kedar Nath Kundu* (28) and *Radha Shyamkar* v. *Dinabandhu Biswal* (29)].

On the question whether an Act embodying the law on a particular subject is or is not complete in itself, there are always the observations of Lord Herschell in *Bank of England* v. *Vagliano* (30), to which Lord Macnaghten referred in connection with section 188 of the Bengal Tenancy Act in the course of the argument in *Jatindra Nath* v. *Prasanna Kumar* (31).

The language of section 104 in the present respect is not ambiguous and in interpreting the plain words of a positive enactment such as this, any suggestion of hardship is out of place. It was argued that if the period of limitation had been two months the plaintiffs could not have sued at all. Possibly that is why the Legislature chose the longer period of six months. If the prescribed period had been twelve months, instead of six, the same plea of hardship would have been put forward.

In my opinion, therefore, the decision in the unreported case*, which is binding on us, is not inconsistent, but consistent, with the current of authority, and it would serve no useful purpose to make a reference to a Full Bench.

The learned Government Pleader informed us that subject to the maintenance of the rent assessed by the Settlement Officer, he had no objection to the plaintiffs being described in the Record of Rights as occupancy *raiyats* in place of the present description 'tenure-holders'. It may be well, however, to add that if there are tenants under the plaintiffs, they are not parties to this litigation and are not bound by the result of it.

The result is that this appeal should be allowed in part. The judgments and decrees of the Courts below must be discharged so far as they vary the rent settled by the Settlement Officer, but the Record of Rights should be altered in the manner agreed to by the Government Pleader. No order as to costs.

WALMSLEY, J.—I agree.

Appeal partly allowed.

(27) 29 C. 813.

(28) 3 Ind. Cas. 34; 10 C. L. J. 517.

(29) 20 Ind. Cas. 760; 18 C. W. N. 31; 18 C. L. J. 533.

(30) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

(31) 8 Ind. Cas. 842; 38 I. A. 1 at p. 4; 15 C. W. N. 74; 9 M. L. T. 1; 13 C. L. J. 51; 8 A. L. J. 1; 13 Bom. L. R. 1; 21 M. L. J. 92; 38 C. 270; (1911) 2 M. W. N. 119 (P. C.).

*Since reported as *Secretary of State* v. *Gangadhar Nanda*, 45 Ind. Cas. 228, 27 C. L. J. 374.—*Ed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 839 OF 1917.

March 7, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

BALASUNDARA PANDIAM PILLAI—
—PLAINTIFF—APPELLANT

versus

AUTHIMULAM CHETTIAR—
DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 39—Limitation Act (IX of 1908), Sch. I, Art. 91—Cancellation of instrument, suit for—Limitation, starting point of.

The word 'entitled' in Article 91 of Schedule I of the Limitation Act means entitled by law, *i.e.*, under section 39 of the Specific Relief Act. [p. 506, col. 1.]

In a suit for cancellation of a document time will begin to run from the time when plaintiff becomes aware of facts which create in him a reasonable apprehension that he will suffer injury if the document be left outstanding. [p. 506, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 104 of 1916, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 362 of 1915.

JUDGMENT.—The right to bring a suit to have a document adjudged void and to have it cancelled is governed by section 39 of the Specific Relief Act. One of the provisions in this section is that the person suing must have reasonable apprehension that the instrument, if left outstanding, may cause him serious injury. Under Article 91 of the Limitation Act time begins to run when the facts "entitling" the plaintiff to have the instrument cancelled or set aside be-

come known to him. We think that the word "entitled" must be interpreted as meaning "entitled by law," *i.e.*, under section 39, Specific Relief Act, for we can find no other provision of law which gives a right to bring such a suit to avoid an injury before it is suffered. This is the view taken in *Singarappa* v. *Talari Sanjivappa* (1) and according to it the period of limitation in the present case began to run, not when the facts which would render the document invalid became known to plaintiff, but when he became aware of facts which aroused a reasonable apprehension that he would suffer serious injury if the document were left outstanding. The plaintiff says he felt this apprehension when the document was registered, and we can see no circumstances to justify us in finding that he must have had a reasonable apprehension before that date. If the date of registration is taken as the starting point for limitation, the suit is within time. We accordingly set aside the decree of the lower Court and remand the suit to the District Munsif for disposal on the merits. Costs will abide the result.

Appeal allowed; Case remanded.

M.C.P.

(1) 28 M. 349; 15 M. L. J. 228.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 253 OF 1917.

July 12, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

Sreemati THANDAMOYEE DASI—PLAINTIFF—APPELLANT

versus

Srimati GOONAMANI DASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s 23—Public policy—Agreement to refer non-compoundable case to arbitration—Award, whether can be enforced.

On a complaint of cheating being lodged by the plaintiff against the defendants, the Magistrate referred the case to a gentleman for enquiry with the suggestion that perhaps he would be able to effect a settlement between the parties The parties then agreed to refer their difference to arbitrators and the Magistrate on being informed of this dismissed the complaint. The arbitrators made an award in favour of the plaintiff and the latter applied to have it filed:

Held, that the award was not enforceable, as the agreement to refer to arbitration was invalid having been made to stifle a prosecution. [p. 507, col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 25th of May 1916, affirming that of the Munsif, 2nd Court at Serampore, dated the 29th May 1915.

FACTS appear from the judgment.

Babu *Manmatha Nath Roy*, for the Appellant.—The Court of Appeal below was wrong in holding that as the agreement to refer to arbitration was entered into in order to stifle a criminal prosecution, the award was invalid. No criminal prosecution began when the parties went to arbitration. The criminal case was dismissed for non appearance under section 203, Criminal Procedure Code.

It was wrong for the Court below to say that the object of the agreement was to stifle criminal prosecution, because at the time when the parties went to arbitration process in the criminal matter had not been issued and there are rulings of your Lordships' Court to show that in such cases it cannot be said that a criminal case has yet begun. Reference to arbitration and the award are valid in law inasmuch as (1) no prosecution was commenced at that time; (2) the Deputy Magistrate himself helped to have the matter settled. As the suggestion of a settlement came first from the Magistrate and as he mentioned the case as being of a civil nature and as it was finally dismissed under section 203, Criminal Procedure Code, it was wrong for the Court of Appeal below to say that the arbitration was to stifle a criminal prosecution.

Secondly, as no process was issued the criminal case could not be said to have been started. No criminal prosecution can be said to have commenced until and unless a process is issued under section 204, Criminal Procedure Code. *Golap Jan* v. *Bhola Nath* (1) referred to. In *Rai Charan Purkait* v. *Amrita Lal Gain* (2) the reasoning of the Judges is that if a criminal prosecution is pending and if the object of the parties

(1) 11 Ind. Cas. 311; 38 C. 880 at p. 887; 15 C. W. N. 9.7.

(2) 5 Ind. Cas. 98; 11 C. L. J. 131 at p. 133.

referring to arbitration is to stifle prosecution, then the award is invalid, otherwise not. Hence *Rai Charan Purkait* v. *Amrita Lal Gain* (2), on which the lower Court relied, is distinguishable from this case. *DeRozario* v. *Gulab Chand Anundjee* (3) referred to.

The five arbitrators who are respectable gentlemen were unanimous in their award.

Babus *Dwarka Nath Chakraburtty* and *Charn Chunder Bhatt charjiya*, for the Respondents.—The agreement for submission to the award of arbitrators was an invalid agreement and was entered into by pressure. The principle of law is that if a person is under a shadow of a criminal case and if some agreement is entered into to stifle that criminal case, such agreement is invalid *Rai Charan Purkait* v. *Amrita Lal Gain* (2) referred to. If the result of the agreement is to stop the criminal case then it is invalid. As Mr. Justice Mookerjee points out in that case, when the object of the agreement is to stifle criminal prosecution it is in essence a bargain and hence against public policy. The award of the arbitrators shows that my client was guilty of cheating which is a non-compoundable offence. When the arbitrators got notice of the criminal case, it was their duty not to proceed further and they were *functus officio* and by making the award they acted beyond jurisdiction.

Babu *Manmatha Nath Roy*, in reply.—As for the contention of my learned friend that when there is a complaint against a person, he ceases to be a free agent, I submit such a contention is not correct, because it is not a fact that whenever a complaint is made even without the issue of summons, the accused ceases to be a free agent.

The question arises whether in a criminal case in which processes are not issued, the parties can enter into arbitration before such issue of processes and whether the award in such an arbitration would be valid. The arbitrators were quite justified in making the award even after notice of the criminal case.

JUDGMENT.

WALMSLEY, J.—The plaintiff, now appellant, brought the suit out of which this appeal arises for the purpose of having an award passed by certain arbitrators filed. The plaintiff instituted a criminal case on 7th August 1913 against the defendants making various charges, the principal one being that they had persuaded her to execute a document which she meant to be a *benami* document but which they subsequently treated as a genuine deed of sale. The Magistrate referred the case to a gentleman living in the neighbourhood for enquiry, with the suggestion that herhaps he would be able to effect a settlement between the parties. On 31st August an *ekrarnama* was drawn up by which the parties agreed to refer their difference to arbitrators. They informed the Magistrate of this and on 1st October the complaint was dismissed. The result of the arbitrators' meeting was an award in favour of the plaintiff, and it is this award that she now seeks to get enforced. The main defence taken by the defendants is that the agreement was invalid because it was made in order to stifle a prosecution; and this defence has been upheld by both the lcwer Courts.

It is contended before us that, as a matter of fact, no prosecution had been started because no process had been issued; and our attention has been drawn to two cases where the suit was in the nature of a suit for damages for malicious prosecution. There it was held that mere filing of a complaint did not amount to a prosecution, but no useful analogy can be drawn from such cases. Here the point for consideration is whether the defendants, in coming to an agreement, did so under the pressure of an imminent criminal case. It is also urged that the Magistrate himself suggested the reference to arbitrators; but that I think cannot make any difference A third suggestion is that, although section 417, Indian Penal Code, is one of the sections mentioned at the head of the complaint, there is, in substance, no allegation of cheating. In the written complaint the allegation is distinctly thin; but in the complaint recorded by the Magistrate it comes out quite clearly. The gist of the accusation in the complaint was that the defendants persuaded the complainant to execute a *benami* document, but directly she had done so they turned round and asserted they had actually bought the property. There can, therefore, be no doubt that there was an allegation of cheat-

(3) 6 Ind. Cas. 877; 37 C. 358.

RAJADA v. GHULLA.

ing; and cheating is an offence which is not compoundable under the Criminal Procedure Code.

It follows on these findings that the case comes within the scope of section 23 of the Contract Act as explained by illustration (*b*); and I am fortified in this view by the decision to which reference is made by the learned Munsif. In my opinion, therefore, the Courts below have taken a correct view of the case. The appeal must be dismissed with costs, hearing fee two gold *mohurs*.

PANTON, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2926 OF 1914.

August 6, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

RAJADA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GHULLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit on behalf of minor, when permissible—Minor, benefit of—Court, duty of, to protect interests of minor.

Courts should be very jealous of the interests of minors and should not allow a suit or part of a suit instituted on a minor's behalf to be withdrawn without being satisfied that it is for his benefit. [p. 510, col. 1.]

In a suit for a declaration that the sale of certain land will not affect the plaintiffs' reversionary rights, it appeared that the plaintiffs had in their minority sued along with certain others for the same relief asking in the alternative for pre-emption of the land sold and that, subsequently there had been an amendment of the plaint by which the other plaintiffs alone claimed pre-emption, it being stated that the minor plaintiffs had no money with which to pre-empt. Later on an application was presented by all the plaintiffs for permission to withdraw the prayer for declaration. The Court did not give its permission, nor did it consider whether the withdrawal was for the benefit of the minors. The case proceeded and eventually a decree for pre-emption was passed in favour of the adult plaintiffs, but by mistake the names of all were entered in the decree:

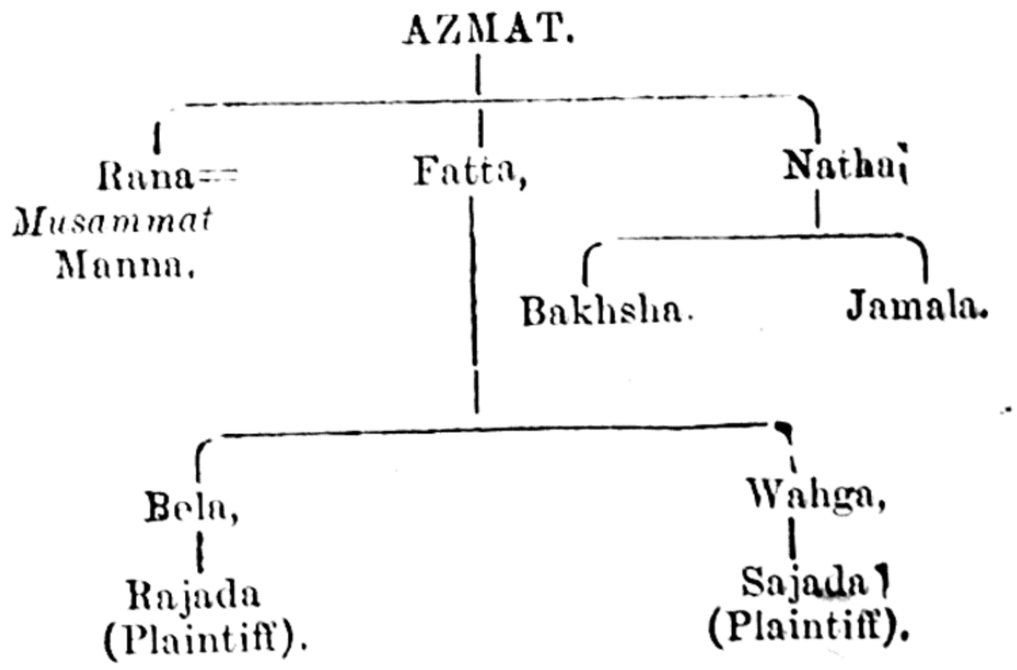
Held, that inasmuch as no reason was given by the next friend for withdrawing the suit on behalf of the minors, nor was the Court asked to allow the plaintiffs to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter of such part, nor was the interest of the minors considered, the minors were entitled to bring a separate suit for the relief which was abandoned in the previous suit. [p. 509, col. 2; p. 510, col. 1.]

Second appeal from the decree of the Additional Judge, Lahore, dated the 31st August 1914, affirming that of the Subordinate Judge, 1st Class, Lahore, dated the 10th June 1914, dismissing the suit with costs.

Lala *Durga Das*, for the Appellants.

Lala *Mathra Das*, for the Respondents.

JUDGMENT.—In order to understand the facts of the present case the following pedigree table will be found useful :—



On the 2nd June 1908 *Musammat* Manna, Bela and Wahga sold 800 *kanals* of land to Ghulla, defendant respondent, for Rs. 6,000. On the 25th May 1909 a suit was brought by Bakhsha and Jamala, adults, and Rajada and Sajada, minors, through Bakhsha, their next friend, for a declaration that the sale would not affect their reversionary rights; and in the alternative they asked for pre-emption of the land sold. In November 1909 there was an amendment of the plaint by which Bakhsha and Jamala alone claimed pre-emption, it being stated that the minor plaintiffs had no money with which they could pre-empt. Subsequently on the 20th March 1911, an application was presented by the plaintiffs for permission to withdraw the prayer for declaration. No reason, however, was given for this application. It came up before the Court on the 6th May 1911; but as the plaintiffs were not present in person, the hearing was adjourned until the 8th May. On that date Jamal Din stated that he did not wish for a declaratory decree

but only for pre-emption. Bakhsha, plaintiff, stated, "I relinquish the claim to a declaratory decree for myself and for the minors." The Court did not give its permission for the withdrawal of this part of the claim, nor did it purport to consider whether the withdrawal was for the benefit of the minors; it recorded an order to the effect that costs would be considered at the time of the final order. The case was then proceeded with and eventually a decree was given for pre emption of the land in favour of Jamala and Rajada; but in the decree by mistake the names of all the four plaintiffs were entered. Jamala and Rajada appealed for reduction of the price as fixed by the Court. But eventually their suit was dismissed on the ground that they had not paid the sum ordered within the time fixed by the Court. Rajada and Sajada have now brought the present suit for a declaration to have the same alienation of land declared invalid as against them.

The Courts below have dismissed the suit on the ground that the plaintiffs were bound by the withdrawal of part of the previous suit on 8th May 1911, and the plaintiffs have thereupon filed a second appeal in this Court. It is contended on their behalf that the withdrawal does not bind them, mainly because it was without the leave of the Court, which did not consider whether it was in the interests of the minors. In the plaint in the present suit the previous suit was altogether ignored, no mention whatever being made of it. The defendant Ghulla, however, in his pleas referred to the previous suit; but plaintiffs were not called upon to put in any replication to his pleas; nor were they or their Counsel orally examined in respect of them. If they had been, it is possible that fraud or negligence on the part of the next friend of the minors might have been specifically pleaded by them. Counsel for the appellants does not now urge that there was any fraud on the part of the next friend, but he urges that there was gross negligence, and he cites *Doraswami Pillai* v. *Thungasami Pillai* (1) and *Ram Sarup Lal* v. *Shah Latafat Hossein* (2) as authorities for the proposition that in the circumstances the plaintiffs are not bound by the withdrawal of the previous suit.

In the *Doraswami Pillai* v. *Thungasami Pillai's case* (1), where a suit, which was being conducted on behalf of a minor, was withdrawn without leave being asked for or given to bring another suit, the order passed on the petition for withdrawal was set aside by the High Court on revision on the ground that it was prejudicial to the interests of the minor.

The case of *Ram Sarup Lal* v. *Shah Latafat Hossein* (2) was one where the next friend of a minor plaintiff withdrew from the suit and it was held that it was open to the minor through another next friend to have the suit re opened on review, on the ground that the former next friend, though guilty of no fraudulent conduct, was grossly negligent of the minor's interests in withdrawing from the suit. At page 737 of the report the following passage occurs:—

"Against such conduct as his, a minor is entitled to invoke the assistance of a Court of equity either by an application for review of judgment or by separate suit. As remarked by Lord Hardwick in *Gregory* v. *Molesworth* (3), the infant has such a remedy when either gross laches or fraud and collusion appear in the next friend."

This case may not strictly come within the terms of section 462 of the Code of Civil Procedure, because it is not proved that the defendants entered into any agreement or compromise with the next friend of the infant, but it is within the scope of the general principle enunciated in Story's Equity Jurisprudence, section 1353: "In all cases where an infant is a ward of Court, no act can be done affecting the person, or property, or state of the minor, unless under the express or implied direction of the Court itself."

The present case is very similar to the one referred to above. No reason was given by the next friend for withdrawing the suit, nor was the Court asked to allow the plaintiff to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter

(1) 27 M. 377.
(2) 29 C. 735.
(3) (1747) 3 Atk. 626; 26 E. R. 1160.

of such part, nor does the Court appear to have considered whether the withdrawal was in the interests of the minors or not. Under such circumstances, we consider that the minors can bring a separate suit for the relief which was abandoned in the previous suit. A Court should be very jealous of the interests of minors and should not allow a suit or part of a suit instituted on their behalf to be withdrawn without being satisfied that it is for their benefit.

We accordingly accept the appeal and setting aside the orders of the lower Courts remand the case to the Court of first instance for trial on the merits. Stamps in this and in the lower Appellate Courts will be refunded and other costs will be costs in the case.

Appeal accepted;
Case remanded.

CALCUTTA HIGH COURT.
MATRIMONIAL SUIT No. 3 OF 1910.
June 3, 1910.
Present:—Mr. Justice Fletcher.
CHARLES WALTER GEORGE COX—PETITIONER
versus
EMILY FLORENCE COX—RESPONDENT.

Divorce Act (IV of 1869), ss. 7, 11—Petition for dissolution of marriage—Co-respondent not made party—Procedure.

A petitioner cannot be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. [p. 511, col. 1.]

Where a petitioner for dissolution of marriage is unable to discover the name of the co-respondent, he should apply to be excused from making him a party to the petition, on motion to the Judge supported by an affidavit before the hearing of the petition. [p. 511, col. 1.]

Where there is no co-respondent to a petition for dissolution of marriage, the Master ought not to issue citation to the respondent unless the Judge has granted leave to the petitioner to proceed without a co-respondent. [p. 511, col. 1.]

Mr. *A. N. Chaudhuri* (with him Mr. *P. C. Mitter*), for the Petitioner.

Messrs. *Avetoom* and *A. C. Banerji*, for the Respondent.

JUDGMENT.—This is a petition presented to the Court by C. W. G. Cox for the dissolution of his marriage with the respondent E. F. Cox on the ground of adultery To this petition there is no co-respondent. The adultery alleged in the petition is said to be proved by the admission contained in a letter, dated the 31st January, written by the respondent and addressed to the petitioner, in which it is said that she admitted that in a weak moment she had committed adultery with a man who sympathises with her but whose name she will not give up. The other case of adultery alleged is in the month of December, when it is said the respondent on three occasions was visited in the petitioner's house by a man whose name the petitioner has been unable to discover. Now the petition was presented to the Court and the Master directed citations to issue to the respondent. In my opinion, he was wholly wrong in doing that. However that may be, the jurisdiction is a special jurisdiction vested in the Court by the Indian Divorce Act to enable it to grant divorces in respect of persons professing the Christian religion and resident in India. The Act is chiefly modelled on the Matrimonial Causes Act of 1857. Section 7 is the first material section, being placed under the heading "Jurisdiction", and it says:—"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." The other section that is material in this case, and which is substantially taken from section 28 of the Matrimonial Causes Act of 1857, is section 11, which enacts:—"Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court:—(*i*) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed; (*ii*) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it; (*iii*) that the alleged adulterer is dead." Now the rules in England which govern this application

are rules 4, 5 and 6 of the Divorce Court Rules. First rule 4 provides: "Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct." Rule 5 says: "Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit." That it must be by affidavit shows obviously that the direction must be by application to the Judge on motion founded on affidavit before the hearing of the petition. Then rule 6 applies to the case where the address of the adulterer is unknown to the petitioner. It is obvious in this case that the direction ought to have been applied for on motion to the Judge supported by an affidavit and the affidavit ought to be sufficient to satisfy the Court that the petitioner, after having made reasonable endeavours, has been unable to find the name of the co-respondent. It seems to me to be a matter of grave public importance that a person should not be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. In my opinion, the Master ought not to have issued the citation when the petition contained no co-respondent, unless the Judge had granted leave to the petitioner to proceed without a co-respondent. In my opinion, the Court has no jurisdiction to entertain the petition and that, therefore, the petition must be dismissed with costs to the respondent.

Petition dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 1675 OF 1917.

June 17, 1918.

Present:—Mr. Justice Wilberforce.

GIRDHARI LAL—JUDGMENT-DEBTOR—APPELLANT

versus

ATTAR—DECREE-HOLDER—

MIR ZAMAN—JUDGMENT-DEBTOR—RESPONDENTS.

Pre-emption, suit for, dismissal of—Vendee recovering costs out of deposit—Suit decreed on appeal—Deposit, whether to be treated as intact—Civil Procedure Code (Act V of 1908), s. 144.

A suit for pre-emption was dismissed by the first Court with costs. The vendee thereupon recovered his costs from the deposit of one-fifth of the purchase price made by the plaintiff. On appeal the suit was remanded and the plaintiff eventually got a decree:

Held, that the deposit made by the plaintiff must be treated as if it were intact, and that the plaintiff was bound to pay into Court only the balance of the purchase price after deducting the full amount of his deposit. [p. 512, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Rawalpindi, dated the 2nd January 1917, affirming that of the Subordinate Judge, 2nd Class, Rawalpindi, dated the 11th November 1916, disallowing the objection of the judgment-debtor.

Bhagat *Gobind Das*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—In these two connected appeals the same questions arise to understand which it is necessary to give a brief recital of facts. Plaintiff sued for pre-emption in three separate cases. He made deposits of one-fifth of the purchase price. His suits were originally dismissed by the first Court with costs. The defendant vendee then proceeded to recover his costs from the deposits. The District Judge on appeal remanded the cases for re-trial on the merits and his decision was upheld by the Chief Court. Plaintiff was finally successful and obtained elaborately prepared decrees from the first Court, showing how the purchase money was to be paid. The Court allowed the plaintiff the full amount of his deposits and also allowed him deduction of costs. Plaintiff paid up the amounts as ordered by the Court. In fact he paid up sums in excess in both cases. The vendee objected in the first Court that the pre-emption money was not properly paid. His objections were disallowed and his appeals to the District Judge were dismissed.

On appeal it is first argued that the amounts which the defendant vendee had taken as his costs from the original deposits could only have been recovered under section 144, Civil Procedure Code, and that only the balances standing at the credit of the plaintiff could be deducted from the total payable. I agree that plaintiff, if he had wished for a refund of the costs taken by the vendee, could only have proceeded under section 144, but this section appears to have no application to the present case. As it was subsequently held that plaintiff was not

responsible for these costs, the deposits were rightly considered intact by the first Court.

The second point taken is that described in ground 3 of appeal, *viz.*, that the decree did not authorize the decree-holder to deduct costs allowed to him by the Chief Court. This ground of appeal was not pressed before me and the omission was clearly due to an oversight. The first Court was, therefore, justified in allowing a deduction of these costs when the error was brought to its notice.

Counsel also objects to the inclusion of costs of the appeal to the District Judge. In this technical plea he is met by the fact that his grounds of appeal are silent on the subject. Under these circumstances and as the deduction was justly allowed by the lower Court, I decline to take notice of this point.

The first ground of appeal, *viz.*, that the decree-holder did not deposit the money which he was required to do by the Court, is not based upon the facts on the record. The decree-holder did deposit the money which he was required to do by the decree *minus* his costs of the Chief Court, which he was allowed to deduct by a valid order of the Court.

I dismiss the appeals with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 113 OF 1918.

June 14, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

BEJOY KRISHNA NANDY AND ANOTHER —JUDGMENT-DEBTORS—APPELLANTS

versus

Maharaj Kumar DHARENDRA KRISHNA DEB BAHADUR AND OTHERS —DECREE-HOLDERS—RESPONDENTS.

Appeal, right of—Execution—Order overruling judgment-debtor's objection to valuation, whether appealable, —Civil Procedure Code (Act V of 1908), s. 47.

There is no right of appeal against an order of the executing Court overruling the judgment-debtor's objection to the valuation put in by the decree-holder in the sale proclamation and refusing the judgment-debtor's prayer for adjournment of the sale and issue of a fresh proclamation.

Deoki Nandan Singh v. *Bansi Singh*, 10 Ind. Cas. 371; 14 C. L. J. 35; 16 C. W. N. 124, *Panch Duar Thakur* v. *Mani Raut*, 17 Ind. Cas. 88; 16 C. W. N. 970, relied upon.

Appeal against the order of the Subordinate Judge, 1st Court, Tipperah, dated the 6th of April 1918.

FACTS.—On the 6th of January 1918 the decree-holders made an application to execute their decree. On the same day notices, under Order XXI, rule 66, were issued on the judgment-debtors. The judgment-debtors did not appear on the due date and a sale proclamation was issued on the 22nd February 1918 fixing the 5th of April for the sale. In the proclamation the valuation put by the decree-holders was inserted. On the following day the judgment-debtors appeared and objected to the valuation as put by the decree-holders. They also prayed for adjournment of the sale and issue of a fresh sale proclamation. The objections of the judgment-debtors were overruled by an order, dated 6th April 1918. From the said order the present appeal was preferred.

Babu *Mohendra Nath Roy* (with him Babu *Rupendra Kumar Mitter*), for the Respondents.—No appeal lies from the said order. The settlement of sale proclamation is an administrative act and not a judicial act in a judicial proceeding, and orders made in that connection, do not come under section 47 of the Civil Procedure Code. See *Sivagami Achi* v. *Subrahmania Ayyar* (1), *Decki Nandan Singh* v. *Bansi Singh* (2) and *Panch Duar Thakur* v. *Mani Raut* (3).

Babu *Gunada Charan Sen*, for the Appellant, referred to *Ganga Prosad* v. *Raj Coomar Singh* (4) and *Rajah Ramessur Proshad Narain Singh* v. *Rai Sham Krissen* (5) and submitted that the appeal was competent.

JUDGMENT.—This appeal must stand dismissed. Clearly there is no right of appeal in this case, as is shown by the authorities of the cases of *Deoki Nandan Singh* v. *Bansi Singh* (2) and *Panch Duar Thakur* v. *Mani Raut* (3). The appeal is accordingly dismissed with costs—two gold *mohurs*.

Appeal dismissed.

(1) 27 M. 259; 14 M. L. J. 57 (F. B.).
(2) 10 Ind. Cas. 371; 14 C. L. J. 35; 16 C. W. N. 124.
(3) 17 Ind. Cas. 88; 16 C. W. N. 970.
(4) 30 C. 617.
(5) 8 C. W. N. 257.

IMAMBANDI *v.* MUTSADDI.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 28, 1918.

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali, Sir Walter Phillimore, Bar., and Sir Lawrence Jenkins.

IMAMBANDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh Haji MUTSADDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Guardianship—Mother acting as de facto guardian, powers of—Alienation by mother, validity of—Moveables and immoveables, distinction between—Marriage—Legitimacy—Acknowledgment, presumption arising from—Civil Procedure Code (Act V of 1908), O. XIII, r. 1—Documentary evidence, admissibility of.

Under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian", has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant. [p. 523, col. 2; p. 524, col. 1.]

A mother is entitled only to the custody of the person of her minor child, but is not the natural guardian of the minor and has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge of the infant for the time being. [p. 518, col. 2.]

A father alone, or if he be dead, his executor (under the Sunni Law) is the legal guardian of his minor child. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather, and should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian devolves upon the Judge as representing the Sovereign. But the powers of even the *de jure* guardians to intermeddle with the property of minors are confined within legal limits. If the mother is the father's executrix or is appointed by the Judge as the guardian of the minors, she has all the powers of a *de jure* guardian. If there is no legal guardian, the person in charge of a minor, (*e. g.* the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities, such as food, clothing or nursing, but has no power to deal with the immoveable property. [p. 519, cols. 1 & 2; p. 520, cols. 1 & 2.]

The Muhammadan Law makes a sharp distinction between "goods and chattels" and immoveable property with regard to the powers of dealing by guardians. [p. 521, col. 2.]

Hyderman Kutti v. *Syed Ali*, 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244, disapproved.

Clear and reliable evidence that a Muhammadan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother. [p. 517, col. 2.]

Mahatab Bibee v. *Prince Ahmed Haleemoozooman*, 10 C. L. R. 293, approved and applied.

Documentary evidence which has not been produced at the first hearing of a suit in accordance with Order XIII, rule 1 of the Code of Civil Procedure, may be admitted at any subsequent stage at the discretion of the Court. [p. 517, col. 1.]

Appeal from a judgment and decree of the Calcutta High Court (Mookerjee and Carnduff, JJ.), dated the 30th August 1911, reported as 13 Ind. Cas. 678, affirming a judgment and decree of the Subordinate Judge, Saran, dated the 14th July 1910.

FACTS of the case sufficiently appear from their Lordships' judgment. Ismail Ali Khan died leaving widows and children. Zohra claimed that she was his widow and that two of her children were his children. Zohra for herself and her children executed a conveyance in favour of the plaintiffs, who brought the present suit in ejectment against Ismail Ali Khan's admitted wives and their children. The reliefs sought were; (1) a declaration of the title and status of the plaintiffs' vendors; and (2) a decree for possession of the shares covered by the deed of sale. The defendants denied that Zohra was married to Ismail and that her children were legitimate. Issues were framed. The eighth issue was as follows—"Of what properties the plaintiffs are entitled to recover possession?" The Subordinate Judge decided all the material issues in favour of the plaintiffs and allowed the claim against the contesting defendants. The High Court affirmed that decision. In reference to the contention that Zohra as the *de facto* guardian of her minor children was incompetent to alienate her children's shares, the learned Judges of the High Court said as follows:—

"It has finally been contended that Enayet Zohra, as merely the *de facto* guardian of her children, was not competent to alienate their shares, and upon this point reliance has been placed upon the cases of *Moyna Bibi* v. *Banku Behari Biswas* (1), *Mafuzzul Hosain* v. *Basid Sheikh* (2), *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (3), *Durgozi Row* v. *Fakeer Sahib* (4), *Ummi Begam* v. *Kesho Das* (5), *Syedan* v. *Velayet* (6), *Hunoomanpersaud Panday* v. *Musammat*

(1) 29 C. 473; 6 C. W. N. 667.
(2) 4 C. L. J. 485; 34 C. 36; 11 C. W. N. 71.
(3) 4 C. L. J. 578; 34 C. 65; 11 C. W. N. 160.
(4) 30 M. 197; 1 M. L. T. 433; 17 M. L. J. 9.
(5) 30 A. 462; 5 A. L. J. 474; A. W. N. (1908) 220.
(6) 17 W. R. 238.

IMAMBANDI *v.* MUTSADDI.

Babooee Munraj Koonweree (7). The question, thus raised, does not, however, properly arise in the present suit. The contesting defendants do not claim through Zohra's children; on the contrary, they completely repudiate any claim of the latter and it is not open to them to contend that they will be prejudiced if a decree is made in favour of the plaintiffs. It is conceivable that the plaintiffs may have to face a contest with the ninth and tenth defendants when they come of age and are able to assert their own rights; but in the present litigation the plaintiffs are entitled to succeed as against the first seven defendants, who have denied the title of their vendors."

Hence this appeal.

Mr. *Upjhon*, *K.C.*, and Dr. *Abdul Majid*, for the Appellants.—Concurrent findings of the Courts below that Zohra was the wife of Ismail Ali Khan cannot stand in this case, because the Courts arrived at them by improperly excluding the account books from consideration. The accounts filed by the defendants were genuine and the grounds on which the lower Courts excluded them were not put to the defendants' witnesses. The family accounts for more than twenty years showed that Zohra was not the wife of Ismail, and in fact it was conceded before the Subordinate Judge that "the entries in these books completely disprove and demolish plaintiffs' case and this fact is admitted by the learned Counsel for the plaintiffs." The account books were admissible under section 34 of the Indian Evidence Act, 1872. Reference was made to *Govind Soonduree Debea* v. *Juggodumba Debea* (8).

There is no evidence to support the concurrent finding that the defendants mutilated the accounts. If the accounts are not left out of consideration, the concurrent findings of the lower Courts on the other part of the case cannot stand as they were arrived at after excluding the accounts: See *Tayammaul* v. *Sashachalla Naiker* (9), *Rajeswari Kuar* v. *Rai Bal Krishan* (10), *Pauliem Valoo Chetty* v. *Pauliam Sooryah Chetty* (11) and *Venkateswara Iyan* v. *Shekhari Varma* (12).

The evidence did not establish the alleged marriage ceremony. The requirement of Muhammadan Law of an unambiguous acknowledgment before witnesses is a matter of substance and not of evidence: Baillie's Digest (1865 Edition), pages 4, 5, 7, 749; Baillie's Muhammadan Law of Inheritance (1824), pages 28 and 31; Fatawa-i-Alamgiri, Volume IV, page 48; and *Aklemannessa Bibi* v. *Mahomed Hatem* (13). The evidence as to alleged acknowledgments was not sufficiently specific as to the person referred to to raise any presumption: *Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (14) and *Musammat Butoolun* v. *Musammat Koolsoom* (15).

Further, Zohra was not the legal guardian of the minors and had no power to alienate their shares: *Mata Din* v. *Ahmad Ali* (16). The plaintiffs could not recover more than Zohra's share.

Mr. *DeGruyther*, *K. C.*, and Sir *W. Garth*, for the Respondents, were asked by their Lordships to confine their argument to the question as to whether the mother was competent to alienate the minor's share. The widow has power to alienate the minors' share as their *de facto* guardian. Her act is voidable and not void and the minors on attaining majority would be free to avoid the transaction. The case of *Mata Din* v. *Ahmad Ali* (16) did not decide the point. The sale was good subject to the minors' right to set it aside on the ground that it was not for their benefit or was not made for any necessity or any other valid cause.

(7) 6 M. I. A. 393 at p. 413; 18 W. R. 81 (*note*); Sevestre 253*n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.).

(8) B. L. R. 168 at p. 171; 2 Suth. P. C. J. 375; 15 W R. P. C. 5; 6 M. Jur. 113; 2 Sar. P. C. J. 611. (P. C.).

(9) 10 M. I. A. 429 at p. 434; 2 Sar. P. C. J. 139; 9 E. R. 1034 (P. C.).

(10) 14 I. A. 142; 9 A. 713; 5 Sar. P. C. J. 80; 5 Ind. Dec. (N. S.) 912 (P. C.).

(11) 4 I. A. 109; 1 M. 252; 1 Ind. Jur. 323; 3 Suth. P. C. J. 387; 3 Sar. P. C. J. 698; 1 Ind. Dec. (N. S.) 107

(12) 3 M. 384; 8 I. A. 143; 5 Ind. Jur. 542; 4 Sar. P. C. J. 259; 1 Ind. Dec. (N. S.) 822 (P. C.).

(13) 31 C. 849; 8 C. W. N. 705.

(14) 11 M. I. A. 94; 7 W. R. P. C. 1; 1 Suth. P. C. J. 659; 2 Sar. P. C. J. 223; 20 E. R. 37 (P. C.).

(15) 25 W. R. 444.

(16) 13 Ind. Cas. 976; 39 I. A. 49; 34 A. 213; 23 M. L. J. 6; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L J. 270; 14 Bom. L. R. 192; 15 O. C. 49 (P. C.).

Reliance was placed on the judgment of Abdur Rahim, J., in *Hyderman Kutti* v. *Syed Ali* (17).

The following cases were discussed:—*Sita Ram* v. *Amir Begam* (18), *Nizam-ud din Shah* v. *Anandi Prasad* (19), *Majidan* v. *Ram Narain* (20), *Ummi Begam* v. *Kesho Das* (5), *Syedun* v. *Velayet* (6), *Bhutnath Dey* v. *Ahmed Hosain* (21), *Moyna Bibi* v. *Banku Behari Biswas* (1), *Mafuzzul Hosain* v. *Basid Sheikh* (2), *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (3), *Kali Dutt Jha* v. *Abdul Ali* (22), *Hurbai* v. *Hiraji Byramji Shanja* (23), *Baba* v. *Shivappa* (24), *Pathummabi* v. *Vittil Ummachabi* (25), *Durgozi Row* v. *Fakeer Sahib* (4), *Abdul Khadar* v. *Chidambaram Chettyar* (26), *Thattoli Kothilan Aliyamma* v. *Kunhammed* (27), *Amba Shankar* v. *Ganga Singh* (28) and *Husain Ali Mirza* v. *Muhammad Azim Khan* (29).

JUDGMENT.

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 30th August 1911,* which affirmed the decree of the Subordinate Judge of Saran awarding to the plaintiffs possession of a share in certain landed property situated in that district.

The property in suit belonged originally to one Ismail Ali Khan, a wealthy Muhammadan inhabitant of the Sub-Division of Siwan in the Saran District. The plaintiffs allege that on his death in March 1906 he left him surviving three widows and several children, and that from one of these widows, named Enayet-uz-Zohra, acting for herself and for her two minor children, they purchased the share in suit for the possession of which they brought the present action.

It appears that shortly after Ismail Ali Khan's death the contesting defendants Nos. 1 to 7 applied to the Revenue Courts for mutation of names (as proprietors) in the Collector's records, and, as usually happens in these cases in India, especially in Muhammadan families, immediately this application was made, a claim was put forward on behalf of Enayet-uz-Zohra and her children that they were equally entitled with the other heirs of Ismail Ali Khan to have their names entered as co-sharers in the estate by right of inheritance, the allegation being that Zohra was one of his lawfully wedded wives and that her children were his legitimate issue. The Revenue Courts rejected her claim, holding that it was not established to their satisfaction that she was Ismail Ali Khan's married wife or that the children were his lawful issue. They accordingly made an order directing the registration of the contesting defendants' names in succession to Ismail Ali Khan.

It should be mentioned here that the defendants Nos. 1 and 5 are admittedly Ismail Ali Khan's married wives, defendants Nos. 2, 3, and 4 are his issue by defendant No. 1, and defendants Nos. 6 and 7 his daughters by defendant No. 5.

The plaintiffs are dealers in hide and live also at Siwan. There seems to have been litigation between them and Ismail Ali Khan in his lifetime and since his death they seem to have espoused Zohra's cause. The deed executed by Zohra bears date the 10th June 1906, and purports to convey to the plaintiffs the shares of both herself and her minor children, and in the suit they are included as defendants Nos. 8 to 10. The reliefs sought are of a twofold character: *first*, a declaration of the title and status of the plaintiffs' vendors; and, *secondly*, a decree in favour of the plaintiffs for possession of the shares covered by the deed of sale.

The contesting defendants denied, as they had done in the Revenue Courts, that Zohra was one of Ismail Ali Khan's married wives or that her children were his legitimate issue, and they further contended that the shares the plaintiffs claimed to recover did not pass under the

(17) 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244.

(18) 8 A. 324; A. W. N. (1886) 101; 5 Ind. Dec. (N. S.) 105.

(19) 18 A. 373; A. W. N. (1896) 99; 8 Ind. Dec. (N. S.) 955.

(20) 26 A. 22; A. W. N. (1903) 183.

(21) 11 C. 417; 5 Ind Dec. (N. S.) 1038.

(22) 16 C. 627; 16 I. A. 96; 13 Ind. Jur. 130; 5 Sar. P. C. J. 326; 8 Ind. Dec. (N. S.) 413.

(23) 20 B. 116; 10 Ind. Dec. (N. S.) 636.

(24) 20 B. 199; 10 Ind. Dec. (N. S.) 692.

(25) 26 M. 734.

(26) 3 Ind. Cas. 876; 32 M. 276; 5 M. L. T. 201.

(27) 8 Ind. Cas. 1093; 34 M. 527; 20 M. L. J. 946; 9 M. L. T. 100.

(28) 9 O. C. 97.

(29) 31 Ind. Cas. 728; 18 O. C. 168.

**See* 13 Ind. Cas. 678.—*Ed.*

sale. The sixth issue framed by the Subordinate Judge seems to relate to this point.

The plaint was filed on the 25th March 1909, but it does not appear to have been admitted until the 2nd April. The contesting defendants filed their written statements in July 1909; after that the case dragged its slow length along until the 18th June 1910, when the actual trial began. In the interim, however, various interlocutory orders were made, including an order for the appointment of Zohra as guardian *ad litem* for her children (though her interest in the suit was clearly adverse to theirs). Admittedly she was never appointed under the Guardians and Wards Act (VIII of 1890) a guardian of their property.

The examination in Court of the plaintiffs' witnesses commenced on the 16th June 1910; on the 18th June (the date given in the judgment of the High Court does not appear to agree with the date in the order-sheet) they applied for a summons against the defendants for the production of certain *bahis*, or account books, belonging to Ismail Ali Khan for the Fasli years 1294 to 1313 (1887—1906). The order on this application was as follows: "I decline to issue summons at this stage." And there, so far as the plaintiffs were concerned, the matter was allowed to rest.

As a large part of the judgments of both the Courts in India is occupied with an examination of these *bahis*, *viz.*, whether they are reliable or not, it is necessary to mention that these very books had been produced and filed in Ismail Ali Khan's lifetime on his behalf in the litigation between him and the plaintiffs; after his death they were returned to the contesting defendants' Pleader, when it was discovered that a large number of leaves were abstracted from several of the books. This was represented to the presiding officer of the Court where the books were filed, but there is nothing to show the result of the representation. The plaintiffs' case appears to have closed on the 26th June, and on the following day the defendants commenced to examine their witnesses. On the same day they produced the *bahis*. The Subordinate Judge's order on their petition is in these terms: "On the defendants' application filing therewith the *bahis* from 1294 to 1311 Fasli, it is ordered that they be kept with the records, and that the plaintiffs' Pleader be informed accordingly.' About this time the missing leaves turned up mysteriously. The trial Judge says he received them by post from some unknown source; and apparently after receipt he handed them to the proper officer. Upon becoming aware of this fact the defendants applied to the Court that the torn-out leaves thus re-discovered might be admitted in evidence; and on the 29th June, whilst the trial was proceeding and evidently in the presence of the Pleader for the opposite party, the Subordinate Judge ordered that the leaves in question should be used as evidence, and marked them as Exhibits F 1 to F 5.

It is hardly likely that the leaves were originally abstracted by the defendants and that this roundabout way was adopted for the purpose of getting the books admitted as evidence. On the face of it, the suggestion appears to be absurd.

The use the contending defendants wished to make of the account books was of a negative character. These books contain regular entries of payments by Ismail Ali Khan to his admitted wives, defendants Nos. 1 and 5, under the honorific designation of *Haveli Kalan* ("senior mansion") and *Haveli Khurd* ("junior mansion"), being euphemisms for wives. There is no entry, however, of any payment to Zohra. The defendants accordingly asked the Court to draw from the absence of any such entry in her name the inference that she was not Ismail Ali Khan's wife and did not hold the same position as the other ladies. Counsel for the plaintiffs seems to have been greatly impressed by this argument; in fact, he appears to have conceded that, if the books were to be relied upon, Zohra's claim must fail. He was thus driven to challenge their genuineness. The Subordinate Judge appears to have taken the same view; he thought that the books must be first eliminated before the direct evidence could be properly appraised, and this reasoning runs through the judgments of both the

Courts in India. The trial Judge on certain grounds came to the conclusion that the *bahis* must be put aside from consideration as unreliable. He then proceeded to discuss the oral testimony; and in the result found that Zohra was, in fact, a wife of Ismail Ali Khan, and that the defendants Nos. 9 and 10 were his children by her. He accordingly decreed the plaintiffs' claim. And his decree has been affirmed by the High Court of Calcutta. The learned Judges of the High Court also felt impressed with the absence of entries in the *bahis* in Zohra's name, and, therefore, proceeded to deal with them first. This mode of treatment has been strongly assailed, not without reason, before this Board. It seems to their Lordships that the true criterion for the determination of the question at issue was missed by both the Courts. The onus of establishing the title of their vendors lay primarily on the plaintiffs; the evidence furnished by the books was negative and inferential, and in substance directed to the corroboration of the defendants' witnesses, who denied that Zohra was one of Ismail Ali Khan's wives. Rule 1, Order XIII of the Civil Procedure Code, requires the parties or their Pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. In the present case the books had been filed previously in another Court, and when produced on the 27th June they were in fact received and ordered to be placed with the records. There seems to have been no objection to their reception for non-compliance with the provisions of the Code. If the plaintiffs had taken notes of certain entries in the books, as is alleged they had done when the *bahis* were in the other Court, they could surely have cross-examined the defendants' witnesses, who were called to prove the books, as to the discrepancies. Their Lordships are not satisfied that the books are not the genuine account books of Ismail Ali Khan. What effect the absence in them of entries in Zohra's name may have in the consideration of the general evidence is another matter.

In the absence of any statutory provision making compulsory the registration of Muhammadan marriages, the Indian Courts, in case of a dispute as to the *factum* of a marriage, are usually left to discover, or attempt to discover, the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses. Such has been the burden cast on the Courts in the present instance. The plaintiffs have endeavoured to prove in two ways that Zohra was one of Ismail Ali Khan's wives, *viz.*, *first*, by direct evidence of an actual marriage, and, *secondly*, by the acknowledgment by him of her children as his legitimate issue, and by the presumption of marriage arising from such acknowledgment. The defendants, on the other hand, tried to show that Zohra was a woman of loose character, with the object apparently of establishing that it was most unlikely a man in Ismail Ali Khan's position would marry such a person. They also called a number of witnesses, who are said to have been on terms of intimacy with him, to state that they never heard him speak of Zohra as his wife. Including the inference from the account books, all the evidence on the defendants' side is purely and naturally negative. In their Lordships' opinion, the oral testimony regarding the solemnisation of a marriage accompanied by ostentatious ceremonies and high dower is by no means satisfactory, and if the case had stood there, the absence of Zohra's name in Ismail Ali Khan's account books might have weighed heavily against her. But their Lordships find clear evidence of a reliable character regarding his acknowledgment of her children. Her case, therefore, comes within the rule of Muhammadan Law to which Garth, C. J., and Wilson, J. (afterwards Sir Arthur Wilson), gave expression in *Mahatala Bibee* v. *Prince Ahmed Haleemoozooman* (30).

In their Lordships' opinion, the legal presumption arising in favour of Zohra from the acknowledgment of the children is not displaced by the mere inference the defendants seek to draw from the

(30) 10 C. L. R. 293.

absence of entries in her favour in Ismail Ali Khan's account books. Such absence is capable of explanation, and it is possible she could have explained it had her attention been called to the matter. One explanation, however, is on the surface: on the facts proved in the case it is quite clear that this lady's father, though belonging to the same clan as Ismail Ali Khan, was a man considerably inferior in social status: it is not at all unlikely that the deceased was not particularly proud of his connection with the daughter. This would explain both the absence of the entries and his reticence about her to ordinary acquaintances and even friends. On the whole, their Lordships are of opinion that both Zohra and her children are entitled to their legal shares in the inheritance of Ismail Ali Khan. But the Courts in India have awarded to the plaintiffs, on the basis of the deed of purchase from Zohra, a decree for possession of her share and the shares of defendants Nos. 9 and 10. And the question is, whether they have acquired any title to the infants' shares under the sale by the mother. The defendants objected in the High Court to the decree of the Subordinate Judge on the ground that she had no power to convey her children's interest to the plaintiffs. The learned Judges overruled the objection on the ground that the question did not arise in the present case. Their Lordships regret to have to differ from this view. This is an action in ejectment; the defendants are in possession; the plaintiffs, if they are to obtain possession of the minors' shares, must do so on the strength of their own title. It is essential, therefore, to consider whether the title they allege to have acquired under the conveyance by Zohra is well-founded.

The question how far or under what circumstances according to Muhammadan Law, a mother's dealings with her minor child's property are binding on the infant has been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies: one set of decisions purports to give such dealings a qualified force, the other declares them wholly void and ineffective. In the former class of cases the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on the part of the mother to alienate or encumber the minor's property.

In this conflict of opinion, their Lordships think it desirable that a definite rule should, if possible, be laid down; and with this object they propose to review briefly the provisions and principles of the Muhammadan Law, as they apprehend it, governing the subject.

It is perfectly clear that under the Muhammadan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone or, if he be dead, his executor (under the Sunni Law), is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term "*de facto* guardian" that has been applied to these persons is misleading: it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous; and the judgment of the Board in *Fata Din* v. *Ahmad Ali* (16) clearly indicated it. There an infant's share was sold by the elder brother, in whose charge the child was, along with his own share, to pay a joint ancestral debt. The vendee at the time of the sale was in possession of the whole property under a mortgage executed by the ancestor. On attaining majority the younger brother, ignoring the sale, brought a suit against the vendee-mortgagee for the redemption of his own share. The defence set up was that the sale by the infant's *de facto* guardian, made for a valid necessity, was binding on the infant. The lower Courts decreed the plaintiff's claim; on appeal to this Board the arguments proceeded on the same lines as in the present case, though in reverse order.

Lord Robson in delivering the judgment of the Board observed as follows:—

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondents, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts, and was, therefore, necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

And he went on to add :—

"There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Muhammadan Law, a sale by a *de facto* guardian, if made for necessity or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case."

And he then proceeded to state the reasons why that was not considered necessary.

This latter passage in Lord Robson's judgment has created the impression that their Lordships' decision was confined to the special facts of that case and left open the general question regarding the validity of alienations by unauthorised guardians of the property of the minors.

As already observed, in the absence of the father, under the Sunni Law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the sovereign (Baille's "Digest," Edition. 1875, page 689; Hamilton's Hedâya, Volume IV, page 555). No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor, guardian (*wasi*) may "sell or purchase moveables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss," dealings with his immoveable property are subjected to strict conditions (Baillie's "Digest," page 687). The reason for the restrictions is thus given in the Hedâya (Volume IV, page 553):—

"The ground of this" (the difference in the power of dealing with the two kinds of property) "is that the sale of moveable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily preserved than the article itself. With respect, on the contrary, to immoveable property, it is in a state of conservation in its own nature whence it is unlawful to sell it—unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed."

In fact the Mussulman Law appears to draw a sharp distinction between moveable and immoveable property (A'kâr) in respect of the powers of guardians, as will be seen from the following passage in Baillie's "Digest," page 689:—

"With regard to the executor of a mother or brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but Akar* belonging to the estate of the deceased, but can neither sell the Akar, nor lawfully buy anything for the minor but food and clothing which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father, whether moveable or immoveable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies the executor may sell what is moveable, but he cannot sell Akar. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of Akar coming

Akar is immoveable property and includes houses, groves, orchards, etc.

within his power: and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and as to his power to sell the surplus there is the same difference of opinion as has been stated above."

When the mother is the father's executrix, or is appointed by the Judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant. This rule, however, is subject to certain exceptions provided for the protection of a minor child who has no *de jure* guardian. A fatherless child is designated in the law books an "infant-orphan" (*yeteem saghir*). The Hedâya classifies the acts that may have to be done for an infant under three heads. It says:—

"Acts in regard to infant-orphans are of three descriptions, *viz.*, (1) acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him, a power which belongs solely to the *walee*, or natural guardian whom the law has constituted the infant's substitute in those points; (2) acts arising from the wants of an infant such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a foundling) the *mooltakit** or *taker-up* or the mother, provided she be the maintainer of the infant; and as *these* are empowered with respect to such acts, the *walee*, or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite, with respect to the *guardian*, that the infant be in his immediate protection; (3) acts which are *purely advantageous*† to the infant, such as accepting presents or gifts, and keeping them for him, a power which may be exercised either by a *mooltakit*, brother, or uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature." (Volume IV, page 124, Bk. XLIV.)

The examples given under the second head indicate the class of cases in which the acts of an unauthorised person who happens to have charge of a child are held to be binding on the infant's property. They also help to explain and illustrate the extent of such "*de facto* guardian's" powers. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. For instance, he may stand in immediate need of aliment, clothing, or nursing; these wants must be supplied forthwith. He may own "slaves" or live-stock: food and fodder must be immediately procured. And these imperative wants may recure from time to time. Under such circumstances power is given to the lawful guardian to incur debts or to raise money on the pledge of the minor's goods and chattels (*mata'*)* (Majma-ul-Anhar, Vol. II, page 571). And this power, in the absence of a *de jure* guardian, the law extends to the person who happens to have charge of the child and of the child's property, though not a constituted or authorised guardian.

There is no reference to the pledge or sale of immoveable property (A'kâr), as the power of dealing with that class of property is confined to the *de jure* guardians, and is treated in the Fatawa-i-Alamgiri in a separate chapter (Baillie's "Muhammadan Law of Sale," Chapter XVI).

It is to be observed that under the third "description" of acts that may be needful for an infant, a person in charge of a child, although not a *de jure* guardian, may validly accept on behalf of his ward an unburdened bounty, it being an act "purely advantageous" to the child, to use the expression of the Hedâya.

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*A *mooltakit* is a person who undertakes to bring up a founding or an orphan-child.

† In the original the words are *nafa mahaz*, which mean 'unmixed benefit.'

* Mr. Hamilton translates *mata* as meaning "personal chattels."

The reasoning on which it is sought to give to persons who happen to have charge of the person and property of a child, and are, therefore, called "*de facto* guardians," the same powers as are possessed by *de jure* guardians, is purely inferential. It proceeds on the analogy of a dealing by an outsider who purports to sell another's property without any authority from the real owner. Such a person in the Hanafi Law is called a *fazuli*, or, as Mr. Hamilton spells it *fazoolee*, which expression is defined by Richardson to mean a person "busying himself in things not belonging to him, or acting without authority." With the effect of the acts of a *fazuli* their Lordships will deal presently. Before doing so, they wish to refer briefly to the state of the decisions in the Indian Courts.

The Calcutta High Court, in sustaining transactions entered into by *de facto* guardians, has proceeded mainly on considerations of necessity for and benefit to the infant. The other High Courts, generally speaking, have cut the Gordian knot by holding that all such dealings with a minor's property were void.

Their Lordships do not feel called upon to examine in detail either set of decisions. But the last case on the subject in the Madras High Court requires their careful and respectful consideration [*Hyderman Kutti* v. *Syed Ali* (17)] In their judgment in this case the learned Judges have examined the law at considerable length, and their decision appears to divide itself into three broad propositions: *first*, that as regards the powers of guardians, *de jure* as well as *de facto*, the Muhammadan Law recognises no distinction as to the nature or kind of property, *viz.*, whether it is immoveable or moveable; *secondly*, that in substance the powers of an unauthorised person who has charge of an infant are co-extensive with those of a lawfully constituted guardian, except in so far that the acts of the former are subject to considerations of necessity or benefit to the infant; and, *thirdly* (and this seems to form the essence of the judgment), that dealings by "a *de facto* guardian" are neither void nor voidable, but are "suspended" until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it.

With regard to the first of the above propositions, their Lordships have already indicated their views. In their opinion, the Muhammadan Law, for obvious reasons, makes a distinction, and sharp distinction, between "goods and chattels" (*mata'*) and immoveable property (A'kar) with regard to the powers of dealing by guardians.

The second proposition, speaking with respect, appears to their Lordships to lose sight of the fact that the acts of *de jure* guardians also are subject to the conditions of necessity for or benefit to the infant. So that upon the reasoning of the Madras judgment, the powers of "a *de facto* guardian" would, to all intents and purposes, be co-extensive with those of a *de jure* guardian. This conclusion would wipe out one of the most important safeguards provided by the Muhammadan Law for the protection of the interests of infants. The learned Judges say that :—

"The law as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to sales by a person professing to deal with another's property, but without having legal authority to do so, *i.e*, by a *fazuli*, as he is technically called; such sales generally are treated as *manquf*, or dependent."

Then, after referring to various authorities, they continue as follows :—

"The result of the above discussion is that, according to Muhammadan Jurists, in cases of urgent and imperative necessity, such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between moveable and immovable property."

It would have been an advantage to their Lordships if they had been placed in a position to judge for themselves, on the actual texts, the meaning of the Arabian text-writers and commentators. However, the Hedayeh and the Fatawa i-Alamgiri are recognised as standard authorities in India on the Hanafi branch of the Sunni Law. Of the Hedayah there is a rendering in English made by Mr.

Hamilton under the orders of Warren Hastings ; and a large part of the Fatawa-i-Alamgiri has been paraphrased into English by Mr. Neil Baillie, which is commonly known as Baillie's "Digest" (Hanafia Law). Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added phrases which do not exist in the original, but on the whole the English versions of the Hedayah and of the Fatawa-i-Alamgiri are valuable works on Muhammadan Law.

The subject of sales by unauthorised persons is treated in the Hedayah in a separate section entitled "of Fazoolee Beea,* or the sale of the property of another without his consent" (Book XVI, Volume II, page 508). It says:—

"If a person were to sell the property of another without his order the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. Shafei is of opinion that the contract, in this case, is not complete, because it has not issued from a lawful authority, for that is constituted only by property or permission neither of which exist in this case."

It then proceeds to give the arguments of the Hanafi doctors in support of their view that the unauthorised contract is "complete" And then it adds :—

"If the proprietor should die, then the consent of the heirs is of no efficacy in the confirmation of the Fazoolee sale, in either case, that is, whether the price has been stipulated in *money* or in *goods*; because the contract rested entirely on the personal assent of the deceased."

In other words, the so-called sale remains wholly ineffective until it receives the "confirmation" of the owner, to whom alone belongs the power of "confirming" it. If he dies before he has "confirmed" it, the transaction falls to the ground, as the right to adopt the *fazuli's* act does not pass to his heirs.

In the Fatawa-i-Alamgiri† the subject is treated under the designation of "dependent sales" (Volume III, page 245 Baillie's "Muhammadan Law of Sale,' pages 218-219) :—

"When a person sells the property of another, the sale is suspended, according to us [*i.e.*, the Hanafis], for the sanction or ratification of the proprietor; and the existence of both the parties to the contract, and of the subject of sale, is a necessary condition to the validity of his sanction . . . . .

"If the owner should die before sanctioning the sale, sanction by his heir would not suffice to give it operation. Sanction by an owner himself renders a sale operative."

The word in the above passage translated as "suspended" is derived from the same root as the word that has been translated in the heading as "dependent" and in this connection really means "is dependent upon"; also the words "or ratification" have been introduced by Mr. Baillie by way of explanation. The word *ijazat* in the original is rightly rendered into "sanction."

The Majma-ul-Anhar states the rule relating to a sale by a *fazuli* in similar terms; it says in substance that such a sale is "established" (takes effect) on the sanction of the *malik* (owner), subject to four conditions, which it specifies. And then it adds significantly that according to Shafei (the founder of the second great Sunni School of Law) all dealings by an unauthorised person are absolutely void (*batil*); Volume II, page 88.

In their Lordships' opinion, the Hanafi doctrine relating to a sale by an unauthorised person remaining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines relating to *fazuli* sales, so far as they appear in the Hedaya or the Fatawa-i-Alamgiri, to dealings with the property of minors by persons who happen to have charge of the infants and their property—in other words "*de facto* guardians."

The Hanafi doctrine about *fazuli* sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified

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* Correctly Bai'.

† The "Book on Sale" in the Fatawa-i-Alamgiri has been rendered into English by Mr. Baillie under the name of the "Muhammadan Law of Sale"

by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Muhammadan Law as to every other system.

In this connection it should be noted that whilst Chapter XII deals exclusively with the effect of "dependent sales," in Chapter XVI the rules relating to the powers of guardians are discussed at considerable length (Baillie's "Muhammadan Law of Sale," page 243; Fatawa-i Alamgiri, Volume III, page 229). The following rule lays down the conditions governing sales by the executor (*i. e.*, the appointed guardian) of the immoveable property of an infant:—

"And, according to modern decisions, the sale of immoveable estate by an executor is lawful only in one of the three cases following: that is, where there is a purchaser willing to give double its value, or the sale is necessary to meet the minor's emergencies, or there are debts of the deceased, and no other means of paying them." (Baillie's "Muhammadan Law of Sale," page 247; Fatawa-i-Alamgiri, Volume III, page 233.)

Having regard to the object in view, this dictum appears to their Lordships to apply to all forms of property which, like A'kar, combine both security and permanency. But it does not exclude the discretion of the Judge to sanction any alteration of investment in the interests of the infant.

The following case affords a further illustration of the limitations on the powers of "*de facto* guardians":—

"A woman after the death of her husband sells property that belonged to him, supposing herself to be his executrix, and her husband having left *minor* children; she after some time declares that she was not the executrix, her assertion, however, is not to be credited as against the purchaser, but the sale remains in suspense till her children arrive at puberty. If they should admit that she was the executrix, the sale by her is lawful; but if they deny the fact, the sale is void; and though the purchaser should have manured the purchased land, he has no recourse for reimbursement against the woman. What has been said is on the supposition that the woman sues for a cancellation of the sale, on the ground that she was not the executrix; but if the *minor* sues on that ground, his claim is to be heard." (Baillie, page 249; Alamgiri, Volume III, page 234).

The rest of the passage is immaterial for the purposes of this judgment.

The above case shows that even where the mother believes she is vested with authority as her husband's executrix, and in that belief purports to deal with the minor's property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. Her own subsequent denial of authority does not affect the purchaser's position; but if the transaction is impugned by the rightful owner—*viz.*, the infant—the onus is on the vendee to establish the foundation of his title, that is, that his vendor possessed in fact the authority under which she purported to act.

A further rule, which is given in the "Book on Pledges" (Mortgages) (Kitab-ur-Rahn) of the Fatawa i-Alamgiri, which does not appear to have been translated by Mr. Baillie, is equally explicit. After stating the principle applicable to the powers of the father to pledge or mortgage his minor child's property, it goes on to say: "the mother: if she pledges (mortgages) the property of her infant child, it is not lawful, unless she be the executrix [of the father] or be authorised therefor by the guardian of the minor or the Judge should grant her permission to pledge the infant's property Then it is lawful; and the right to possession and user is established in the Murtahin (pledgee or mortgagee) without power of sale;" (Fatawa-i-Alamgiri, Volume V, page 638).

It seems to their Lordships that the power to sell cannot be wider than the power to mortgage.

For the foregoing considerations their Lordships are of opinion that under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant: nor can such transferee, if let into possession of the property under

GANGADHAR NANDA *v.* JANAKIMONI DASI.

such unauthorized transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.

Their Lordships are accordingly of opinion that the decree of the High Court, in so far as it awards to the plaintiffs possession of the shares of the defendants Nos. 9 and 10, should be discharged, and, subject to this variation, it should be affirmed and the appeal be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of foreign Courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of justice.

Appeal partly allowed.

Solicitors for the Appellants.—Messrs. *Truefitt* and *Francis.*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2072 AND 2082 OF 1916.

May 22, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

IN No. 2072 OF 1916.

GANGADHAR NANDA AND OTHERS—APPELLANTS

IN No. 2082 OF 1916

THE SECRETARY OF STATE FOR INDIA—APPELLANT

versus

Srimati JANAKIMONI DASI AND OTHERS—RESPONDENTS.

Limitation Act (*IX of* 1908), *s.* 15 (2), *applicability of*—*Bengal Tenancy Act* (*VIII B. C. of* 1885), *s.* 104*H*, *suit under*—*Civil Procedure Code* (*Act V of* 1908), *s.* 80, *notice under*—*Exclusion of time during currency of notice.*

The provisions of section 15, sub-section (2) of the Limitation Act, do not apply to a suit instituted under the terms of section 104H of the Bengal Tenancy Act. Therefore, a suit under that section must be brought in any event within the six months specified therein and the plaintiff is not entitled to exclude the period of the currency of the notice to the Secretary of State under section 80, Code of Civil Procedure. [p. 527, col. 1.]

Appeals against the decrees of the District Judge, Midnapur, dated the 12th of June 1916, affirming those of the Subordinate Judge, 2nd Court of that District, dated the 23rd of July 1914.

FACTS.—These two appeals arose out of the same suit brought by the respondent under section 104H of the Bengal Tenancy Act. The facts are these:—After the abolition of the salt agency, the Jalpai lands were settled with tenants for purposes of bringing them under cultivation. The land in respect of which the suit was brought was situate in the Mal Jalpai Estate, of which the proprietors were the appellants, Nandas. The predecessor-in-interest of the plaintiff-respondent took settlement of the land for cultivation and made the same culturable. Soon after that, *i.e.*, in 1876, a settlement was made of the Mahal by the Government under Regulation VII of 1822, when the predecessor-in-interest of the plaintiff was recorded as occupancy *raiyat*. Then there was a suit between the Nandas and the predecessor-in-interest of the plaintiff, which ended in a compromise; the Nandas granting him a *raiyati* confirmatory lease.

In the year 1910 settlement of the Mahal was made under Chapter X of the Bengal Tenancy Act for purposes of settling revenue, the Mahal being a temporarily settled estate, when the plaintiff was recorded as a tenure-holder, and her rent was increased under section 7 of the Bengal Tenancy Act. The Record of Rights was finally published on the 2nd June 1910 and 10th June 1910. The plaintiff thereupon gave notice to the Secretary of State under section 80, Civil Procedure Code, and after the expiry of 2 months as required by that section brought the present suit against the Nandas and the Secretary of State for India in Council. The Nandas did not

appear in the suit, but the Secretary of State for India in Council appeared and contested the suit.

Babu *Ram Charan Mitter* (with him Babu *Srish Chandra Chowdhury*), for the Secretary of State, Appellant in Appeal No. 2082 of 1916. —The plaintiff had no cause of action against the Secretary of State. The latter was made a defendant in a lower Court and was made a party; although it was said there was no necessity to make him a party and the suit not being brought within 6 months, as required by section 104H of the Bengal Tenancy Act, it was barred by limitation. The other side says that 8 months is the limitation, because a notice is to be given to the Secretary of State within two months before the institution of a suit, and he wants to add these 2 months to 6 months. My submission is that those 2 months are included within these 6 months under section 104H, Bengal Tenancy Act. The other side says because 2 months' notice was to be given to me, limitation would otherwise be virtually reduced to 4 months. But this is not so and I beg to invite your Lordships' attention to *Secretary of State* v. *Gangadhar Nanda* (1) in support of my contention, and this decision has been followed in *Secretary of State* v. *Shib Narain Hazra* (2) in this Court decided by Richardson and Walmsley, JJ. Whether the Secretary of State is a necessary party or not, I have every right to say that the suit is barred by limitation.

[HUDA, J.—You have been discharged from the suit by the order of the District Judge. Therefore, how are you affected by the order?]

Government is interested in seeing that the correct status of the plaintiff, *i.e.*, whether he is a *raiyat* or a tenure-holder, is established in the Record of Rights. The lower Appellate Court was wrong in holding that the Secretary of State was not a necessary party.

Babu *Saroda Charan Maity*, for the Respondents.—The Nandas are the landlords. Government in its sovereign authority takes the revenue. The Government, therefore, is not a necessary party. There is no decree against the Secretary of State, therefore, he had no right of appeal.

So far as the Nandas are concerned, they did not contest the suit either in the trial Court or in the Appellate Court. The District Judge was quite right in rejecting their application. Order XLI, rule 4 or rule 33, Code of Civil Procedure, does not help them. *Rangamlal* v. *Jhandu* (3) referred to.

[FLETCHER, J.—You are not entitled to get the deduction of time. The question is, have you a right of suit beyond 6 months?]

Sections 184 and 185 of the Bengal Tenancy Act do not say that subject to those provisions the provisions of the Limitation Act will apply to cases mentioned in the Schedule and not to other cases. There is no such limitation in those sections. Therefore, those sections do not exclude the application of the Limitation Act to other suits not mentioned in the Schedule to the Bengal Tenancy Act.

[HUDA, J.—They mean that.]

I submit not. Then there is section 29 of the Limitation Act, which says that when any special period of limitation is provided for by any special or local Act, the provisions of the Indian Limitation Act will not affect or alter that. Exclusion of time requisite for notice under section 80, Civil Procedure Code, cannot affect or alter the period of limitation prescribed, it simply gives a particular mode of computation.

[FLETCHER, J.—If section 15, clause (2) of the Limitation Act, applies, it will extend the time by 2 months.]

I submit, not. If your Lordships look at the arrangement of the Limitation Act, you will see that sections 12 to 25 do not lay down any substantive rule of limitation. They only provide for the mode of calculation or computation. *Dropadi* v. *Hira Lal* (4) *Srinivasa Aiyangar* v. *Secretary of State* (5), referred to.

[FLETCHER, J.—But the Bengal Tenancy Act is a complete Code.]

(1) 45 Ind. Cas. 228; 27 C. L. J. 374.
(2) 47 Ind. Cas. 502; 22 C. W. N. 802.
(3) 11 Ind. Cas. 640; 34 A. 32 at p. 34; 8 A. L. J. 1111.
(4) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3.
(5) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.

I submit not. Refers to *Kripa Sindhu Mukherji* v. *Annada Sundari Debi* (6).

[FLETCHER, J.—What is meant by "prescribed" in section 29 and section 15?]

It means prescribed by any legislative authority. It does not mean prescribed by the Limitation Act only.

[FLETCHER, J.—Suppose the Chief Commissioner of Assam passes any Act; would you contend that this section will apply?]

I will say that.

[FLETCHER, J.—There is the case of *Secretary of State* v. *Gangadhar Nanda* (1), which is directly in point. That is clearly against you. It was followed in a subsequent case.]

That is so. But those cases were wrongly decided. See *Behari Loll Mukerjee* v. *Mungolanath Mukerjee* (7). The decisions are conflicting. Therefore, the matter ought to be set at rest by reference to a Full Bench.

[FLETCHER, J.—Have you any reported case under section 104H which is in your favour?]

I have not, but I say the reasons given in those cases are not correct.

[FLETCHER, J.—How can you say that?]

Because the exclusion of the period of notice will not affect or alter the period of limitation. The period of 6 months remains the same, only the 2 months during which the notice is to be given will not be taken into account for determining the starting point for limitation. The fallacy in those cases is obvious. Your Lordships can refer this case to a Full Bench and see what the effect would be. In the case of other persons the period is 6 months but in the case of Government it will be practically 4 months if the period of notice under section 80, Code of Civil Procedure, be not excluded.

[FLETCHER, J.—At present we are not convinced that these cases are wrongly decided].

Then your Lordships will have to consider another point. This is a suit for declaration of status under the proviso of section 111A, for which the limitation is 6 years;

[FLETCHER, J.—But you amended your plaint so as to bring it under section 104H. On the face of this amendment, how can you say that?]

Even after the amendment the suit is competent for purposes of section 111A proviso. What was the amendment? Before the amendment there were two prayers: (1) For declaration of status; and (2) for reduction of rent. After the amendment both the prayers were amalgamated into one. The prayer for declaration of status was not omitted.

[HUDA, J.—That is only ancillary to the main prayer.]

But see *Jogendra Nath Singh* v. *Secretary of State* (8) which says that the only prayer competent in a suit under section 104H is regarding rent.

[FLETCHER, J.—No, after amendment it is a suit under section 104H.]

Then your Lordships will allow me to amend the plaint.

[FLETCHER, J.—No, we cannot allow you to re-amend.]

[HUDA, J.—You can even now bring a suit under section 111A, proviso, if you like.]

Babu *Shib Chandra Palit* for Babu *Khirode Narain Bhuiyan*, for the Appellants in No. 2072 of 1916.

JUDGMENT.

FLETCHER, J.—The question raised in these two appeals is whether the suit was competent. That arises on a consideration of the terms of section 104H of the Bengal Tenancy Act. First of all, it is quite clear that, as against the Nandas, that is, one set of defendants who has preferred one of these appeals, namely, Appeal No. 2072 of 1916, the suit was brought eight months after the final publication of the Record of Rights. There does not seem to be any ground why as against them the period should be extended. As against the Secretary of State for India in Council, the reason why the suit was brought beyond six months is this: The Secretary of State was entitled to two months' notice under the provisions of section 80, Code of Civil Procedure, and the plaintiff's view is that he was entitled under the provisions of section 15, sub-section (2) of the Indian Limitation Act, to exclude the period during which the notice to the Secretary of State

(6) 6 C. L. J. 273 at p. 290; 11 C. W. N. 983; 35 C. 34.

(7) 5 C. 110; 4 C. L. R. 371; 2 Ind. Dec. (N. S.) 681.

(8) 17 Ind. Cas. 921; 16 C. L. J. 385; 17 C. W. N. 53.

was current. That, of course, depends on this: Does the provision of section 15, sub-section (2) of the Indian Limitation Act, apply to a suit instituted under the terms of section 104H of the Bengal Tenancy Act? The decisions of this Court are clear that it does not. There is, first, in support of it the decision in the case of *Secretary of State* v. *Gangadhar Nanda* (1). That case, it is admitted, is directly in point. That decision was followed and approved of in *Secretary of State* v. *Shib Narain Hazra* (2) by Mr. Justice Richardson and Mr. Justice Walmsley. It is quite clear that we are bound by those two considered judgments of this Court, unless we see reason to disapprove them and send them to a Full Bench. It has been suggested in this case that these two cases ought to be sent for consideration to a Full Bench. I do not think so. I think that both these cases were rightly decided. The only case that has been suggested as having any value as against these two decisions is the case of *Behari Loll Mukerjee* v. *Mungolanath Mukerjee* (7). That decision is not consistent with the decision of the Full Bench case in *Nagendra Nath Mullick* v. *Mathura Mahun Parhi* (9). We cannot send two considered judgments, the terms of which we approve, for consideration by a Full Bench on the doubtful authority of the decision reported as *Behari Loll Mukerjee* v. *Mungolanath Mukerjee* (7).

It seems to me quite clear that a suit under section 104H of the Bengal Tenancy Act must be brought in any event within the six months specified in that section. As against the Nandas, there is absolutely no reason why the time should on any account be extended. It is only in the case of the Secretary of State, if at all, that the plaintiff can say that he should get an extension of time. But on the decisions already referred to, in a suit under section 104H of the Bengal Tenancy Act, the parties are not entitled to exclude the time during the currency of the notice to the Secretary of State.

Then, another point is taken which seems to be a point that has got no force in it. It is said that this is not a suit under section 104H but is a suit under section 111A of the Bengal Tenancy Act. That is a most extraordinary proposition to put forward in the Court here. In the lower Court, it was expressly objected by the Government that the suit was not maintainable, it not being a suit under section 104H of the Bengal Tenancy Act. Thereupon, the plaintiff applied to the Court for leave to amend and amended his plaint so as to bring it under section 104H of the Bengal Tenancy Act. How can he be now heard to say that the suit is a suit under section 111A when he deliberately applied to the Court to make such amendments as would bring it under the provisions of section 104H. That is a position that cannot possibly be taken.

Finally, an appeal has been made that we should permit the plaint at this stage to be amended or rather re-amended so that the plaintiff, having once made amendments which he said were necessary to bring the case under section 104H of the Bengal Tenancy Act but which he now urges were not sufficient for that purpose, might further amend his plaint by taking back shelter under section 111A. It is quite clear that he cannot be allowed to shift his case between the two sections as he finds most convenient. He must stick to one case and having made his case under section 104H, it is quite clear that on the decisions of this Court already referred to, the present suit was instituted beyond the period of limitation mentioned in section 104H, sub-section (2) of the Bengal Tenancy Act. In my opinion, the suit was incompetent for the Court to deal with at the very outset. The present appeals must, therefore, be allowed and the plaintiff's suit dismissed. In Appeal No. 2072, the Nandas will get costs only in this Court and will bear their own costs in the lower Courts. In Appeal No. 2082, the Secretary of State for India in Council will get his costs in this Court as well as in the Courts below.

SHAMSUL HUDA, J.—I agree.

Appeals allowed.

(9) 18 C. 368; 9 Ind. Dec. (N. S.) 246 (F. B.).

NAZAR ALI v. ASHRAF ALI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 9B OF 1917.

December 28, 1917.

Present:—Mr. Prideaux, A. J. C.

NAZAR ALI, MINOR, BY GUARDIAN COLLECTOR, AMRAOTI—APPLICANT

versus

ASHRAFALLI—NON-APPLICANT.

Power-of-attorney, construction of—Minor, suit against—Admission by unauthorised agent, whether binding on minor.

A power-of-attorney should be construed strictly. [p. 528, col. 2.]

Where a power-of-attorney relates to matters connected with the management of a minor's *jagir* only, it cannot, in the absence of express provisions, be held to authorize the person in whose favour it has been executed to defend the minor's title to the *jagir* in a suit. Any statements or admissions made by such agent in a suit against the minor relating to the *jagir* cannot, therefore, bind the minor. [p. 528, col. 2.]

Application for review of judgment in Second Appeal No. 122 B, 1914, dated the 29th September 1916.

ORDER.—This is an application by the respondent, a minor, for review of my judgment passed on the 29th September 1916 in Second Appeal No. 122-B, 1914. The application was presented on the 23rd March 1917, and is thus barred by time 72 days, and objection on this ground has been taken to its admission. The application has been filed by the Collector of Amraoti as guardian, and the circumstances accounting for the delay, as shown in the affidavit of the 22nd March last, are so exceptional that I have no hesitation in extending time. I do so and proceed to consider the grounds on which review is sought. These are as follows: The fact that the applicant who is a minor was not properly represented in the original case and in the first and second appeals was not brought to the notice of this Court. The suit was filed on the 22nd January 1912 and the plaintiff did not move the Court by affidavit or otherwise for the appointment of a guardian to represent the present applicant. One Govindrao, alleging himself to be the agent of Kasam Ali Beg, appeared and made certain statements and admissions on behalf of the minor applicant. But he was not a recognised agent for the minor defendant and had no power to appear. It was not until the 17th July 1912 that the Court discovered that no guardian had been appointed and proceeded to appoint Mirza Kasam Ali Beg. This was after the statements and preliminary issues had been recorded, and the appointment was made without ascertaining the fitness of the said Mirza Kasam Ali Beg to be a guardian. It is contended for the applicant that the said Mirza Kasam Ali Beg on whose power-of-attorney Govinda the agent appeared was formerly acting as the guardian of the estate and person of the minor but was removed from the guardianship by the District Judge, Amraoti, for mismanagement; the Collector being appointed in his place on the 6th September 1915.

The application of Mirza Kasam Ali to be appointed guardian under the Guardians and Wards Act was made to the District Judge in November 1912 and orders were passed on the 12th August 1913. That is long after the statements of the agent complained of had been made, and after the date of the power-of-attorney under which the agent acted. As Mirza Kasam Ali failed to put in an inventory of the property, the District Judge was of opinion that the estate was being mismanaged; he, on the 6th September 1915, removed Mirza Kasam Ali from the guardianship of the property and appointed the Collector such guardian.

It is clear that though this was the case, the said Mirza Kasam Ali failed to intimate the fact to the Civil Courts, nor did he inform the Collector of the second appeal filed by Ashraf Ali then pending. In my opinion in any case the power-of-attorney given to Govinda by Mirza Kasam Ali Beg did not authorise the agent to defend a suit of the character brought by Ashraf Ali. The power related to matters connected with the management of the Jagir, only. A power has to be strictly construed and in the absence of authority in that power to defend the minor's title to the Jagir I cannot hold that the said Govinda was a properly constituted agent for Mirza Kasam Ali in that suit. His statements and admissions cannot, therefore, bind the minor. Mirza Kasam Ali Beg did not live in British India and would not, in my opinion, have been appointed guardian by the trial Court had that Court gone into the matter of his fitness for the appointment. Taking the case as a whole, I have come to the conclusion that the minor applicant was not properly repre-

sented and that the agent appointed by Mirza Kasam Ali Beg was not empowered by his power-of-attorney to defend the suit I, therefore, allow this review and cancel the directions contained in my judgment under review as to the burden of proof. I return the case for trial *de novo* after the appointment of the Collector as guardian for the minor.

No refund certificate will issue and costs will abide the result. I fix Pleader's fees as Rs. 25.

Review allowed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 534 OF 1912.

August 20, 1917.

Present:—Justice Sir Asutosh Chaudhuri, KT.

THE BANK OF UPPER INDIA

versus

THE ADMINISTRATOR-GENERAL OF BENGAL.

Administration of assets—Priority—Crown debts—Mortgage, English, debts secured by—Mortgagee, rights of—Fixtures, whether pass to mortgagee Shares, deposit of, effect of—Civil Procedure Code (Act V of 1908), O. XX, r. 13 (2)—Presidency Towns Insolvency Act (III of 1909), s. 49.

In the distribution of the assets of a deceased person whose estate is under administration by a decree of the Court, under Order XX, rule 13 (2), Code of Civil Procedure, read with section 49 of the Presidency Towns Insolvency Act, all debts due to the Crown must be paid in priority over all other debts, secured or unsecured, except debts secured by a first mortgage in English form. [p. 530, col. 2; p. 533, col. 1.]

In an English mortgage the ownership is wholly transferred to the creditor, which is, however, liable to be divested by the repayment of the loan on an appointed day. The mortgagee has the right to enter upon possession of the property immediately upon execution of the deed, unless the possession of the mortgagor is protected by a covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged under rule 18 of the Presidency Towns Insolvency Act. He has no debt proveable in the insolvency until his security has been valued or realised. He stands outside the bankruptcy. [p. 532, col. 2; p. 533, col. 1.]

The general rule is that unless a contrary intention is shown, a mortgage of land or buildings passes the right to the fixtures then upon the premises, and fixtures attached by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the contrary, pass to the mortgagee [p. 533, col. 1.]

The ownership of the property passes to the first mortgagee in an English mortgage but not to the puisne mortgagees. [p. 533, col. 1.]

The rule of law, that where the titles of the Crown and of the subject concur the title of the Crown shall be preferred, except so far as the Legislature has thought fit to interfere with it, appears to be one of universal application. [p. 532, col. 2.]

Shares merely deposited and not actually transferred do not create a right in favour of the depositee superior to the right of the Crown. [p. 533, col. 2.]

Mr. *Buckland*, for the Alliance Bank of Simla, Ltd.

Mr. *Langford James*, for the Punjab Government.

Mr *Gregory*, for the Administrator-General, Bengal.

JUDGMENT.—This matter was before me on the 2nd September 1915 in connection with the claim of the Administrator-General of Bengal for the refund of a certain sum by the Punjab Government, which that Government claimed the right to set off against the amount which was due to it for still-head duty.

The question which now comes up for consideration arises out of the claim of that Government to priority, in respect of the said amount for still-head duty, over the Alliance Bank of Simla, Limited, and the Delhi and London Bank, claimants Nos. 34 and 33, who are mortgagees.

The deceased died on the 20th January 1911. This suit was instituted on the 27th May 1912 by the plaintiff Bank as unsecured creditors. Letters of Administration to the estate were granted by this Court to the Administrator-General on the 28th March 1912. The mortgages to the present claimants were executed on the 10th April 1908 and the 2nd November 1910 respectively. By an order made by this Court on the 29th August 1913 the Administrator-General was appointed Receiver of the Distillery Company with power to carry on the business with a view to the sale thereof. There was a still-head duty due to the Punjab Government at the time of the death of the deceased. For the purpose of enforcing its claim warrants of attachment of the machinery, plants, stock and other moveable properties of the distillery at different places were executed under section 34 of the Excise Act and section 70 of the Punjab Land Revenue Act. These attachments were issued on the 30th September 1913 for Rs. 1,84,926-0-3. The amount owing appears not to have been definitely settled at the time. These attachments were issued in consequence of the proposed sale of some of the properties by the Administrator-General who had obtained the consent of the mortgagees. Certain steps were taken

for the sale of those properties and they were sold, but the sale was cancelled, and the properties in respect of which the warrants of attachment had been withdrawn were subsequently re-attached by the Punjab Government. The Administrator-General then applied to this Court for leave to sell, and on the 13th February 1914 leave was given to him to sell the land, buildings, plants, machinery, etc. of the sugar factories at certain places and to hold the proceeds subject to all encumbrances, attachments and distraints justly made on those properties subject to the further orders of this Court. On the 3rd May 1915 the Administrator General applied for leave to sell the Amritsar Distillery as a going concern, free from encumbrances, but without prejudice to the rights of the Punjab Government and of the mortgagees. An order was made by consent to that effect on the 2nd June 1915. The Distillery was sold on the 29th March 1916. There was a dispute as to a sum of Rs. 17,167-5-0 paid to the Government for duty on certain spirits supplied to troops by the Distillery after the death of the testator. The Administrator-General claimed that it should be refunded, but the Government said that they were willing to refund, provided the amount was set off against their claim. I held on the 2nd September 1915, on the materials then before me, that this amount was refundable by the Government and it has now been reported by the Assistant Referee as an outstanding asset of the estate. This is the position of the contending parties at present. The attachments by the Government were withdrawn and the sales were effected free from encumbrances, but such sales were without prejudice to their rights. The Government in addition to their rights under the Excise Act claim priority over all other debts as Crown debts. The mortgage to the Alliance Bank is in respect of the leasehold properties mentioned as items 5, 6 and 7 of Part II of Schedule A to Referee's report, and upon the distillery and the buildings, plants and machinery thereof in item 1 of Part II of Schedule A, and also upon certain shares belonging to the deceased mentioned as item 7 (*b*) of Part I of the said schedule. The mortgage to the Delhi and London Bank is a second mortgage of the same properties and a first mortgage of the shares, items X to WW of Part I of the said schedule, and of certain other securities held by the Bank, mentioned in Schedule E, consisting of shares. The assets of the estate are wholly insufficient to pay off the debts. The administration of the estate, therefore, being under a decree of this Court is governed by Order XX, rule 13, sub-clause (2), under which the same rules have to be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, as are in force in respect to estates of persons adjudged or declared insolvent within our local limits, that is to say, under section 49 of the Presidency Towns Insolvency Act of 1909, which provides that in the distribution of the property all debts due to the Crown shall be paid in priority. The question raised is whether there is such priority against the mortgages in favour of the Alliance Bank of Simla, Limited. and the Delhi and London Bank.

In England under the old law it was settled that the Bankruptcy Statutes did not bind the Crown, but owing to the Bankruptcy Act of 1883, as amended, so far as actual proof in bankruptcy goes, the Crown appears to be on the footing of an ordinary creditor, although the provisions relating to the remedies against the property of the debtor and the general effect of section 150 of that Act on the rights of the Crown are by no means clear in every respect, but we need hardly refer to the English Law, as under the Civil Procedure Code we have to consider the matter in view of our Insolvency Act. Order XX, rule 13 (2), provides that the same rules shall be observed "as to respective rights of secured and unsecured creditors and as to debts and liabilities proveable." This rule closely follows section 25 of the Judicature Act of 1873, in which the same words were interpreted by Jessel, M.R., as meaning debts and liabilities which can be proved and the manner in which they are to be proved [see *Mersey Steel & Iron Co. v. Naylor* (1) which was affirmed in 9 A. C. 434*]. It is argued on behalf of the Punjab Government that in this country a Crown debt

(1) (1882) 9 Q. B. D. 648; 51 L. J. Q. B. 576; 47 L. T. 369; 31 W. R. 80.

*Mersey Steel & Iron Co. v. Naylor, (1884) 9 A. C. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.—Ed.

is entitled to precedence over every other kind of debt, whether secured or unsecured. This has been based upon a passage in Dr. Ghose's work on Mortgages, 4th Edition, Volume I, page 415, and the authorities there cited, to which I shall refer.

The question in *Secretary of State* v. *Bombay Landing and Shipping Company* (2) was whether a judgment recovered by the Secretary of State was entitled to precedence over the claims of ordinary creditors who sought the benefit of a winding up order. The Court held that the Crown was not, either expressly or even by implication, bound by the Indian Companies Act X of 1866, inasmuch as that Act had not worked any alteration in the ownership in the property against which the Secretary of State sought execution. The ownership still remaining in the Company, the doctrine which prevailed in *Giles* v. *Grover* (3) was applied. *Rex* v. *Cotton* (4) was referred to, and the following observation of Chief Baron Parker was cited with approval, *viz.*, "that the property was not altered was the true reason." *Ganpat Putaya* v. *Collector of Kanara* (5) merely decided that the Crown had the first claim for levying Court-fees on the proceeds of a pauper suit. *Puthia Valappil Barga* v. *Veloth Assenar* (6) decided that inasmuch as the stamp fee recoverable by the Government in connection with a pauper suit was a first charge under section 411, Civil Procedure Code, the purchase of property sold to recover the amount due to the Government prevailed against the subsequent purchase of the same property sold in execution of any other decree. In *Gayanoda Bala Dassee* v. *Butto Kristo Bairagee* (7) the amount of Court-fees was declared as the first charge on the premises in which the pauper plaintiff succeeded in getting her right declared, and Sale, J., decided that inasmuch as the Crown had the prerogative of precedence, it was not necessary for the Crown to attach the fund in Court which represented the proceeds of the property sold. These cases do not directly deal with the question now before me and do not appear to me to support the passage cited from Dr. Ghose. Sale, J., relied upon *Collector of Moradabad* v. *Muhammad Daim Khan* (8), where it was held that the principle that the Government took precedence of all other creditors is not liable to exception in the case of lien holders, upon the strength of *Ganpat Putaya* v. *Collector of Kanara* (5), I have already referred to, which does not appear to me to support the principle enunciated by the Allahabad Court in *Collector of Moradabad* v. *Muhammad Daim Khan* (8), which has now been expressly overruled by a Full Bench of that Court: see *Dost Muhammed Khan* v. *Mani Ram* (9). I find Stanley, C. J., took the same view of the Bombay case and said, "I am at a loss to see how the Government's claim in respect of the Court-fee in such a case can be properly satisfied out of the property of the mortgagee who is in no way liable for its payment. The Court-fee is no doubt a first charge upon the interest of the mortgagors, but before the mortgagor is entitled to any benefit from the property mortgaged he must... satisfy the subsisting mortgage." The question of the precedence of a Crown debt over private hypothecation debts was discussed in *Rama chandra* v. *Pitchaikanni* (10). The learned Judges in that case were not prepared to accept *Collector of Moradabad* v. *Muhammad Daim Khan* (8) and said they "hesitated to import into places outside the presidency towns the doctrine of the common law of England relating to Crown debts." They held that the right of Government to priority to a mortgagee was not recognised in the Mofussil, was shown by the express language of the Act—which declared the land revenue to be a first charge on the land—an unnecessary provision if by common law every debt due to the Crown was a first charge on the land. This case has been followed in *Ibrahim Khan Sahib* v. *Rangasami Naicken* (11). The Madras cases arose out of sales for Abkari revenue and in the last case I have referred to, the learned Judges held that

(2) 5 B. H. C. R. 23.
(3) (1832) 9 Bing. 128; 131 E. R. 533.
(4) (1751) Parker 112; 145 E. R. 729.
(5) 1 B. 7; 11 Mad. Jur. 214; 1 Ind. Dec. (N. S.) 5.
(6) 25 M. 733; 12 M. L. J. 405.
(7) 33 C. 1040; 10 C. W. N. 857.
(8) 2 A. 196; 1 Ind. Dec. (N. S.) 678.
(9) 29 A. 537; A. W. N. (1907) 157; 4 A. L. J. 720.
(10) 7 M. 434; 2 Ind. Dec. (N. S.) 886.
(11) 28 M. 420.

the sale did not affect a mortgage which had been created prior to the sale. In some of the cases above referred to, a view seems to have been taken that the law relating to the priority of Crown debts in a presidency town where the common law of England may be applied, is different from the law applicable to the Moffussil.

The English Law relating to the matter is conveniently summed up in Coote on Mortgages, 8th Edition, pages 1386-88. It says that a mortgagee is liable to have his security postponed to certain claims of the Crown, which by virtue of its prerogatives has the right to issue an "extent" or execution against all the lands of its debtors, except copyholds, and to follow such lands into the hands of subsequent mortgagees or purchasers, though without notice. The Crown claiming under an "extent" is like a judgment-creditor, subject to prior equities and to such encumbrances as the debtor has lawfully created. Not only all interests actually created by the debtor before the lien of the Crown has attached, but also the conditions to which the lands have been subjected prior to the date of such lien, are binding upon the Crown.

The question in England does not now depend merely upon the common law, which has been largely modified by special Statutes. There is no general priority in all cases for Crown debts over the debts of the subject. The matter before me is a matter solely of the administration of assets under the direction of the Court. In such a case it has been held by James, L. J., in *Henley & Co., In re* (12) that whenever the right of the Crown and the right of the subject with respect to payment of a debt of equal degree come into competition, the Crown right prevails. It was held that the Crown having a right of distress, which was not taken away by the Companies Act of 1862, could proceed to distress and it was, therefore, right that the Crown debt should be paid in priority to the other creditors. Cotton, L. J., held that this right existed even when the Crown submitted to come in under the administration of the assets in the winding up of the Company. A distinction has always been drawn between bankruptcy and winding up, inasmuch as in the former, the whole of the property is divested from the bankrupt and passes to the trustee and becomes his property, while in the case of winding up there is no such divesting. The decision of the Court of Appeal in *Henley & Co., In re* (12) rested upon both grounds, namely, that the property had not passed out of the Company and also on the right of the Crown to be paid in priority to all other creditors of equal degree. This case was considered in *New South Wales Taxation Commissioner* v. *Palmer* (13). In England it has been held that if for any reason the Crown loses its prerogative remedies, such as extent, or does not choose to avail itself of them, it can still come in and claim priority of payment in administration by virtue of "the incontrovertible rule of law that *where the King's and the subjects' title concur*, the King's shall be preferred" [*R.* v. *Wells* (14)]. Except so far as the Legislature has thought fit to interfere with it, this rule appears to be one of universal application. In the present case there is no question of divesting, because the assets are in the hands of the Administrator-General as Receiver.

The question, so far as we are concerned, depends upon section 49 of the Presidency Towns Insolvency Act The position of secured creditors in that Act is different from that of unsecured creditors, see section 12, clause (2). A secured creditor may not petition for adjudication of an insolvent unless he is willing to relinquish his security for the benefit of the general body of creditors, or gives an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated. Schedule II of that Act provides for the proof of debts by secured and other creditors. Clauses 9 to 16 are the rules applicable to the former. A secured creditor may realise his security, or choose to surrender it to the Official Assignee and may prove for the balance. These rules are the same as under the English Bankruptcy Act, 1883.

The mortgages in favour of the Alliance Bank and the Delhi and London Bank are

(12) (1878) 9 Ch. D. 469 at p. 481; 48 L. J. Ch. 147 39 L. T. 53; 26 W. R. 885

(13) (1907) A. C. 179; 76 L. J. P. C. 41; 96 L. T. 278; 23 T. L. R. 304; 14 Manson 106.

(14) (1812) 16 East 278 at p. 282; 104 E. R. 1094; 14 R. R. 347.

English mortgages. In such mortgages the ownership is wholly transferred to the creditor, which is, however, liable to be divested by the repayment of the loan on the appointed day. The mortgagees have the right to enter upon possession of the property immediately upon execution of the deed, but the possession of the mortgagor is protected by a covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged under rule 18 of the Presidency Towns Insolvency Act. He has no debt proveable in the insolvency until his security has been valued or realised. He stands outside the bankruptcy. I, therefore, hold that the Crown is not entitled to priority over the immoveable properties so mortgaged. In this I am supported by *Dost Muhammad Khan* v. *Mani Ram* (9) and *Ibrahim Khan Sahib* v. *Rangasami Naicken* (11). The general rule is that unless a contrary intention is shown, a mortgage of land or buildings passes the right to the fixtures then upon the premises, and fixtures attatched by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the contrary, pass to the mortgagee.

In respect of the mortgages, the Alliance Bank ranks first. The second mortgagee has a right to redeem, so has the Official Assignee on behalf of the insolvent debtor. The ownership of the property passes to the first mortgagee in an English mortgage, but not to the puisne mortgagee. I, therefore, hold that he is not entitled to priority over the Crown.

The next question is as to the shares. The Alliance Bank claims paramount title to certain of their own shares registered in the name of the deceased which were not mortgaged to them. The claim arises upon clause 35 of their Articles of Association. I do not think this article affects the right of the Crown. In *Harrold* v. *Plenty* (15) the deposit of a certificate of shares as security for a debt was held to create an equitable mortgage, or in other words, an agreement to execute a transfer of the shares by way of mortgage. It was not treated as a pledge, on the ground that a share is a chose in-action and the certificate is merely evidence of title. Shares merely deposited and not actually transferred do not seem to me to create a right in favour of the depositee, superior to the right of the Crown. I hold the same in respect of what is claimed as the hypothecation of moveables.

Order accordingly.

(15) (1901) 2 Ch. 314; 70 L. J. Ch. 562; 85 L. T. 45; 49 W. R. 646; 8 Manson 204; 17 T. L. R. 545.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 371 OF 1917.

March 14, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Bakewell.

ADHIKARI VISHNUMURTHIAYYA—DEFENDANT NO. 1—APPELLANT

versus

AUTHAIYA AND OTHERS—PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 3 TO 5—RESPONDENTS.

Ejectment, suit for, by tenant-in-common—Claim for fractional possession—Co-tenant impleaded as defendant, right of, to obtain decree for his share on plaintiff succeeding—Offer to pay Court-fee in written statement—Hindu Law—Alienation by widow—Suit for possession by reversioner against alience from widow—Right of co-reversioner defendant to obtain decree for his share.

Where a tenant-in-common sues in ejectment for his share alone of the property, the co-tenants who are impleaded as defendants and who did not ask to be made co-plaintiffs cannot, on the plaintiff obtaining a decree, be given a decree for their shares on payment of the requisite Court-fee. [p. 534, col. 1.]

The procedure applicable to partition suits where one co-owner seeks a joint declaration by which all co-owners can benefit, cannot be resorted to in the above class of cases. [p. 534, col 2.]

Somasundara Mudali v. *Kulandavelu Pillai*, 28 M. 457; 14 M. L. J. 404, distinguished.

Plaintiff sued for recovery of his share of property from 1st defendant, who was an alienee from a Hindu widow. The plaintiff was a reversioner next after the widow, as also was the 2nd defendant. The 2nd defendant offered to pay Court-fee for his share, in the event of the plaintiff succeeding in the suit. The plaintiff obtained a decree for possession of his share, and defendants Nos. 3 to 5, legal representatives of 2nd defendant, claimed a decree for their share:

Held, that no decree could be passed in favour of defendants Nos. 3 to 5 for their shares. [p. 535, col. 1.]

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 55 of 1916, preferred against the decree of the Court of the District Munsif of Udipi, in Original Suit No. 167 of 1915.

FACTS appear from the judgment.

Mr. *B. Sitarama Row*, for the Appellant.—The lower Court erred in giving a decree to defendants Nos. 3 to 5 for their share in the property. The 2nd defendant, whose legal representatives they were, did not ask to be made co-plaintiff and by continuing as a defendant, he risked his position. If the plaintiff had brought a suit for a general partition, then the position might be more favourable for defendants Nos. 3 to 5.

Mr. *K. Y. Adiga*, (with him Mr. *K. P. Lakshmana Row*), for the Respondents.—The procedure adopted in partition suits is applicable to this case. The action must be deemed to be brought by the plaintiff for the benefit of his co reversioner, the 2nd defendant. On plaintiff's succeeding, 2nd defendant was entitled to be delivered his share in this suit alone. He offered to pay the Court-fee in the written statement.

JUDGMENT.—In this case the plaintiff sued the 1st defendant, here appellant, to recover the half share of property alienated to the latter by a widow, whose husband's reversioners plaintiff and 2nd defendant are; 3 to 5 defendants are 2nd defendant's legal representatives. The lower Appellate Court's judgment is concerned with the validity of this alienation; and the 1st defendant has not disputed the correctness of its conclusion in plaintiff's favour before us. The appeal, therefore, so far as it relates to plaintiff's claim, must be dismissed with costs as between him and 1st defendant.

As between 1st defendant and 3 to 5 defendants the facts are that, although the suit was brought in ejectment by plaintiff as a co-owner and 2nd defendant made no attempt to disclaim his position as a defendant, he offered in his written statement to pay the necessary Court-fee in case a decree should be given him for his share, proposing apparently to follow the procedure which is undoubtedly open to a defendant in a suit for partition of joint property; and the question is whether this procedure is open to a tenant-in-common, when his co-tenant has sued for possession of the common property or a part of it.

Before, however, dealing with this question, we refer to another argument: that he took this course without objection being made to his doing so at any stage of the litigation, that it may now be too late for his legal representatives to sue separately and that they should not be prejudiced by 1st defendant's acquiescence with the possibility that they may suffer, if 1st defendant's contention is allowed now. We are not impressed by this argument. It was open to 2nd defendant to have himself made a plaintiff and pay duty on his claim in the ordinary way. He chose at his own risk to adopt a procedure, which enabled him to postpone payment of duty, until he could tell whether it would be worth while to pay it; and, if he was wrong in supposing that the benefit of that procedure was open to him, he risked and his legal representatives must take the consequences. But in fact 1st defendant did not acquiesce in his conduct. The suit was first tried before one District Munsif and afterwards on remand by another; and at each trial a distinct issue as to 1st defendant's right to recover was framed and decided; and, although the grounds of appeal to the lower Appellate Court are badly worded, we are not prepared to hold that Nos. 4 and 19 did not raise 1st defendant's present contention.

On the merits 3 to 5 defendants rely on the analogy of the procedure in suits for partition and ascertainment and possession of a share in joint or common property, in which relief was sought against an alienee thereof and the fact, recognised in *Raghuraj Singh* v. *Bishen Tewary* (1), that a suit is maintainable by one co-owner on behalf of all against a trespasser, the inference suggested being that all suits by one co-owner, whether for the whole or of his share in the property in question, must be regarded as so brought and as terminable by a decree in favour of any or all of those on behalf of whom the plaintiff is regarded as suing. This is unsustainable. For it neglects the distinction drawn in *Hikmat Ali* v. *Wali-un-nisa* (2) between suits in which the plaintiff (as here) only claims his share and those in which a comprehensive partition between him and his joint owners or co-owners is asked and in which he desires to obtain a joint declaration by which all interested in the property can benefit. *Dost Muhammad Khan* v. *Said Begam* (3) and

(1) 37 Ind Cas. 384.
(2) 12 A. 506; A. W. N. (1890) 128; 6 Ind. Dec. (N. S.) 1076.
(3) 20 A. 81; A. W. N. (1897) 199; 9 Ind. Dec. (N. S.) 411.

Assan v. *Pathuma* (4). In *Somasundara Mudali* v. *Kulandavelu Pillai* (5) the plaintiffs, although they purported to sue on behalf of the co-owners, were not regarded as doing so ; and the conclusion was that a co-owner defendant could not take advantage of the decision as *res judicata*. The fact that the defendant then in question was *ex parte* makes no difference to the principle involved, since it was held sufficient that in the suit, as framed, for the plaintiff's share he could not have been joined as a co plaintiff, and, it may be added, he did not in order to be so joined obtain an amendment in respect of the additional share he claimed. When, as in the present case, the plaintiff sues for his own share alone and not as representing co-owners, nothing regarding the latter's shares is or can legitimately be decided. The right of a defendant to execution of a decree, which does not grant him relief explicitly, has been recognised only in certain well-defined cases, of which this has not been shown to be one. *Tricomdas Coverji Bhoja* v. *Gopinathji Thakur* (6) is relied on; but in it the defendant concerned had asked to be made a plaintiff and the High Court in appeal merely gave him the decree, which would have been given at the trial if this prayer had not been erroneously disregarded. In these circumstances we hold that 3 to 5 defendants were entitled to no decree in the present case.

The result is that the appeal is allowed to the extent that the decree, so far as it is in favour of 3 to 5 defendants, is set aside, but that it is confirmed in other respects. Defendant No. 1 will pay the plaintiff's costs in this Court. The District Munsif gave no costs to 3 to 5 defendants and the lower Appellate Court gave costs only to 4th defendant, who alone of them appeared before it. Defendants Nos. 3 to 5 will pay half of 1st defendant's costs here and in the lower Appellate Court.

M.C.P.

Decree modified.

(4) 22 M. 494; 9 M. L. J. 37, 8 Ind. Dec. (N. S.) 353.
(5) 28 M. 457; 14 M. L. J. 404.
(6) 39 Ind. Cas. 156; 44 C. 759; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450; 44 I. A. 65.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 247 OF 1916.

July, 3 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

NISTARINI DASI—DEFENDANT—APPELLANT

versus

MOHENDRA NATH KAR—PLAINTIFF —RESPONDENT.

Fraud—Ex parte *decree set aside on ground of fraud —Revival of suit—Procedure—Civil Procedure Code (Act V of* 1908*), O. XXIII, r.* 3*—Adjustment of suit.*

The defendants instituted a suit to set aside an *ex parte* decree on the ground of fraud. The specific fraud alleged was to the effect that the plaintiff had agreed on a receipt of Rs. 44 from the defendants to withdraw from the suit but that he had not intimated this arrangement to the Court and had, on the other hand, taken advantage of the absence of the defendants to secure against them an *ex parte* decree. This allegation was fully established and the *ex parte* decree was set aside on the ground of fraud:

Held, that the setting aside of the *ex parte* decree revived the original suit and that the parties were restored to the position they occupied on the day the *ex parte* decree was made, so that the agreement between the parties under which the plaintiff had to withdraw from the suit on receipt of Rs. 44 should be carried into effect by a decree of the Court under Order XXIII, rule 3, Civil Procedure Code, as an adjustment of the suit. [p. 536, col. 1.]

Appeal against the decision of the Subordinate Judge, Hooghly, dated the 30th May 1916, reversing that of the Munsif, Howrah, dated the 29th May 1915.

Babu *Manmatha Nath Ray*, for the Appellant.

Babu *Ram Charan Mitra*, for the Respondent.

JUDGMENT.—This appeal is directed against an order of remand made in a suit for recovery of arrears of rent and for ejectment. The suit was decreed *ex parte*, by the trial Court, on the 1st June 1910. The defendants thereupon instituted a suit to set aside the *ex parte* decree on the ground of fraud. The specific fraud alleged was to the effect that the plaintiff had agreed, on receipt of Rs. 44 from the defendants, to withdraw from the suit, but that he had not intimated this arrangement to the Court and had on the other hand taken advantage of the absence of the defendants to secure against them an *ex parte* decree. This allegation was fully established and the *ex parte* decree was set aside on the ground of fraud. An appeal was preferred against this decree, but the finding of the Court of first instance was

not challenged. At the instance of the then appellant, an addition, however, was made to the decree to the effect that the original suit do stand revived. The propriety of this direction has not been challenged before us, and in view of the decision of the Judicial Committee in *Khajooroonissa* v. *Rowshan Jehan* (1), which has been repeatedly followed in this Court, cannot be successfully questioned. The position, consequently, is that the *ex parte* decree which concluded the suit has been vacated and the suit has been revived. Here the defendant argues, as regards the further progress of the suit, that the parties have been restored to the position they occupied on the day the *ex parte* decree was made. This contention is obviously sound and was accepted by the first Court; the Subordinate Judge on appeal has, however, taken a different view, and has remanded the case for trial on the merits. This is clearly erroneous. On the day the *ex parte* decree (subsequently vacated) was made, the true position was that the plaintiff had in fact agreed to withdraw from the suit on receipt of a certain sum of money. Whether the agreement between the parties was to this effect or not, cannot be investigated afresh in this suit. This was the precise subject of investigation in the suit to set aside the *ex parte* decree on the ground of fraud; indeed, this formed the sole material point for determination in that litigation. Consequently, it must be taken as conclusively decided between the parties that on the day the *ex parte* decree was made in favour of the plaintiff no *ex parte* decree should have been made, but the arrangement between the parties, namely, that the plaintiff do withdraw from the suit, should have been carried into effect by a decree of the Court, under Order XXIII, rule 3 of the Civil Procedure Code. We must accordingly now give effect to this adjustment of the suit.

The result is that this appeal must be allowed, the order of remand set aside and a decree drawn up to the effect that the plaintiff withdraws from the suit. The appellant is entitled to her costs in all the Courts. We assess the hearing-fee in this Court at two gold *mohurs*.

Appeal allowed.

(1) 2 C. 184 at p. 191; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 206-B OF 1917.

July 16, 1918.

Present:—Mr. Mittra, A. J. C.

ADAM KHAN—DEFENDANT No. 3—APPELLANT

versus

DATTARAM AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Mortgage suit—Party impleaded without objection, whether can complain of error in impleading him after decision of suit.

A party who has been impleaded in a suit on his own motion or being impleaded does not object, cannot, after being cast in the suit, change front and complain of the error in impleading him. Having taken the chance of a favourable verdict, he cannot be permitted to undo the effect of an adverse verdict by being permitted to retire from the suit. The adverse verdict must, however, be one which is correct in point of law. [p. 537, col. 2.]

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 156 of 1916, dated the 29th March 1917, arising out of Civil Suit No. 94 of 1915, decided by the Sub-Judge, Yeotmal, on the 14th July 1916.

Mr. *M. V. Joshi*, for the Appellant.

The Hon'ble Mr. *M. R. Dixit*, for Respondent No. 1.

JUDGMENT.—This second appeal arises out of a suit for foreclosure based upon a mortgage, dated the 6th October 1909, executed by the first defendant as manager of a joint family consisting of himself and his brother, the second defendant. The third defendant, who is the appellant before me, was made a party on the sole allegation that he was in possession of the mortgage field No. 6. In Suit No. 55 of 1915 the first two defendants sued the third defendant for, among other reliefs, possession of the western half of survey No. 6, on the ground that defendant No. 3 was in wrongful possession thereof. As regards the eastern half share defendants Nos. 1 and 2 claimed pre-emption. On the 15th May 1909 the defendants obtained on appeal a decree for possession of the western half of survey No. 6 and for pre-emption of the eastern half on payment of Rs 626-10-0 within two months from the date of the decree. It is now conceded that the money was deposited by defendants Nos. 1 and 2 within the time allowed by the decree. In 1912 and 1913 defendants Nos. 1 and 2 applied for execution

of the decree but failed to obtain an order of the Court for delivery of possession on account of some technical defects in the applications.

In the present suit the defendant No. 3 pleaded that he was holding field No. 6 in his own right, that possession was not taken in execution of the decree in suit No. 55 and that the right to apply for execution was barred by limitation. There was also an irrelevant plea that the third defendant had no notice of the deposit made by the first two defendants. There was also an untenable plea that the plaintiff's mortgage was taken *pendente lite*.

The Subordinate Judge held that the plaintiff's mortgagors duly deposited the pre-emption money on the 14th July 1909, and under Order XX, rule 14, acquired a title from the date of the deposit. As regards the plea of limitation it was held that the right of the defendants Nos. 1 and 2 to execute the previous decree was not barred by limitation at the date of the mortgage. The learned Subordinate Judge writes:—

"The defendant No. 3 has no right of redemption at all, as he does not claim any interest through defendants Nos. 1 and 2. Really speaking he was not a necessary party to a foreclosure suit, but his contentions were heard and decided as the plaintiff claimed possession also and the field was in defendant No. 3's possession. In order to avoid multiplicity of suits I have adjudicated upon his claim: and I was within my right to do so [*vide*, *Gokul Chandra Roy* v. *Rasheswari Chowdhurani* (1)]."

The usual foreclosure decree was passed against the first two defendants and possession was decreed as against all the three. On appeal by defendant No. 3 the District Judge merely observes that defendant No. 3 is only entitled to the money deposited as the price of pre-emption.

It is conceded on behalf of the plaintiff-respondent that defendant No. 3 was not a necessary party, but it is argued as the latter did not set up a paramount title, the decree of the lower Court was correct. The defendant No 3 did claim that he was holding in his own right, but he certainly did not say that he was not a necessary or proper party to the suit. The learned Counsel for the plaintiff-respondent relies upon the following passage in Dr. Gour's Transfer of Property Act:

"But a party who has been impleaded on his motion, or being impleaded does not object cannot, after being cast in the suit, change front and complain of the error in impleading him. Having taken the chance of a favourable verdict, he cannot be permitted to undo the effect of an adverse verdict by being permitted to retire from the suit."

This may be conceded, but it does not touch the real question for decision. The adverse verdict must be one which is correct in point of law. Now all that has been rightly decided in the case is that the plaintiff's mortgagors by paying the pre-emption money acquired a title to the entire field No. 6, and that at the date of the plaintiff's mortgage the mortgagors' right to apply for execution had not been barred.

The learned District Judge is wrong in deciding what the defendant No. 3 was entitled to: what had to be decided was whether the plaintiff can obtain any relief against defendant No. 3. At the utmost the plaintiff can only get a declaration that his mortgagors had a title to mortgage at the date of the mortgage. The plaintiff is not entitled to a decree for possession against defendant No. 3 as he is a mortgagee by conditional sale. He only asked for a foreclosure decree against all the defendants. This, it is conceded, the plaintiff cannot ask for against defendant No. 3, nor has a decree for foreclosure been passed by the Subordinate Judge. As mere mortgagee the plaintiff is not entitled to possession against defendant No. 3. His mortgage-money may be paid by defendants Nos. 1 and 2 and a final decree for foreclosure may never be passed.

The learned Advocate for defendant No. 3 only asks that the relief by way of possession granted against his client should be disallowed. But he does not urge that defendant No. 3 should now be discharged from the suit, as he is willing that any adjudication correctly arrived at should bind him. I have also not been asked by the plaintiff to pass a declaratory

(1) 11 Ind. Cas. 826; 14 C. L. J. 108.

decree against defendant No. 3. Under these circumstances, I modify the decree of the lower Courts by disallowing possession against defendant No. 3. Each party will bear his own costs throughout.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1269 OF 1916.

November 19, 1917.

Present:—Mr. Justice Seshagiri Aiyer and Mr. Justice Napier.

THIRAVIYAM PILLAI AND ANOTHER —DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

LAKSHMANA PILLAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, rr. 55, 83—'Assets held by Court', meaning of—Property of judgment-debtor, attachment of, at instance of several decree-holders—Payment, into Court, of money raised by private alienation under O. XXI, r. 83—Permission, grant of, in execution proceedings started at instance of one decree-holder—Rateable distribution, right to, of all attaching creditors.

Where money is paid into Court by any one of the modes mentioned in Order XXI, rule 55, Civil Procedure Code, it is an 'asset held by the Court' within the meaning of section 73 of the Code. [p. 539, col. 2.]

Sorabji Coovarji v. *Kala Raghunath*, 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193, not approved.

J. C. Galstaun v. *Woomesh Chandra Bannerjee*, 35 Ind. Cas. 850; 44 C. 789; 25 C. L. J. 303, distinguished.

When permission is granted to a judgment-debtor under Order XXI, rule 83, Civil Procedure Code, to raise money by private alienation and the money thus raised is paid into Court, it is paid under a pending execution application. [p. 539, col. 1.]

Where property is attached at the instance of several decree-holders, permission should not be granted under Order XXI, rule 83, to satisfy only one of the decrees. [p. 540, col. 1.]

Money paid into Court by virtue of a permission granted under rule 83 of Order XXI should not be credited to the decree of the person in whose execution application the permission was ordered, but should be rateably distributed among all the attaching decree-holders. [p 539, col. 2.]

Semble.—The language of section 73, Civil Procedure Code, is wide enough to cover cases where money is in the hands of the Court, however realised. [p. 539, col. 1.]

Second appeal against the decree of the Subordinate Judge, Madura, in Appeal No. 40 of 1915, preferred against that of the Additional District Munsif, Madura, in Original Suit No. 153 of 1913.

FACTS appear from the judgment.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.—There were two attachments on the property of the judgment-debtor and money paid into Court on behalf of the judgment-debtor is an 'asset held by the Court' for the benefit of both the attaching creditors. No distinction should be drawn between money realised by Court sale and money paid into Court by virtue of the provision in Order XXI, rule 83. The fact that the permission was granted in the proceedings had at the instance of the plaintiff cannot give him a higher right.

Mr. *T. R Venkatarama Sastriar* (with him Mr. *P. S. Narayanaswami Iyer*), for the Respondent.—On the analogy of the general provisions in Order XXI, the money paid on the judgment-debtor's behalf should be taken to have been earmarked for plaintiff. To enable all decree-holders to claim rateable distribution, the assets should have been realised by process of execution. *Sorabji Coovarji* v. *Kala Raghunath* (1) and *Suikeena Katum Sahiba* v. *Mahomed Abdul Aziz*. (2). Money paid into Court as the result of a private alienation by the judgment-debtor is not an asset held by the Court.

JUDGMENT.—Plaintiff and first defendant obtained decrees against one Thoppiah Pillai. Plaintiff applied for execution and an order was made for the attachment of the judgment-debtor's property. The first defendant also applied for execution and the same property was again attached at his instance. When the property was about to be sold, the judgment-debtor applied under Order XXI, rule 83 of the Code of Civil Procedure, for permission to raise money by private alienation. The District Munsif gave him permission. Why he granted it when there was an attachment at the instance of the first defendant, and why he accepted the payment by the judgment-debtor of monies which could only have covered the amount due to the plaintiff have not been explained. It seems to us that the permission should not have been accorded, but as the judgment-debtor is not before us, we shall not deal with

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.
(2) 29 Ind. Cas. 239; 38 M. 221 at p. 224.

that question any further. In accordance with the permission, the judgment-debtor executed a mortgage on the property and the mortgagee paid into Court money just enough to cover the plaintiff's decree. The District Munsif divided this amount rateably between the plaintiff and the first defendant. Thereupon this suit was instituted to contest that order. The Courts below have held that the money should entirely be given to the plaintiff, apparently on the ground that it was deposited in Court by virtue of the permission obtained in the proceedings taken by the plaintiff. We are unable to agree with them.

Mr. Venkatarama Sastriar, Vakil for the respondent, in his able argument took us through the various analogous provisions contained in Order XXI and argued that the money paid by the judgment debtor must be taken to have been earmarked for the benefit of the plaintiff. A significant change has been made in the language of section 73 of the present Civil Procedure Code. In the old Code, the words were "whenever assets are realized by sale or otherwise in execution of a decree." In the present Code, the words are "where assets are held by a Court." The change was apparently intended to set at rest the question whether the word "realization" should not be restricted to what is paid in by virtue of process taken in execution; but apparently the Legislature has not succeeded in the object. There can be no question that the language of the present Code is wide enough to cover cases where monies are in the hands of the Court by whatever process the same has been realized. It is true that the learned Judges of the Bombay High Court hold that even under the new Code, the money to be held by the Court must have reached its hands in execution. See *Sorabji Coovarji* v. *Kala Raghunath* (1). An observation of Mr. Justice Bakewell in *Suikeena Katum Sahiba* v. *Mahomed Abdul Aziz* (2) lends support to this proposition. It is not necessary to express any opinion on this question, as we are of opinion that when permission is granted under Order XXI, rule 83, to raise money by private alienation, the money is paid under a pending execution application. The further point which Mr. Venkatarama Sastriar pressed before us was that the money should be taken to have been paid solely to the credit of his client's decree. The learned Vakil asked us to apply the analogy of Order XXI, rule 55. In that rule three classes of payments are indicated. We are prepared to concede that if money is paid outside the Court and the decree-holder certifies the payment, it cannot be said that it is an asset held by the Court. It may be that in such a case, as the attachment would cease to subsist, rival decree-holders can have no remedy, but if money is paid into Court by the other modes mentioned in rule 55, we are not satisfied that this money cannot be regarded as an asset held by the Court. If *Sorabji Coovarji* v. *Kala Raghunath* (1) lays down this proposition, we are not prepared to accept it. It must be remembered that an attaching creditor acquires no lien upon the proceeds of the sale because he procured the attachment, and we fail to see why the fact that the attachment is raised in consequence of the payment made into Court should take the money out of the expression "assets held by the Court." As regards *J. C. Galstaun* v. *Woomesh Chandra Bannerjee* (3) that was a decision under Order XXI, rule 89. That rule distinctly provides for payment to the decree-holder or to the purchaser, consequently the payment must be taken to be earmarked.

The learned Vakil for the respondent conceded that where monies are realized by process of Court solely at the instance of one of the attaching decree-holders he does not obtain, apart from getting his expenses paid, any higher right than the other decree-holders who have before payment applied for execution. This being so, we fail to see on what principle the fact that the money was paid into Court by virtue of the permission granted to raise money privately should give a larger right to the person in execution of whose decree permission was so granted. The policy of the Legislature seems to be to bring all monies realized at least in process of execution to the hotchpot to be shared by all the decree-holders. It is analogous to distribution on an insolvency. The language of Order XXI, rule 72, shows that even when monies are not actually paid into

(3) 35 Ind. Cas. 850; 44 C. 789, 25 C. L. J. 303.

Court, as in cases where the decree-holder is given permission to purchase property and the sale-proceeds are applied to the satisfaction of his decree, the Legislature specifically provided for the money being regarded as assets held by the Court. The intention of the Legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. Therefore, unless there is something clear in the language of the provisions of the Code to exempt a payment from being applied to the benefit of all the creditors, Court should incline to the view that monies in the hands of the Court should be shared by all decree-holders rateably.

In this view, we must reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout. The memorandum of objections is dismissed. There will be no order as to costs.

M. C. P.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 484 OF 1917.

August 26, 1918.

Present:—Mr. Mittra, A. J. C.

DINDAYAL SHEODUTTA—PLAINTIFF—APPELLANT

versus

Musammat SUKHA AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (Act IX of 1898), s. 81 (b)—Rent suit—Appeal, second, whether lies.

To bring a case under clause (*b*) of section 81 of the C. P. Tenancy Act it is necessary that there should have been an adjudication as between persons impleaded as parties to the suit and having conflicting interests.

Hemraj Askaran v. *Kanhailal*, 14 C. P. L. R. 31, followed.

Plaintiff Malguzar sued the defendants for arrears of rent, the amount of which was less than Rs. 100. The defendants pleaded that they were not liable for rent as they had relinquished their share in the holding in favour of their nephew *J.*:

Held, that no second appeal lay, inasmuch as the amount claimed was less than Rs 100, and the case did not fall under clause (*b*) of section 81 of the C. P. Tenancy Act, *J.* not being a party to the suit and the defendants and *J.* not having conflicting claims with regard to the tenancy.

Appeal from the decree of the Additional District Judge, Bilaspur, in Civil Appeal No. 780 of 1917, dated the 4th July 1917.

Mr. *P. S. Kotwal*, for the Appellant.

Mr. *Gangadhar Sitaram*, for the Respondents.

JUDGMENT.—The plaintiff-appellant, who is the Malguzar of the village, sues the defendants for arrears of rent. The defence was that by a compromise they have relinquished their share in the holding in favour of their nephew one Jodha and have, therefore, ceased to be liable for rent. This defence has prevailed in the Courts below, and this second appeal has been filed by the landlord.

The preliminary point for decision is whether having regard to the provisions of section 98 of the Tenancy Act there is a second appeal. The amount claimed was less than Rs. 100. Admittedly there will be no second appeal unless the case comes under clause (*b*) of section 81, that is, "unless a question relating to a title to land or some interest in land has been determined as between parties having conflicting claims thereto." The plaintiff's title to the land has never been disputed. But it is urged that a decision has been arrived at regarding the rights to the tenancy as between the defendants and Jodha. Jodha was not a party to the suit, nor can the defendants and Jodha be said to have had conflicting claims with regard to the tenancy. The defendants admit Jodha's right and do not dispute it. To bring the case under clause (*b*) it is necessary that there should be an adjudication as between persons impleaded as parties to the suit and having conflicting interests. *Hemraj Askaran* v. *Kanhailal* (1). Neither of these conditions is fulfilled in this case. The appeal is dismissed with costs, on the ground that no appeal lies in the case.

Appeal dismissed.

(1) 14 C. P. L. R. 31.

ARRACAN COY., LTD. *v.* HAMADANEE & CO.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No 157 OF 1917.
February 14, 1918.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.
THE ARRACAN COMPANY LIMITED—DEFENDANTS—APPELLANTS
versus
H. HAMADANEE & CO.—PLAINTIFFS—RESPONDENTS.

Construction of document—Contract for sale of rice milled by certain firms—Election—Breach of contract.

Defendant contracted to sell a certain quantity of rice to the plaintiff, and the contract gave the seller the right of delivering the milling of seven specified firms. One of the clauses of the contract absolved the defendant from liability in case of accidents to machinery, etc. It appeared that the plaintiff agreed to accept the milling of the defendant's mill, but before the delivery was completed the mill was burnt down. Plaintiff sued the defendant for damages for non-delivery of the balance:

Held, (1) that the clause giving the option to the defendant to deliver the milling of any of the specified firms was inserted for the benefit of the defendant and that the latter could not be compelled to deliver from all the mills; [p. 542, col. 1.]

(2) that the clause relating to accidents to machinery referred to the mill from which delivery was to be taken or was being taken and that that mill having been burnt down, the defendant was absolved from giving or completing delivery of so much of the rice as remained undelivered under the contract. [p. 542, col. 1.]

Mr. *Lentaigne*, for the Appellants.

Mr. *N. M. Cowasji*, for the Respondents.

JUDGMENT.—The defendants in Rangoon agreed to sell to the plaintiff 10,000 bags of rice, delivery to be taken "ex hopper in April 1916 at Moulmein" date at sellers' option. The contract was in writing, upon one of the defendants' Rangoon printed forms of "rice sale notes."

The plaintiff took delivery of 6,442 bags from the defendants' mill at Moulmein up to 26th April, when the mill was burnt down and the deliveries under the contract ceased. The plaintiff sued for damages for breach of contract in not delivering the balance. The defendants rely upon clause 16 of the contract: . ."Accidents to machinery, strikes or sickness of mill hands or coolies always excepted." Clause 18 gives the sellers the right of delivery under the contract the milling of seven specified firms, some of which have no mill at Moulmein, and the defendants' mill is not included. No evidence was taken at the hearing and there is nothing in the contract to show that the defendants had a mill or were entitled to give delivery of their own milling. But the plaintiff in his plaint says that "in terms of the said contract the defendants delivered to the plaintiff 6,442 bags," and the learned Judge on the original side has assumed that the contract was for the defendants' milling. He gave the plaintiff a decree on the ground that clause 18 applied not only to the defendants' mill, but to the other mills mentioned therein as well; and that the defendants were bound to deliver from those other mills if they could not deliver from their own mill.

Clause 16 is in the interest of the seller and absolves him from giving delivery, if prevented from doing so by a breakdown in the mill Mr. Lentaigne for the defendant-appellant contends that clause 16 refers to the defendants' mill. Mr. Cowasji for the plaintiff-respondent contends that clause 16 would not operate to absolve the seller from giving delivery, until all the mills mentioned in the contract had broken down—which in effect means that clause 16 applies only to the last surviving mill.

If the contract had stated that the defendants were selling their own milling the defendants would not have been under any obligation to deliver their own milling. They could have selected any one or more of the mills mentioned in clause 18; and having communicated to the buyer their election to deliver the whole or a portion of the rice from one of those mills, the contract would have to be read as if the buyer had expressly agreed to buy that quantity of rice of that milling; and the buyer could not require the seller to give him any other milling.

If *A* agrees to buy rice from *B* of X milling "ex hopper" and gives *B* the right of delivering, under the contract, Y milling, and if *B* elects to give Y milling, *A* cannot compel *B* to give delivery of X milling. And the fact that delivery of Y milling has after *B*'s election has been communicated to *A* become impossible, does not alter the case. Under the contract, the seller is entitled to say that he will give delivery from one mill only. The learned Judge was in error in construing clause 18, which

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is clearly inserted for the benefit of the seller, as if it imposed an obligation upon the seller to deliver, in certain circumstances, from all the mills.

Clause 16 clearly refers to the mill from which delivery is to be taken or is being taken; and means that if that mill breaks down, the seller is absolved from giving or completing delivery of so much rice as the buyer would have had to take from that mill if it had not broken down. The clause absolves the seller from anticipating and providing against a breakdown in the mill from which delivery is to be given.

In the present case the plaintiff accepted a milling notice on the defendants' mill. It must be taken, therefore, that the parties had agreed that the defendants should be at liberty to give delivery under the contract from their own mill and the milling notice has been taken to have been in respect of the whole quantity of rice. Clause 16, therefore, applies to a breakdown of machinery in the defendants' mill which actually occurred, and the defendants are absolved from any further delivery.

The appeal is allowed and the plaintiff's claim is dismissed with costs in both Courts.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 87 OF 1917.

April 17, 1918.

Present:—Mr. Prideaux, A. J. C.

SHRIRAM—DEFENDANT—APPELLANT

versus

RAGHURAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Foreclosure, suit for—Costs, personal decree for, whether can be passed—Appeal, whether lies.

In a suit for foreclosure a Court may pass a decree directing that the costs of the suit should be recovered personally from the mortgagor, if there is a condition to that effect in the mortgage-deed.

Dhondu v. *Daulatpuri*, 3 N. L. R. 97, followed.

An appeal lies from a preliminary decree for foreclosure directing the recovery of the costs of the suit from the person of the mortgagor.

Appeal from the decree of the Additional District Judge, Raipur, dated the 8th August 1917, in Civil Suit No. 150 of 1917.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *A. Bhagwant*, for Respondent No. 1.

JUDGMENT.—The suit from which this appeal arises was filed on two mortgage bonds, dated respectively the 7th May 1912 and 18th March 1914. The foreclosure decree asked for has been obtained. In this appeal I am concerned with the question of costs. The lower Court, following the stipulations in the two documents sued upon, has given the plaintiff a personal decree for costs of the suit against the present appellant. It is contended for him that this should not have been done. A preliminary objection is raised that no appeal lies. *Sidha Gopal Brahmin* v. *Puran* (1) is quoted in support of the objection. This authority does not seem to me applicable, for the decree in the present case cannot be said to be final. It seems to me that an appeal does lie. On the merits, however, I am of opinion that the appellant has no case. There is no valid reason why the mortgagee in the present case should not get his costs and as both mortgage-deeds contain personal covenants to pay, the lower Court was in its discretion justified in directing that such costs should be recovered from the appellant personally. That a Court may award costs personally is clear from *Dhondu* v. *Daulatpuri* (2). The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 2 N. L. R. 49.
(2) 3 N. L. R. 97.

GODAVARTHY SUNDARAMMA *v.* GODAVARTHY MANGAMMA.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 97 OF 1916.

November 15, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

GODAVARTHY SUNDARAMMA—

PLAINTIFF—APPELLANT

versus

GODAVARTHY MANGAMMA—

DEFENDANT No. 1—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (v) (b), (d)—Suit for recovery of land forming part of entire estate, but neither sub-divided nor separately assessed—Valuation, method of—Court-fee payable.

The Court-fee payable in respect of a suit for recovery of land forming part of an entire area, but neither sub-divided nor separately assessed to land revenue, must be computed on the market value of the land sued for under section 7 (*v*) (*d*) of the Court-Fees Act. [p. 544, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Coutts Trotter, in Civil Revision Petition No. 663 of 1915, praying the High Court to revise the order, dated the 27th April 1915, of the Court of the Additional District Munsif of Tenali, in Original Suit No. 43 of 1915.

FACTS appear from the following judgment of

COUTTS-TROTTER, J.—This case raises the question of the construction of a section of the Court Fees Act, VII of 1870, and the way that the matter arises is this. A suit was brought for the recovery of land which was a definite plot forming part of Survey No. 304 and was in fact 3 acres and 59 cents in extent. That Survey Number, as a whole, consists of 4 acres and 42 cents, out of which 83 cents had been sold away before, leaving a residue of 3 acres 59 cents, which was what the plaintiff was suing for. The point is this, that according to the construction of the Court Fees Act will the question be determined as to what Court has jurisdiction, because it is not contested that on the method of valuation of the land, the jurisdiction of the Court to try will depend. According to the plaintiff the proper sub-section to apply is sub section 5 (*b*) of section 7 of the Act, which would be to apply a system of multiplying the revenue payable in order to arrive at the calculation provided by the Act for fixing the value of the suit. According to the defendant, it is sub-section 5 (*d*) of the section which really governs the matter, in which case the market-value of the land has to be ascertained. According to the plaintiff, as I say, section 5 (*b*) applies and the words then are these:—"Where the land forms an entire estate." that is not this case—"or a definite share of an estate, paying an annual revenue to Government, or forms part of such estate, and is recorded as aforesaid," which by reference to sub-clause (*a*) means "is recorded in the Collector's register as separately assessed with such revenue." It is not disputed that what appears in the Collector's book is this, a description of the whole area covered by a particular *patta*, an enumeration of its extent and a figure representing the total revenue payable in respect of that *patta*. Then there follow particulars which show the rate charged per acre. I am asked to say by the plaintiff that the true construction of this Act is that because you can, by a mathematical calculation, arrive at what fraction of the whole *patta* any piece of land is, therefore, any and every bit of land that you take within the whole *patta* must be considered to be separately assessed to revenue That seems to me to be a proposition which is utterly incapable of being supported, if for no other reason because it gives no meaning whatever to the words "separately assessed." It is all assessed; the only thing is whether it is separately assessed as distinct from something which is assessed as part of a whole, and that is what I find to be the meaning of the words. Within the meaning of these words, therefore, the land in question in this suit cannot fall.

Then it is said that, even if this is not a part of an estate separately assessed to revenue, nevertheless it may be regarded as "a definite share of an estate." Once more I make the same criticism on that construction as upon the other. It entirely ignores the word 'definite', because every share in an estate is in some sense a definite share, and I have no doubt that what is meant by the words "definite share" is an undivided tangible fraction of an estate as distinct from a defined demarcated plot which has been taken out of an estate. Supposing, for instance, I sell Brownfield plot out of Whiteacre estate, that would be, in my opinion, not a definite share of an estate within the

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meaning of this enactment. But if I sell a fraction of my Blackacre estate and it has got to be divided up among different kinds of land, that, I think, is a definite share of an estate within the meaning of the section. I observe the same view was taken by a learned Judge of the Allahabad High Court in *Reference under the Court Fees Act*, 1870, *section* 5 (1). I am conscious of the extreme inconvenience of this decision but I see no possible escape from that construction of the Act. It leads, no doubt, to this absurdity in some cases. For instance, you might have a case where, if you sue for the recovery of the whole plot, if it falls under sub-section 5 (*b*), taking five times the revenue would result in a lower value than if you sue for a portion of the land which, according to this view, has to be taken at the market-value. Probably in the present case it may be that a suit for the recovery of the whole Survey Number will have to go to the District Munsif, whereas the suit for a portion of it may have to go to the Subordinate Judge's Court. The result is, doubtless, regrettable and I tried very hard to avoid it; it seems to me that the view of the person who drafted the section in fact was that, wherever you can calculate with reasonable certainty the amount of revenue payable on a plot, you should take 5 or 10 times the revenue and in default of any possibility of measuring the revenue then you must, in the last resort, have recourse to the inconvenient and cumbersome method of valuation by the market-value. That is a logical and intelligible method and must have been the intention of the framer of the Statute, but if so, he has fallen very short of his object; because though, as I say, the construction that I have adopted is probably not what was intended, it is the only possible construction on the wording of the Statute.

The result is that this petition is allowed and I declare that the subject-matter of this suit must be valued according to its market value and the case must be remanded to the lower Court to ascertain the market-value and determine the question of jurisdiction in accordance with the value found. The petitioner's costs in this Court will be paid by the respondent.

Mr. *P. Narayanamurthy*, for the Appellant.—The Court-fee must be computed under section 7 (*v*) (*b*) of the Court Fees Act, and not on the market-value. Though the land sued for is not separately assesed, it is possible to determine, by reference to the Collector's register, which furnishes particulars of the revenue charged per acre, what fraction of the whole area the land in suit is. It must, therefore, be deemed to be separately assessed.

Mr. *A. Krishnasawmy Aiyar*, for the Respondent.—Section 7 (*v*) (*b*) cannot clearly apply. The language used is a '*definite share*' of an estate. A fractional plot not sub-divided is not separately assessed. The whole area is assessed. The Court-fee should be calculated according to the market-value,

JUDGMENT.—The report of the District Munsif now received places it beyond doubt that the portion of Survey No. 304, which is a part of the subject-matter of the suit, has not been sub-divided and separately assessed to land revenue.

It cannot, therefore, be valued under clause (*b*) of section 7 (*v*) of the Court Fees Act. The order of the learned Judge is clearly right.

The appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 16 A. 493; 8 Ind. Dec. (N. S.) 320.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 271 OF 1916.

July 6, 1917.

Present:—Mr. Justice Young.

CONSTERDINE—PETITIONER

versus

SMAINE—RESPONDENT.

Divorce Act (IV of 1869), s. 4—Christian Marriage Act (XV of 1872), ss. 4, 5—Jurisdiction of Court in matrimonial matters—Fraud, whether ground for annulling marriage—Consent—"Rules, rites, ceremonies

and customs" of church, meaning of—"Solemnised", meaning of.

Section 4 of the Divorce Act, which provides that the jurisdiction exercised by the High Court in all causes, suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, does not preclude the Court from considering the provisions of sections 4 and 5 of the Christian Marriage Act and declaring a particular marriage void as not having been solemnised in accordance therewith. [p. 546, col. 1.]

The word "solemnised" in section 5 of the Christian Marriage Act means "celebrated" and refers to the ceremony only. [p. 547, cols. 1 & 2.]

Section 5 of the Christian Marriage Act deals only with the ceremony and the person who may perform it, and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it, save that he should have received episcopal ordination [p. 547, col 2.]

There is no degree of deception which can avail to set aside a contract of marriage knowingly made, unless the party imposed upon has been deceived as to the person and thus has given no consent at all. [p. 546, col. 2.]

When fraud is spoken of as avoiding a marriage, it means such fraud as procures the appearance without the reality of consent: it does not include such fraud as induces a consent, nor fraud which is practised on a third party in order to procure a license. [p. 546, col. 2.]

Messrs. *Giles* and *Villa*, for the Petitioner.

Messrs. *DeGlanville* and *Miller*, for the Respondent.

JUDGMENT.—In this suit the petitioner seeks to have it declared that his marriage with the respondent is null and void (*a*) on the ground that his consent was procured by fraud, (*b*) on the ground that they were married by a Roman Catholic priest, who was by the rules and regulations of his church incapable of marrying them inasmuch as the respondent was a divorced woman, a fact of which he was unaware when he performed the marriage ceremony.

Mr. DeGlanville for the respondent raised a preliminary objection to the jurisdiction relying on sections 4, 18 and 19 of the Indian Divorce Act, the effect of which is clearly, if this Act alone is to be considered, to deprive the Court of any jurisdiction to consider the petitioner's second ground. Mr. DeGlanville also urged that section 4, which provides that the jurisdiction then exercised by the High Courts in all causes, suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, precludes the Court from considering the provisions of section 4 of the Christian Marriage Act, which declares that every marriage solemnised otherwise than in accordance with the provisions of section 5 shall be void. In support of his contention he relied upon the case of *Gasper* v. *Gonsalves* (1), in which Pontifex, J., held that the High Court could not entertain a suit of a matrimonial nature otherwise than as provided by the Indian Divorce Act and, therefore, had no jurisdiction to make a decree of nullity on the ground that the marriage was invalid. This case, however, was decided *ex parte*. Further in *Lopez* v. *Lopez* (2), where the question was whether a certain marriage was void on the ground that the parties were within the prohibited degrees—one of the grounds on which a marriage may be declared null and void under the Indian Divorce Act, it was also argued that the marriage was void under the Christian Marriage Act and Wilson, J., who delivered the opinion of the Full Bench, stated as follows: "Section 5 of Act XV of 1872 enacts, as did the Act of 1865, that 'marriage may be solemnised in India (1) by any person who has received episcopal ordination provided that the marriage be solemnised according to the rules, rites, ceremonies, and customs of the church of which he is a minister'. It was argued that the words 'rites, rules, ceremonies, and customs' here used include rules as to capacity to marry, and make those rules in each case depend upon the law of the church whose minister performs the marriage. That argument would lead by a short process to the same conclusion at which we have arrived upon this reference. The construction of those words is difficult: we are not prepared to express a unanimous opinion upon it and it is unnecessary that we should deal with it."

The case was, therefore, decided on the Indian Divorce Act, but while it is unfortunate that this Court is deprived of the advantage of learning the views of the Calcutta High Court on the meaning of these words, it is significant that it never occurred either to Counsel or to Court to question the jurisdiction to decide the references under the Christian Marriage Act. The Court refrained from doing so only

(1) 13 B L. R. 109.

(2) 12 C. 703 at p. 731; 11 Ind. Jur. 62; 6 Ind. Dec. (N. S.) 478.

from lack of unanimity and because it was possible to decide the question raised in the case under the Divorce Act. I am of the same opinion: the Christian Marriage Act in section 4 expressly declares that marriages are null which are not solemnised in accordance with the provisions of section 5 and I fail to see how if, as here, the question is whether a particular marriage was so solemnised, I can refrain from deciding it and declaring the result in accordance with the law. I cannot agree with the decision in *Gasper* v. *Gonsalves* (1), if, and so far as, it decides to the contrary, and I am not bound by it, and if I were, I should require to be satisfied that the suit being one to declare a marriage solemnised in Chandernagore, a French settlement, null and void, the learned Judge had any jurisdiction to deal with the case at all, for under the Divorce Act decrees of nullity can only be granted in cases where the marriage has been solemnised in British India (section 2) and the same is the case under the Christian Marriage Act. Unless, therefore, Chandernagore is in India, which seems to me doubtful under the General Clauses Act, which defines India as meaning British India together with any territories of any native prince, or chief under the suzerainty of His Majesty, the decision would be one without jurisdiction. As, however, I am not bound by the decision, I do not propose to discuss the point on which I have not had the advantage of hearing argument. I hold that I have jurisdiction to deal with both grounds of the petition.

As regards the first ground, *viz.*, that the petitioner's consent was obtained by fraud, the cross-examination of the petitioner showed that if there was fraud within the meaning of the Divorce Act, it was condoned and the authorities of *Moss* v. *Moss* (3) and *Swift* v. *Kelly* (4) shew that the frauds alleged do not, according to the principles and rules of the English Courts which under section 7 of the Divorce Act I am bound to follow, afford grounds for granting the relief sought. Thus in *Swift* v. *Kelly* (4) the Judicial Committee stated as follows: "It would seem indeed to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of Statute Law requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent would never have been obtained. Unless the party imposed upon has been deceived as to the person and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made," and in *Moss* v. *Moss* (3) Sir Francis Jeune expressed his agreement with this view of the law of England, and stated (page 268) that "when in English Law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent." In this case it is not alleged that there was no consent, the petitioner expressly pleads that he did consent, but that his consent was procured by fraud. He also pleads that the license was fraudulently obtained by the respondent concealing from the priest that she had been divorced. The alleged fraud upon the petitioner is expressly dealt with by both the above authorities and the fraud upon the priest is inferentially dealt with in *Moss* v. *Moss* (3) and expressly in *Swift* v. *Kelly* (4), where their Lordships say. "If such be the law touching consent to the marriage itself and the fraud whereby that consent was obtained, it would be extraordinary indeed if another rule were allowed to govern the case where fraud has been practised upon a third party, acting immaterially in granting the license to celebrate it." Moreover, section 19 does not include fraud upon a third party as one of the grounds for invalidating a marriage. At the commencement of the second day's hearing I asked Mr. Giles whether in the face of these authorities and the evidence as to condonation it was worth while proceeding with the case upon the ground of fraud, and he abandoned this portion of it.

It remains to deal with the second ground *viz.*, that the marriage was celebrated by a Roman Catholic priest in this city of Rangoon and that as the lady had been divorced, the marriage was null and void under the

(3) (1897) P. 263; 66 L. J. P. 154; 77 L. T. 220; 45 W. R. 635.

(4) (1835) 3 Knapp 257 at p. 293; 12 E. R. 648; 40 R. R. 22.

provisions of the Christian Marriage Act. Section 5 of the Act provides that marriages may be solemnised in India by (amongst others) any person who has received episcopal ordination, provided that the marriage be solemnised according to the rules, rites, ceramonies and customs of the church of which he is a minister. There is no doubt that in this case the celebrant had received episcopal ordination and no doubt that the marriage was celebrated according to the rules, rites, ceremonies and customs of his church, except as regards the fact that the lady had been divorced. There is equally no dobut on the evidence that according to its rules and customs no priest of the Church of Rome can celebrate a marraige between persons one or both of whom has been divorced, and no person can marry a divorced man or woman. The question, however, is not whether the marriage is valid in the eyes of the church which is simple, but whether it is valid in the eyes of the law which is difficult. It is exactly the question on which the Calcutta High Court were not unanimous, and on which unfortunately they expressed no opinion, and the answer depends upon the meaning of the words "provided that the marriage be solemnised according to the rules, rites, ceremonies and customs of the church." According to the tenets of the Roman Church such a marriage is bigamous, no priest can solemnise it, no person can enter into it. According to the law it is otherwise and if the parties had had their marriage solemnised by a marriage registrar or a clergyman of the Church of England, no question, so far as I can see, could have arisen, and it undoubtedly would have been more prudent if the lady, who it may be assumed desired to contract a marriage that would be binding, had adopted this course. But she elected not to do so, and it is, therefore, necessary to determine, not whether the union is binding according to the Church of Rome, but whether it is binding in law.

In my opinion in this Act "solemnised" means celebrated; see *Queen-Empress* v. *Paul* (5), and while the Divorce Act gives the external reasons and causes for which, apart from the ceremony, a marriage may be declared null and void, the Christian Marriage Act in these sections deals with the ceremony and the ceremony only. Section 4 does not say that persons may marry each other if the law of the church by which they are married so permits, and does not say that priests may marry such persons if and only if the law of their church allows, but merely provides, as it seems to me, how every Christian marriage is to be solemnised or celebrated. "Every marriage," it says, "shall be solemnised in accordance with the provisions of section 5 and every marriage not so solemnised shall be null." Again, section 5 does not say that Christians in India may marry one another provided that they are married by a person who has received episcopal ordination and provided further that they are permitted to marry each other by the rules of the church and are married in accordance with its rules, rites, ceremonies and customs, but that marriages may be solemnised in India by certain persons, provided that they are solemnised in accordance with certain rules. In other words, the section, in my opinion, deals only with the ceremony and the person who may perform it and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it, save as is expressed in the section, *viz.*, that he should have received episcopal ordination. It is not suggested that the parties are not Christians, or that the person who performed the marriage ceremony had not received episcopal ordination or that the ceremony was performed in any way differently from that in which marriages are celebrated in the Roman Church. Such being the case, the marriage, in my opinion, fulfilled the conditions required by the Christian Marriage Act, and the parties in the eye of the law are man and wife.

I dismiss the application with costs, eight gold *mohurs*.

Petition dismissed.

(5) 20 M. 12: 1 Weir 820, 7 Ind. Dec. (N. S.) 9.

YEGNARAMA DIKSHADAR *v.* GOPALA PATTAR.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 97 OF 1917.

April 23, 1918.

Present :—Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

YEGNARAMA DIKSHADAR AND OTHERS —APPELLANTS

versus

GOPALA PATTAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Sch. II, paras. 20, 21—Civil Procedure Code (Act XIV of 1882), s. 526—Scheme for management of private endowment, settlement of, by award—Award, filing of, in Court and decree thereon—Variation of terms by consent of parties, legality of—Res judicata.

A consent decree cannot be set aside by the consent of the parties. [p. 549, col. 1.]

A decree embodying the terms of an award settling a scheme of management for a private endowment cannot be varied or altered by consent of parties where the scheme does not provide for such alteration. [p. 549, col. 1; p. 55 ', col. 1.]

Alterations in such a scheme can be secured only by a suit filed for the purpose. [p. 549, col. 1.]

Per *Wallis, C. J.*—Where a decree which settles a scheme for a temple proceeds on the basis that it is a private endowment, the Court should not interfere with such decree by raising an issue in any subsequent proceeding whether the endowment is public. The rights of the public, if any, will not be jeopardised by the decree or any subsequent order made in proceedings between parties to the decree. [p. 549, col. 1; p. 550, col. 1.]

Per *Spencer, J.*—As against the parties themselves, the decree will operate as *res judicata* in subsequent proceedings except when one of the issues before the Court raises the question whether the scheme, owing to a change of circumstances or for other good reasons, needs to be altered by the Court. [p. 550, col. 1.]

Appeal, under section 15 of the Letters Patent, against the judgment and decree of Mr. Justice Abdur Rahim and Mr. Justice Napier, in Second Appeal No. 273 of 1915, reported as 41 Ind. Cas. 738, preferred against the decree of the District Court of South Malabar in Appeal No. 184 of 1913, preferred against the decree of the Court of the Temporary Subordinate Judge of South Malabar at Palghat, in Original Suit No. 48 of 1911.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants —The temple is a private endowment and the villagers who had the management of it made a reference to arbitration for framing a scheme. The arbitrators passed an award which was filed in Court and acquired the force of a decree. The petition for filing the award in Court was unopposed. The villagers, by a majority, subsequently vareid some of the provisions of the scheme. That they could not do except by obtaining the orders of the Court. The consent of parties cannot have the effect of vacating an order of Court, *Ramanathan Chetti* v. *Murugappa Chetti* (1). The decree does not provide for the scheme being altered by the villagers or being superseded by a fresh scheme. None of the parties ever pleaded that it was a public wendoment and this Court cannot go behind the allegations in the plaint.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents.—The temple belongs to the villagers and is, therefore, a public endowment. Neither the award nor the decree in which it was merged could bind the body of villagers. The decree could not operate as *res judicata*.

Even if it is a private endowment, there is nothing to prevent the parties from agreeing to modify the terms of the scheme. The scheme is not unlimited in duration and contingencies that arise have to be provided for. There was no need to apply to Court for directions. The award was only a tentative arrangement providing for the exigencies of the time, and it will be unreasonable to hold that it should not be modified in the light of future contingencies.

JUDGMENT.

WALLIS, C. J.—The case made in the plaint was that the villagers, including the plaintiffs and defendants, are the owners and Urallars or managers of the suit temple situated in their village, that is to say, that it was a private endowment; and this was not contested on the other side. Dealing with the case on this footing we agree with the lower Courts and the learned Judges in holding that the villagers, acting by a majority, were entitled to make the reference to arbitration, Exhibit A, for the purpose of settling a scheme of management and that the award made by the arbitrators, Exhibit B, was afterwards properly filed under section 526 of the Code of Civil Procedure, the 116 Urallars who joined in the petition being entered as plaintiffs and the 46 counter-petitioners being entered as defendants, and thereupon became enforceable as a decree. The order, Exhibit C, recites that some of the

(1) 29 M. 283; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.).

counter-petitioners had withdrawn their objections and that some had been removed from the record so that the petition was not opposed.

Assuming that this is to be treated as a consent decree by virtue of the original agreement to refer to arbitration, the next question, as to which the learned Judges have differed, is whether the villagers, acting by a majority, validly set aside the provisions of the award as regards the management of the temple. Mr. Ramachandra Aiyar contended that they could not, relying on the decision of the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti* (1), which does not appear to have been cited before the learned Judges. It was held in that case that an agreement between several branches of a family as to the management by the various branches of a private endowment belonging to the family must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested. In this case there is the further objection that the award has acquired the force of a decree. The scheme of the management sanctioned by the decree does not provide for any alterations being made by the majority of the villagers, and I do not think that any such provision can be read into it. It is now well settled that a consent decree cannot be set aside by the consent of the parties. In *The Bellcairn* (2) Lord Esher, M. R., observed: "When, at a trial, the Court gives judgment by consent of the parties, it is a binding judgment of the Court and cannot be set aside by a subsequent agreement between the solicitors, or the parties even though it be placed in the form of an order by consent on a summons and taken to a Registrar or Master and by him made as a matter of course. It is only the Court, with full knowledge of all the facts on which it is called on to act, which can set aside the first judgment." And in *Huddersfield Banking Company* v. *Lister* (3), in which the grounds on which the Court would set aside a consent decree or order were considered, Lindley, L. J., observed: "A consent order, I agree, is an order and, so long as it stands, it must be treated as such, and so long as it stands ...it is as good an estoppel as any other order. I have not the slightest doubt on it". In the present case the respondents, if they wished to modify the scheme in the award, should have filed a suit for that purpose. I, therefore, would allow the appeal and remand the case to the lower Court for disposal according to law. Costs to abide.

I have already said that it is not the case of any of the parties to the suit that this is a public endowment. In *Appu Pattar* v. *Kurumba Bhagavati* (4), where such a case was not raised in the pleadings or issues, but the lower Courts went into it and the lower Appellate Court found that the endowment was a public one, this Court set aside the finding as at variance with the case disclosed by the plaint. I think this was the proper course to take, and that we should not be justified in raising such an issue now. The public are in no way represented in this suit, there is no one on the record to assert their rights, and those rights cannot be in any way affected by the decision in this case.

SADASIVA AIYAR, J.—I agree with my Lord. I was, at first, inclined to hold that, on the pleadings themselves, the temple in question might be held to be a public religious trust and hence the old decree settling a scheme on the award passed on a private reference was a nullity and that the plaintiffs, who rely upon that decree, ought to be non-suited on that ground. It is significant that neither side would unhesitatingly assert that it is not a public temple. In *Muthia Chettih* v. *Periannan Chetti* (5) my Lord the Chief Justice says (see pages 232 and 233*): "It may be that a caste or a section of a caste can own a temple as it has been held in *Pragji Kalan* v. *Govind Gopal* (6), that they can own vessels for cooking and dining, but in *Thackersey Dewraj* v. *Hurbhum Nursey* (7)...it was held that a temple which was managed by a certain caste was the subject of a public charitable trust and that a scheme could be framed for it under section 539 of the old Civil Procedure Code....Even if it had been shown that the temple was

(2) (1885) 10 P. D. 161 at p. 165; 55 L. J. P. 3; 53 L. T. 686; 34 W. R. 55.

(3) (1895) 2 Ch. 273 at p. 280; 64 L. J. Ch 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

(4) 11 Ind Cas. 633; 21 M. L. J. 588.

(5) 34 Ind. Cas. 551; 4 L. W. 228.

(6) 11 B. 534; 11 Ind. Jur. 464; 6 Ind. Dec. (N. S.) 352.

(7) 8 B. 432; 4 Ind. Dec. (N. S.) 664.

*Pages of 4 L. W.—*Ed.*

founded for the use of the particular section of the caste (Ilayathakudi Kovil Nagarathar sub-section of the Nagarathar caste), which consists of several families not shown to be otherwise than very distantly related to one another, we should, as at present advised, be inclined to hold that they are a section of the public and that section 92 is applicable. Serious inconveniences would arise from holding that a temple of this kind was the private property of such a large body of persons as the Ilayathakudi Kovil Nagarathars, and we think that such private ownership should be strictly proved." To hold that a temple alleged to belong to the fluctuating residents of four large streets is a private temple is rather extraordinary, even though it is not expressly admitted by either side that other Hindu worshippers have been worshipping in the temple. However, as the case seems to have been argued all along on the footing that the old decree was a valid decree and as my Lord has, in his judgment, sufficiently indicated that the interests of those members of the public who would be interested in the temple, if it was a public temple, would not be jeopardised by the decision in this suit, I concur with my Lord in the decision in this suit just now pronounced by him in favour of the plaintiffs.

SPENCER, J.—I am satisfied, on the pleadings, that no case has been put forward as to this being a public charitable trust and that no such plea should be allowed to be raised now. I also feel no doubt that a scheme for the management of a private endowment, such as the village temple or Devaswom which has been the subject of an award and has further become embodied in a decree, cannot be altered merely by the will of the majority of the persons interested, unless in the scheme itself there is a provision for such alteration. Against those defendants among the villagers who were themselves parties to the decree, the decree would operate as *res judicata* in subsequent proceedings, except where one of the issues before the Court raised the question whether the scheme owing to a change of circumstances or for other good reasons needed to be altered by the Court. One of the learned Judges, who heard the second appeal (Abdur Rahim, J.), considered it reasonable to treat the award as intended to be only a temporary arrangement. There is nothing in the award, so far as I have been able to discover, to limit the duration of the scheme and, therefore, it must be treated as remaining in force until set aside or altered by a competent authority, that is, by a Court having jurisdiction in the matter.

I agree that the appeal should be allowed, that the plaintiffs should be given a decree declaring the proceedings of September 25th, 1910, invalid so far as they purported to contravene the decree in Original Suit No. 292 of 1898.

I think the suit must be remanded to the Subordinate Judge for deciding what reliefs the plaintiffs are entitled to out of those claimed in the plaint upon our decision on this point of law.

M.C.P.

Appeal allowed;
Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 353 OF 1917.

August 28, 1918.

Present:—Mr. Mittra, A. J. C.

BHAOSINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHIPAT AND OTHERS—PLAINTIFFS AND DEFENDANT No. 5—RESPONDENTS.

Trespass—Suit against joint trespassers—Defendants acting in concert—Title in one defendant, whether can be relied upon by others.

A defendant who is sued as a trespasser can rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. [p. 552, col. 1.]

Appeal from the decree of the 3rd Additional District Judge, Buldana, dated the 4th July 1917, in Civil Appeal No. 7 of 1917.

Mr. *M. V. Joshi*, for the Appellants.

Mr. *K. K. Gandhey*, for Respondents Nos. 1 and 2.

JUDGMENT.—The plaint alleges that the defendants Nos. 1 to 4 illegally dispossessed the plaintiffs of the eastern half of survey

No. 29, which belonged to the latter and was in their possession till 1915. Paragraph 2 of the plaint further states the cause of action against the remaining defendants in the following terms:

"Before the Record of Rights the *khata* of the field stood in the name of Dhurpati, defendant No. 5. As she and defendants Nos. 1 to 4 have given the field in suit in mortgage to Narayan Sah, defendant No. 6, in the year 1912, she and Narayan Sah have been impleaded as defendants Nos. 5 and 6. Defendant No. 7 is joined because he helped in removing the crops."

The plaintiffs' prayer was that they be put in possession of the eastern half which the defendants Nos. 1 to 4 have taken possession of and that the defendants be directed to pay Rs. 97 as mesne profits.

The defendants Nos. 1 to 4 pleaded that they were in possession under a mortgage of 1888 executed by one Gopai, the predecessor-in-title of defendant No. 5, who was according to these defendants owner of a half share in the survey number. The case proceeded *ex parte* against the remaining defendants. The Munsif held that the plaintiffs were the owners of the whole field and were in possession till 1915, that Gopai's title to the half share was not proved, and that defendant No. 7 did not help defendants Nos. 1 to 4 in taking away the crops. Dismissing the suit against defendant No. 7, the Munsif passed a decree in favour of the plaintiffs against all the other defendants directing them to deliver back possession and to pay Rs. 40 as mesne profits.

Against this decree defendants Nos. 1 to 4 appealed. The Additional District Judge held that the plaintiffs were in possession till 1915, that Gopai, the predecessor-in-title of defendant No. 5, had an interest in the field but that the interest was lost by lapse of time. The lower Appellate Court further held that the mortgage by defendants No. 1 to 4 was not proved. On these findings the appeal was dismissed.

This second appeal has been filed by defendants Nos. 1 to 4. It is contended on behalf of the plaintiffs-respondents that the finding of the lower Appellate Court regarding the appellants' mortgage is fatal to the appeal and that no question of title on the part of defendant No. 5 can be raised by the present appellants by way of *jus tertii*. It is also urged that Order XLI, rule 4, does not apply to the case, as the appellants are bound to fail upon the finding that their mortgage is not proved. It is contended that rule 4 applies only when the Court is competent to interfere with the decree in favour of the appellants, without reference to the merits of the case so far as the non-appealing defendants are concerned, and that the non-appealing defendants can only be given the benefit of a decision so arrived at in favour of the appellants. On behalf of the appellants reliance is placed upon Order XLI, rule 33, and it is further contended that the decree of the lower Courts proceeds upon a common finding applicable to all the defendants that the plaintiffs have proved their title. I have come to the conclusion that the appeal must succeed even if the scope of Order XLI, rule 4, is limited in the manner contended for by the plaintiffs-respondents and apart from a resort to the provisions of Order XLI, rule 33.

The plaint is not very clear as to the cause of action against the defendants other than the four defendants. Although the actual dispossession was by the first four defendants, yet mesne profits have been claimed against all, and the Court has decreed both ejectment and mesne profits against all defendants except defendant No. 7. In other words, the decree has been passed against the representatives of Gopai under whom the appellants claimed. This could only have been passed upon the view that all the defendants acted in concert in dispossessing the plaintiffs, and this appears to be the suggestion made in paragraph 2 of the plaint. Upon any other interpretation of the plaint it is difficult to see how the plaintiffs were entitled to anything but a declaratory relief against defendants Nos. 5 and 6. The decree of the Courts below proceeds then upon the ground that although ejectment was by the defendants Nos. 1 to 4, all the defendants against whom the suit has been decreed were acting in concert. To act in concert with another person is to act under his authority and

hence the trespass may be justified by showing title in that person.

The appellants admit that they have failed to prove their derivative title as based upon their mortgage-deed of 1888, but, I think, they are entitled to say that as the plaint proceeds upon an allegation of joint trespass, they are entitled to defeat the plaintiffs' claim by showing title in one of the co-defendants. The plaintiffs cannot maintain a suit based merely upon their previous possession against defendant No. 5 if the latter has a title to the land. Under these circumstances the argument that defendants Nos. 5 and 6 have not appealed does not carry much force. A defendant who is sued as a trespasser, can rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. There is nothing in this view which militates against the view adopted in *Nand Ram Patel* v. *Narbad Patel* (1), which is strongly relied upon by the plaintiffs-respondents. I think that notwithstanding the adverse finding on their mortgage the appellants are entitled to show that defendant No. 5 has a title to the land in dispute. The plaintiffs denied that Gopai ever had any interest in land. There was, therefore, no plea nor issue about Gopai losing her rights by lapse of time. This can only be decided after taking proper pleadings and framing proper issues.

The decree of the lower Appellate Court is set aside as against the defendants Nos. 1 to 6 under Order XLI, rule 4, and the appeal is remanded to the lower Appellate Court for a fresh decision with advertence to the above remarks. Costs will follow the result. There will be no order for refund of Court-fees.

Appeal remanded.

(1) 12 C. P. L. R. 59.

MADRAS HIGH COURT.

APPEAL SUITS No. 47 OF 1913 AND No. 243 OF 1914.

October 25, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

SUBBA REDDI—DEFENDANT No. 1—APPELLANT

versus

ALAGAMMAL AND ANOTHER—PLAINTIFF AND DEFENDANT No 2—RESPONDENTS.

Hindu Law—Partition—Construction of deed—Division of all family properties except outstandings—Severance in status—Presumption—Partial partition, validity of.

A deed of partition executed between a Hindu father and son recited that the division was effected owing to misunderstandings among the female members of the family and that the properties mentioned in the schedule were divided. The outstandings due to the family were not mentioned in the schedule:

Held, (*Wallis, C. J., dubitante*) that the family became divided in status even in respect of the outstandings. [p. 555, col. 1.]

Per *Wallis, C. J.*—The mere fact that members of a joint Hindu family execute a document dividing a particular item of property is not sufficient to raise a presumption that they intend to become divided in status. If such a presumption is to be raised, there must be something else in the document to raise it. [p. 553, col. 2.]

Vaidyanath Aiyar v. *Aiyasamy Aiyar*, 1 Ind. Cas. 408; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49, explained.

Per *Seshagiri Aiyar, J.*—When one member of a joint family intimates his willingness to get separate from others, that effects a division in status and where a partition is effected not specifically dealing with some items of the joint property, the status of coparcenary cannot be deemed to be continued in respect of this property which is not divided. [p. 555, col. 1.]

Appeals against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suits Nos. 76 and 151 of 1911, respectively.

FACTS appear from the judgment.

The Hon'ble Mr. *T. Rangachariar* (with him Mr. *K. V. Krishnaswamy Ayyar*).—The deed of partition only effected a severance in respect of the properties specifically dealt with in it. The outstandings have been reserved and the co-parcenary status continues with respect to them. The existance of the outstandings was known to the parties and it was the intention of the parties that they should be reserved. Moreover, the usual clause recited in all partition deeds, 'Hereafter there shall only be blood relationship between us and not property relationship', which is

generally indicative of a complete severance, has been omitted in this deed.

Mr. *S. Srinivasa Aiyangar* (with him Mr. *A. Krishnasawmy Aiyar*), for the Respondents.—There can be no partial partition. From the language of the document and the express recital as to differences among the females, a presumption can be raised that the parties intended to become divided in status. The exclusion of outstandings was due to the feeling that the debts and decrees should be apportioned as they were realised, and there was no use in dividing what might subsequently turn out to be bad debts.

JUDGMENT.

A. S. No. 47 OF 1913.

WALLIS, C. J.—The only question of any difficulty in this case is, whether Exhibit VI is to be construed as effecting a division in status as well as a division of the specific properties with which it deals expressly. This appears to me to be mainly a question of the construction of the document. In *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (1), where a partial partition of property was held to raise a presumption of division in status, there was no deed of partition and I do not think that case is an authority for holding that wherever the co-parceners execute a document dividing a particular item of property, that raises a presumption that they intended to become divided in status. If such a presumption is to be raised, there must, in my opinion, be something else in the document to raise it. This was a case of partition between the 1st defendant and his father, the 1st defendant being the son by the second of the father's three wives, and the partition was brought about by the father who was ill and anxious to make provision for his first and third wives, as he did immediately afterwards in the Will, Exhibit VII, which he executed on the 3rd September, the partition deed Exhibit VI having been executed on the 25th August. Whereas the partition deed appears to have included expressly all the joint family properties except the oustanding decrees and debts which were not mentioned and were considerable, the Will bequeaths to the two wives not only the moveable and immoveable properties taken by the testator under the partition deed, Exhibit VI, but also "all the moveable and immoveable properties, outstanding loans and properties belonging to me at present but not included in this Will, and the moveable and immoveable properties, outstanding loans and properties which I may hereafter acquire." This shows, if proof were necessary, that at the time of Exhibit VI all parties must have been perfectly well aware of the existence of other joint family properties which were not included in the partition deed and the question, in my opinion, is whether from the terms of the deed we can gather that it was the intention of the parties to remain joint or become separate as to these items also. I do not think any strong presumption arises from the situation of the parties who were father and son. If the father was anxious to partition all the joint family properties with a view to leaving his share to his two wives, it is strange he did not do so expressly and it has been argued that such was not his intention and that he probably thought that the Rs. 20,000 he took under the deed would be sufficient for these wives, and was willing that his son should take the rest by survivorship. As against this, there is the recital in the deed that there had been differences between the 1st defendant and his father as well as between the women of the family. On the whole I do not think it is safe to draw any inference as to the motives actuating the parties. The partition deed, however, after providing for the division of the scheduled properties, goes on: "As we have effected partition in this manner", and provides that the 1st defendant's mother who had been living in his family should be maintained by him and not by her husband. I have come to the conclusion, though not without hesitation, that these provisions are sufficient to enable us to raise a presumption that the parties intended to become divided in interest and that the decrees and outstanding debts were not divided then, simply because they had not been collected and it was not possible to make a satisfactory division then as it could not be foretold what they would realize. The appeal will be dismissed with costs.

(1) 1 Ind. Cas 408; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49.

SUBBA REDDI v. ALAGAMMAL

A. S. No. 243 OF 1914.

This case follows my decision in Appeal No. 47 of 1913, and I dismiss the appeal with costs.

A. S. No. 47 OF 1913.

SESHAGIRI AIYAR, J.—I agree. Mr. Rangachariar frankly conceded that in the face of the overwhelming evidence there is regarding the consent of his client to the division, he is not prepared to argue that the partition was brought about by undue influence.

The only question remaining for consideration is whether the father and son were divided in status with reference to the outstandings not specifically mentioned in the deed of partition. In my opinion the language of the document shows that the parties to it were no longer to remain joint. It says, (*a*) we have lived hitherto as members of a joint family; (*b*) that owing to differences among females, it has become necessary to effect partition; (*c*) we shall effect a partition in respect of the undermentioned properties. The list of outstandings is not among the properties mentioned in the schedule. It has also to be mentioned, as pointed by Mr. Rangachariar, that the usual clause "that from this day forward there shall not be property relationship but only blood relationship" is not to be found in this document. Nonetheless I am of opinion that the intention of the parties was to get separated from each other; the reason for the necessity is given in the document. The 1st defendant is the son by one of the wives who was not living with her husband, and the pleadings and the evidence in this case show that the father effected the partition with a view to devise his share of the properties to his other two wives. I am unable to see that the father had any object in allowing particular portions of the property to continue as joint property. The explanation suggested by Mr. Srinivasa Aiyangar for their omission from the schedule is the most natural one. There were debts and decrees. It was apparently thought that the moneys should be apportioned as they were recovered. Some may have been or proved to be bad debts and it was not thought expedient to divide the debts at that time.

On principle, I am clear that the father and son became divided in status. It is pointed out by Mr. Ghose in his Hindu Law that there is nothing in the Smirithis to encourage a partial partition. The practice has grown up in recent years. Mr. Mitra in his Tagore Lectures dealing with this special question quotes from the Smirithis and commentaries to show that partial partition was unknown to Hindu Law. I do not think it necessary to quote excerpts from the texts to substantiate this position (see Mitra on the "Law of Partition," pages 330 and 331).

As regards the decided cases, Sir Richard Garth in *Radha Churn Dass* v. *Kripa Sindhu Dass* (2) says: "It seems indeed very doubtful whether by the Hindu Law any partial partition of the family property can take place except by arrangement." The decisions in *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (3), *Bhowani Prosad Shaha* v. *Juggernath Shaha* (4) and *Ajodhya Pershad* v. *Mahadeo Pershad* (5) prove that with the consent of the co-parceners a partial partition is possible. The decisions in *Timmi Reddy* v. *Achamma* (6), *Kandasami* v. *Doraisami* (7) only say that there can be a partial partition. On the other hand in *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (1) it was clearly laid down that when once a partition was made, the presumption is that it effected a complete severance of interest. This was followed in *Sundaramma* v. *Kamakotiah* (8). In *Anandibai* v. *Hari Suba Pai* (9) Chandavarkar, J., says: "If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interests of all individually, there must be proof that some of them re-united." I entirely agree. The

(2) 5 C. 474; 4 C. L. R. 428; 2 Ind. Dec. (N. S.) 911.
(3) 3 Ind. Cas. 247; 10 C. L. J. 503.
(4) 3 Ind. Cas. 241; 13 C. W. N. 309; 9 C. L. J. 133.
(5) 3 Ind. Cas. 9; 14 C. W. N. 221.
(6) 2 M. H. C. R. 325.
(7) 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.
(8) 26 Ind. Cas. 514.
(9) 10 Ind. Cas. 911; 35 B. 293; 13 Bom. L. R. 287.

recent decision of the Judicial Committee in *Suroj Narain* v. *Iqbal Narain* (10) indicates that when one member intimates his willingness to get separate from the others, that would effect a division in status. In the present case there was an agreement to become divided in consequence of misunderstandings among the female members of the family. I am unable to hold that the status of co-parcenary was intended to be continued with regard to the properties not specifically dealt with in the partition deed. It is conceded that, apart from the language of the document, there is no evidence to prove that the parties intended to remain joint with reference to the properties not specifically mentioned. I would dismiss the appeal with costs.

A. S. No. 243 OF 1914.

I agree that this appeal also should be dismissed with costs.

M.C.P.

Appeals dismissed.

(10) 18 Ind. Cas. 30; 35 A. 80; 24 M. L. J. 345; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C.).

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 339 OF 1915.

July 31, 1917.

Present:—Mr. Justice Robinson.

THE OFFICIAL ASSIGNEE—PLAINTIFF

versus

Haji MAHOMED HADY—DEFENDANT.

Procedure—Judges, change of—Successor, whether bound to accept finding of predecessor on certain issues.

A Judge who is called upon to decide a case on the conclusion of all the evidence is not bound by the previous decision of his predecessor on certain issues, and can decide them afresh.

Messrs. *Cowasji*, *Das* and *Banerji*, for the Plaintiff.

Mr. *Giles*, for the Defendant.

ORDER.—This case came on for hearing last January before another Judge, who framed the issues. By consent of parties he heard arguments and decided the first issue. The case did not come up again till now for various reasons. Mr. Giles now urges that the decision on the first issue be re-opened and that I must re-consider that issue. He relies on a ruling of a Bench of this Court, *Ma Nyo* v. *Ma Yauk* (1), which decides that the Judge deciding the case on the conclusion of all the evidence is not bound by the previous decision on certain issues and can decide them afresh. I am bound by this decision, with which I entirely agree. The only question is, whether the parties having consented to this course it is open to either of them to claim a fresh decision. The question covered by the issue is not an easy one, and it is now said that the translation of the Will the interpretation of which was involved is incorrect. I feel that I should have to consider and come to a conclusion on this issue in any case, and, therefore, even if the parties were estopped, I should still desire the matter to be argued.

I am not bound by the previous decision, but I do not think I should decide adversely to the previous decision if I should have to do so, without hearing Counsel.

The whole case must, therefore, be started now on all the issues as amended by me.

Order accordingly.

(1) 4 L. B. R. 256.

MADRAS HIGH COURT

ORIGINAL SIDE APPEAL No. 61 OF 1917.

March 13, 1918.

Present :—Sir John Wallis, KT, Chief Justice, and Mr. Justice Spencer.

V. P. PEER MAHAMAD ROWTHER—APPELLANT

versus

DALOORAM JAYANARAYAN—RESPONDENT.

Contract Act (IX of 1872), ss. 113, 116—Sale of goods by description—Warranty, implied—Inspection before purchase, effect of—Breach of contract—Damages.

Section 113 of the Contract Act closely follows sections 14 and 15 of the English Sale of Goods Act. [p. 556, col. 2.]

Where goods are sold by description, there is an implied warranty that they are of merchantable quality, even where they have been inspected before purchase. If, however, the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. [p. 557, col. 1.]

PEER MAHAMAD ROWTHER v. DALOORAM JAYANARAYAN.

Per *Spencer, J.*—Section 116 of the Contract Act deals with defects which are detectable only by expert examination. [p. 558, col. 1]

Appeal from the judgment and decree of Mr. Justice Coutts Trotter, dated 10th August 1917, passed in the exercise of the Ordinary Orignal Civil Jurisdiction of this Court, in Civil Suit No. 375 of 1916.

FACTS appear from the judgment.

Mr. *M. D. Devadoss*, for the Appellant.—The goods were inspected by the plaintiff before purchase. Section 113 of the Contract Act, which applies to purchase of goods by description, does not say that there is any warranty as to their being of merchantable quality. Under section 116 the seller is not responsible for latent defects in the articles sold. There is no proof that the damage by white ants was caused before the goods were delivered in Madras.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondent.—Section 113 of the Contract Act follows the language of the corresponding sections 14 and 15 of the English Sale of Goods Act. According to the latter enactment, there is an implied warranty as to merchantable quality.

The inspection by the buyer can give him no cause of action for defects which were revealed. Section 116 of the Contract Act does not apply to the facts of this case. It refers to defects detectable by experts.

JUDGMENT.

WALLIS, C. J.—This is an appeal from a judgment of Mr. Justice Coutts Trotter giving the plaintiff damages for breach of contract, on the ground that the goods delivered pursuant to the contract were found to be damaged by white ants and not of merchantable quality. Mr. M. D. Devadoss, in appeal, has raised a fresh point that section 113, Indian Contract Act, does not mean that in the case of sales by description and sales by sample there is the same warranty that the goods are of merchantable quality as is provided in sections 14 and 15 of the English Sale of Goods Act, 1893. It would be a very extraordinary thing if these two Statutes, which are founded on the same course of English decisions, were found to vary in such a material particular as this. The langauge used in section 113, Indian Contract Act, is not as clear as the language used in the Sale of Goods Act, which uses the words "merchantable quality." But the first illustration to section 113, Indian Contract Act, is clearly taken from the case of *Gardiner* v. *Gray* (1), which was one of the earliest cases to lay down that there was a warranty that the goods 'shall be saleable in the market under the denomination mentioned in the contract between them' (the parties). There was a series of cases subsequently, including the case of *Jones* v. *Just* (2) down to the case of *Mody* v. *Gregson* (3). That case was decided in 1868 about the time when the Indian Contract Act was under consideration, and it appears fairly clear that the langauge of section 113 was borrowed from the language of that eminent Judge the late Mr. Justice Willes at page 55 of the judgment in that case. He says: "Another class of cases is that of goods bought under specified commercial description, either by sample, or even after inspection of bulk" (the two cases dealt with in the section). He goes on: "In such cases it is an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense. The sample in such cases is looked upon as a mere expression of the quality of the article, not of its essential character, and notwithstanding the bulk be fairly shown or agree with the sample, yet if from adulteration or other causes not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense the seller is liable." It is quite clear that the language of section 113 is modelled upon the language of the case just cited, and does not mean to lay down any rule different from that which is to be found in the English cases and which has now been embodied in greater detail in sections 14 and 15 of the Sale of Goods Act.

That being so, the facts of the present case are that the bales of yarn were imported from England bound in iron hoops; and the evidence is that one hoop was removed, when they were imported. If the other hoops had been removed, and

(1) (1815) 4 Camp. 144; 16 R. R. 764.
(2) (1868) 3 Q. B. 197; 9 B. & S. 141; 37 L. J. Q. B. 89; 18 L. T. 208; 16 W. R. 643.
(3) (1868) 4 Ex. 49; 38 L. J. Ex 12; 19 L. T. 458; 17 W. R. 176.

the goods had been subjected to a detailed examination, they would have lost the character of imported goods under which they were sold. The evidence is that the outside of the bales was inspected before purchase but without removing the hoops or examining the contents. That was such examination as the case admitted of, and it would not disclose the fact that white ants had got in and had injured the yarn. Therefore, the fact that the goods were inspected before purchase is no answer. Section 113 of the Indian Contract Act says: Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk." Section 14 of the Sale of Goods Act says that "the goods shall be of merchantable quality; Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed." The present defect is not a defect which the examination which took place ought to have revealed.

The only other point is as to whether there were sufficient grounds to justify the finding on the evidence of the learned Judge that these goods were not of a merchantable quality at the time they were delivered by the seller to the buyer.

They were delivered in Madras and despatched by rail to Calcutta and took about 15 or 16 days to arrive. They were examined on arrival and found to be very badly damaged by white ants, and in such a condition, according to the uncontradicted evidence, they were no longer merchantable as black yarn bearing Hanuman mark. Now, the question which Mr. Devadoss has argued is whether it is sufficiently shown that that damage took place before delivery in Madras. Four witnesses who are accustomed to handle yarn were examined on commission on this subject, and the 3rd and 4th witnesses, who are the brokers of large firms in Calcutta, namely, Messrs. Ewing & Co. and Messrs. Finlay Muir and Co., say that the injury was not recent and that the goods were worm-eaten very long before. There is a slight discrepancy between the 3rd and 4th witnesses, because the 4th witness speaks of seeing the bodies of the dead ants whereas the 3rd witness speaks only of the stain. But this is not a difference of any great importance, as dead white ants would not leave very many traces excepting the stain to which both the witnesses speak, and they both attach great importance to the fact that there were no live white ants to be found, which they would have expected to find if the damage had been recent. White ants are such a common plague in India that there is no reason for disbelieving these gentlemen, who must have had abundant experience of goods which have been damaged by white ants. Their evidence is absolutely uncontradicted and not shaken in cross-examination, and in these circumstances it is not open to us to differ from the learned Judge who has found it to be sufficiently proved that the loss incurred was incurred before delivery by the defendant to the plaintiff.

In the result, the appeal fails and must be dismissed with costs.

SPENCER, J.—I agree. The only question of law argued by Mr. Deva Doss was whether there was any implied warranty of good quality in the five bales of black yarn with Hanuman mark which were sold by the defendant to the plaintiff. If the case were being tried in an English Court of Justice, I consider that the appellant's contention would be quite untenable. The words of section 14, clause (2) of the Sale of Goods Act, are very clear. It runs as follows:—"Where goods are brought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." The corresponding section in the Indian Contract Act, section 113, is as follows:—"Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample or after inspection of the bulk." I consider that the words 'after inspection of

the bulk' correspond with the proviso to clause (2) of section 14, Sale of Goods Act; and I am fortified in this opinion by the commentary on the section in Cunningham and Shephard's Indian Contract Act, which says: "The section, following the English Law, requires that the goods tendered shall not only correspond to the description given but shall also be saleable or merchantable as such. It was so held in *Gardiner* v. *Gray* (1)." Now, if these bales of yarn were eaten by white ants in such a way that the goods were perforated by the channels made by the insects and were crumbling to pieces, there can be no doubt that they would not be saleable or merchantable as yarn. Mr. Deva Doss relied on section 116, Indian Contract Act, which deals with latent defects. I do not think the section applies at all to the present case. It deals with defects which are only detectable by expert examination and would not apply to the state of goods which, as here, are found, on close inspection, to be thoroughly damaged and disintegrated.

As regards the evidence, the statements of the witnesses who were called in to examine the goods on arrival in Calcutta were consistent on the point that the damage could not have been recently caused. Delivery of goods was taken on the 9th and 11th August 1916 and a telegram was sent off from Calcutta on the 26th August reporting that they were damaged. Therefore, the damage must have occurred on some date before the 26th August; and the evidence that the damage was not recent proves that it is not likely to have been caused between the 9th August and the 26th August of that month. The difference between the statements of the 3rd and 4th witnesses, examined on commission on behalf of the plaintiff as to whether dead white ants were visible on the inspection of the bales, is not material; for both of these witnesses agreed that there were no living white ants, and it is possible that one witness was more observant and made a closer examination than the other, so that he detected the bodies of the dead white ants while the other noticed only the stains left by them. In the absence of any evidence of contradiction in the 4 witnesses summoned for the plaintiff, I do not think there is any reason to reject their evidence on the point.

I, therefore, agree that the appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 13 OF 1918.

June 20, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

Musammat BASTI BEGAM—DECREE-HOLDER—APPELLANT

versus

SAJJAD MIRZA—JUDGMENT-DEBTOR—RESPONDENT.

Pleadings—Pleas, inconsistent, whether can be taken—Execution application, dismissal of, and reference to suit—Suit, order in, effect of.

Where a suit to enforce a security bond filed in a Privy Council appeal was dismissed, on the grounds (1) that the necessary parties had not been impleaded and (2) that the claim was barred by section 47 of the Code of Civil Procedure, and on an application for execution to enforce the said security being made, the decree-holder was met with the plea that an order passed before the institution of the above suit in a previous execution proceeding, referring him to seek his remedy by suit, operated as a bar to a fresh application for execution:

Held, that the order passed in the suit had the effect of nullifying the previous order passed in the execution proceeding. [p. 559, col. 2.]

A party who sets up a plea, to which effect has been given by a Court in a previous proceeding, should not be allowed to set up another plea inconsistent with it in a subsequent proceeding brought for the same relief. [p. 559, col. 2.]

Appeal against the decree of the Subordinate Judge, Lucknow, dated the 10th December 1917.

Mr. *J. N. Chak*, for the Appellant.

Babu *Gokul Prasad*, for the Respondent.

JUDGMENT.

KANHAIYA LAL, A. J. C.—The question for consideration in this appeal is whether a security bond filed by an appellant for the costs of the respondent under the provisions of section 600 of the old Code of Civil Procedure in respect of an appeal to His Majesty in Council can be enforced

against the surety by the sale of the property hypothecated in the said bond, in a proceeding taken to execute the decree passed on appeal by His Majesty in Council.

It appears that Sajjad Hussain and Umrao Mirza filed a suit against Nawab Abid Hussain Khan, Saiyid Fazal Hussain and *Musammat* Basti Begam for a declaration that the properties comprised in three deeds of endowment were *waqf* properties and for possession of the same as trustees. The suit was dismissed by the Court of first instance but decreed on appeal in regard to the properties in two of the deeds. The plaintiffs appealed and a security bond for Rs. 4,000 was filed on behalf of Umrao Mirza, one of the appellants, hypothecating certain property for the payment of the costs which might be allowed to the respondents if the appeal was unsuccessful.

The Court charged with the execution of the decree disallowed her application, holding that the security bond could only be enforced by means of a separate suit. A suit was then filed by *Musammat* Basti Begam for the enforcement of the security bond, but it was dismissed on the grounds that a regular suit was not maintainable and that the necessary parties had not been impleaded. The decree-holder applied again to the Court charged with the execution of her decree, praying that the money due to her might be realized by the sale of the property hypothecated in security. This application was disallowed on the ground that the order disallowing her previous application for execution operated as *res judicata*. The Court below did not give effect to the order passed in the suit. The former was passed on the 26th June 1915 in the previous execution proceeding, directing the decree-holder to seek for remedy by a regular suit. The latter was passed on the 20th December 1915 in the regular suit filed in pursuance of that order. In the execution proceeding the judgment-debtor had objected that the decree-holder could not proceed against the property hypothecated without first obtaining a decree for sale. When a suit for sale was filed, he turned round and said that the suit was barred by section 47 of the Code of Civil Procedure. When a fresh application for execution was made, he reiterated the objection that no order for the sale of the mortgaged property could be passed, until a decree for sale was obtained in the manner provided by law. He thus took up inconsistent positions, varying his defences according to the nature of the proceeding taken by the decree-holder against him. As pointed out in *Mahommed Mehdi Ali Khan* v. *Musammat Sharf-un-nisa* (1) and *Abdul Qayum* v. *Fida Husain* (2), a party who sets up a plea, to which effect has been given by a Court in a previous proceeding, should not be allowed to set up another plea inconsistent with it in a subsequent proceeding brought for the same relief. In *Bindeswari Prosad Singh* v. *Lakpat Nath Singh* (3) it was held that where a jurisdiction was usurped by a Court in passing an order against which an appeal lay, an appeal against the order could not be defeated by showing that the order was without jurisdiction. In *Bhagirathi Dass* v. *Baleswar Bagarti* (4) and *Umeshananda Dut* v. *Mohendra Prosad* (5) it was similarly held that a litigant should not be allowed to occupy inconsistent positions in Court: or in other words to approbate and reprobate, for if the parties were to be permitted to assume inconsistent positions in the trial of their causes the usefulness of Courts of Justice would in most cases be paralysed.

The later decision has had, moreover, the effect of superseding the earlier one. In *Dambar Singh* v. *Munawar Ali Khan* (6), where inconsistent orders were passed in different execution proceedings in connection with the same decree, it was held that the later decision neutralized the earlier. The decision passed in the regular suit was, therefore, binding on the parties and the Court below was as much in error in permitting a plea to be raised inconsistent with the pleading in the suit as in refusing to allow the decree-holder to enforce her decree for costs by the sale

(1) 3 O. C. 32.
(2) 30 Ind. Cas. 551; 13 A. L. J. 854.
(3) 8 Ind. Cas. 26; 15 C. W. N. 725.
(4) 19 Ind. Cas. 686; 17 C. W. N. 877; 41 C. 69; 19 C. L. J. 155.
(5) 11 Ind. Cas. 280; 14 C. L. J. 337.
(6) 30 Ind. Cas. 775; 37 A. 531; 13 A. L. J. 764.

of the property hypothecated as security. The surety, in this instance, was one of the appellants himself. The security was furnished under Order XLV, rule 7, of the Code of Civil Procedure, and under section 145 of the Code, the liability of the surety could in any event be enforced to the extent to which he had rendered himself personally liable in the manner provided for the execution of decrees.

In *Motilal* v. *Chandrasangji* (7), where a bond was given as security for restitution in the event of a decree being reversed on appeal, a suit based on such a bond was held to be maintainable. In *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) the decree-holder was permitted to realize his decree money by the sale of the properties given in security without instituting a suit under section 67 of the Transfer of Property Act But in *Chandrabati* v. *Babu Ram* (9) and *Tokhan Singh* v. *Girwar Singh* (10) a contrary view was taken, reliance being placed on old section 99 of the Transfer of Property Act, which has now been replaced in a considerably modified form by Order XXXIV, rule 14 of the Code of Civil Procedure. Where a decree for the payment of money is obtained in satisfaction of a claim arising under a mortgage, different considerations arise. Here the decree is one for costs, and it can be enforced, apart from what was held in the suit, as if it were a simple money-decree, though a suit for sale on the security bond may also be maintainable.

The learned Counsel for the judgment-debtor contends that the order passed in the regular suit was based on two grounds, the first in serial order being that all the necessary parties had not been impleaded. He argues that that finding rendered the decision of any other matter in the suit unnecessary. But the question of the competency of a Court to entertain a suit is logically the first question that a Court has to decide before it can proceed to determine the other issues. In *Shib Charan Lal* v. *Raghu Nath* (11), which was followed in *Jiwa Ram* v. *Salyan* (12) and *Har Sahai* v. *Ali Muhammad Khan* (13), it was held that if there were two findings of fact, either of which would justify in law the making of a decree, that one of such two findings of fact, which should in the logical sequence of necessary issues be first found and the finding of which rendered the other of such two findings unnecessary for the making of the decree which was made, was the finding which would operate as *res judicata*. This difficulty arising out of the non-joinder of necessary parties was the first matter with which the judgment dealt, but it was not the first matter in the order of logical sequence, because the matter could only be taken up after the Court had decided that it had jurisdiction to hear the suit. If it came to the conclusion that the suit was barred by section 47 of the Code of Civil Procedure and that the remedy of the mortgagee was to apply for the execution of her decree by the enforcement of the security, any decision dealing with the other matters raised in the suit could only be ancillary or of secondary interest. That portion of the judgment which decided that a regular suit was not maintainable has become final and operates as *res judicata*; and it is not now open to the judgment-debtor, who was a party to it, to go behind it and contend that the application for execution to enforce the security is not maintainable. The previous order passed in execution is superseded by the order passed in the suit.

The appeal is, therefore, allowed and the case is remanded to the Court below, with a direction to reinstate the execution proceeding and to proceed with the application for execution in the manner provided by law. The appellant will get her costs from the judgment-debtor throughout.

DANIELS, A. J. C.—I concur. To allow a party to play fast and loose with the Courts, as the respondent has been permitted to do in this case, is nothing short of a denial of justice. It is, in my opinion, unnecessary form to decide whether both the findings on which the Subordi-

(7) 12 Ind. Cas. 549; 36 B. 42; 13 Bom. L. R. 909.
(8) 30 C. 1060; 7 C. W. N. 914.
(9) 27 Ind. Cas. 365; 19 C. W. N. 178.
(10) 32 C 494; 9 C. W. N. 372; 1 C. L. J. 118.
(11) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S.) 437.
(12) 9 Ind. Cas. 983; 8 A. L. J. 409.
(13) 20 Ind. Cas. 265; 16 O. C. 178.

nate Judge's judgment of 20th December 1916 was based constitute *res judicata* or only one of them—a point expressly left open in *Har Sahai* v. *Ali Muhammad Khan* (13), as the Court held that the situation referred to did not really arise—inasmuch as whether we adopt the view of the law taken by the Chief Court of the Punjab in *Babu Lal* v. *Hari Bakhsh* (14) or the view adopted by the Allahabad High Court in *Shib Charan Lal* v. *Raghu Nath* (11), in either case the finding that the plaintiff's remedy lay in the execution department certainly did so operate.

Appeal allowed.

(14) 41 Ind. Cas. 479; 13 P. R. 1918; 122 P. W. R. 1917.

COURT OF THE FINANCIAL COMMISSIONER, BURMA.

REVENUE STAMP REFERENCE No. 5 OF 1918.

March 14, 1918.

Present:—Mr. Thompson, F. C.

In re M. A. RAEBURN & Co.

Stamp Act (II of 1899), Sch. I, Art. 13—Bill of exchange—Order on firm to pay specified sum to certain person or bearer.

An order directing a certain firm to pay a specified sum of money to a certain person or bearer is a bill of exchange payable on demand and is chargeable with a duty of one anna under Article 13 of Schedule I of the Stamp Act.

Case referred by the Collector of Rangoon, under section 56 (2) of the Stamp Act, as to whether the following document was chargeable with stamp duty.

MEMO.

Rangoon, 6th February 1918.

T. S. Perichiappa Chetty,
12, Mogul Street.

Pay to Messrs. Goolam Ariff Estate Company or bearer rupees three hundred and seventy-five only.

Rs. 375.

(Sd.) M. A. R. Raeburn & Company.

ORDER.—The instrument which has been referred to me by the Collector of Rangoon under section 56 (2) of the Indian Stamp Act, and which is filed at page 3 of his

Proceeding No. 211 of 1917-18, is undoubtedly a bill of exchange payable on demand and is chargeable with a duty of one anna under Article 13 of the Schedule I of the Act.

Answer accordingly.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 296 OF 1917.

April 10, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

MOHAMMAD ILTIFAT HUSAIN—DECREE-HOLDER—APPELLANT

versus

ALIM-UN-NISSA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6, order refusing to pass decree under, whether decree—Court-fee on appeal, calculation of—Court Fees Act (VII of 1870), Sch. I, Art. 1.

An order refusing to make a decree under Order XXXIV, rule 6 of the Civil Procedure Code, is a decree within the meaning of the definition of that term in section 2 of the Code, and an appeal against it must bear *ad valorem* Court-fees, calculated upon the value of the subject-matter of the appeal. [p 562, col. 1.]

FACTS appear from the following

REPORT OF THE STAMP REPORTER.—This is an appeal against the decree of the Courts below refusing to grant the decree-holder appellant's application for a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure, on the ground that it was time-barred. On the authority of the ruling of this Court to be found in *Tajammul Husain Khan* v. *Muhammad Husain Khan* (1), *ad valorem* Court-fee must be paid both in the lower Appellate Court and in this Court on the value of the relief sought. Accordingly a Court-fee of Rs. 295 must be paid in each Court on Rs. 5,456, the value of the appeal in each Court. A Court-fee of annas eight having

(1) 35 Ind. Cas. 158; 14 A. L. J. 328

been paid in the lower Appellate Court and of Rs. 2 in this Court, there is, therefore, a deficiency of Rs. 587-8-0, or Rs. 550 *minus* Rs. 2-8-0

Objection having been taken to the above report before the Taxing Officer, he referred the case to the Judges hearing the Appeal who made the following

ORDER.—A report has been submitted by the office that the appellant was liable for additional Court-fees in the lower Appellate Court calculated upon the value of the subject-matter of the appeal. The application was for a decree under Order XXXIV, rule 6, made in the original mortgage suit. The application, of course, could be made on an 8-anna stamp, but the question is what should the fee be which either side would have to pay if they were dissatisfied with the ruling of the Court to which the application was made. In the present case the Court made an order dismissing the application for a decree under Order XXXIV, rule 6. In the case of *Tajammul Husain Khan* v. *Muhammad Husain Khan* (1) Mr. Justice Tudball held that the defendant against whom a decree under Order XXXIV, rule 6, had been made was obliged to pay an *ad valorem* Court-fee on the decree which had been made against him. The learned Judge was of opinion that the decision appealed against was clearly a "decree" within the meaning of the Code of Civil Procedure. We think that the view taken by Mr. Justice Tudball was correct. The only difference between that case and the present is that the Court of first instance, instead of granting a decree under Order XXXIV, rule 6, refused to make such decree. We think that an order refusing to make a decree under Order XXXIV, rule 6, must be regarded as a "decree" within the meaning of the definition of that term in the Code of Civil Procedure. We think that the report of the office as to the liability of the appellant for payment of *ad valorem* Court-fees in the first appeal was correct and that the amount must be paid by the appellant.

Order accordingly.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 296 OF 1917.

April 10, 1918.

Present :—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

MOHAMMAD ILTIFAT HUSAIN—DECREE-HOLDER—APPELLANT

versus

ALIM-UN-NISSA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6 - Application for personal decree, whether application in execution—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Art. 181.

An application under Order XXXIV, rule 6, is an application in the original suit for a new decree and it cannot be regarded as an application in execution. Such an application should be made within three years from the time when the right to make such application accrues and the Article which governs the application is Article 181 of the Limitation Act. [p. 563, col. 1.]

Some mortgaged property was put up to sale in execution of a mortgage decree in 1911 and was purchased by the decree-holder. The proceeds of the sale being insufficient to satisfy the mortgage debt, the mortgagee made an application in 1913 under Order XXXIV, rule 6, for a personal decree. That application proved ineffectual and he made another application for a similar decree in 1915:

Held, that the application, not being an application for execution of the original mortgage decree, was barred by time and that the *interim* application did not save limitation. [p. 563, col. 1.]

Execution second appeal from a decree of the District Judge of Budaun.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Appellant.

Messrs. *S. A. Haidar* and *Muhammad Yusuf*, for the Respondents.

JUDGMENT.—This appeal arises out of an application under Order XXXIV, rule 6. This rule applies to cases in which after the mortgaged property has been sold the mortgagee comes to Court and asks for a personal decree for the balance left due. The rule provides that "where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount." In the present case the original mortgage decree was obtained in February 1906. The mortgaged property consisted of two villages. In the events which happened the mortgagee became entitled to the equity of redemption of one of the villages the

result being that the two interests (that is, the interest of the mortgagee and the interest of the mortgagor) vested in one person. This operated to discharge the mortgage to the extent of the value of the property acquired by the mortgagee. In the year 1911 the other village was put up to sale and purchased by the decree-holder. Accordingly the mortgaged property and all rights in respect of it were exhausted in the year 1911, and it was on this basis that the application for a personal decree was made. The application was made in the year 1915, but there was another application for a similar decree in the meantime (1913). If the present application can be regarded as an application for execution of the original mortgage decree, then perhaps the application which was made in 1913 would save limitation. If, on the other hand, the present application is not an application for execution of the original mortgage decree but is an application for a fresh decree, then the application should have been made within three years from the time when the right to make such application accrued, and the Article which governs the application is Article 181 of the Limitation Act. We find it impossible to hold that an application for a decree under the provisions of Order XXXIV, rule 6, is an application for the execution of the original decree which was a decree for the sale of certain property; we think that it is an application in the original suit for a new decree and that it cannot be regarded as an application in execution. In a somewhat similar case of *Behari Lal* v. *Bisheshar Dayal* (1) Mr. Justice Chamier seems to have expressed the view that Article 181 governs an application for a decree under Order XXXIV, rule 6. In this view the order of the Court below dismissing the application was correct, although the reasons for the Court's decision may be open to question. We dismiss the appeal with costs.

Appeal dismissed.

(1) 14 Ind. Cas. 591; 9 A. L. J. 569.

MADRAS HIGH COURT.

CIVIL APPEAL No. 177 OF 1916.

March 21, 1918.

Present :—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

Sri PUSAPATI VENKATAPATHIRAJU GARU AND OTHERS—DEFENDANTS Nos. 1 TO 4, 6 AND 7—APPELLANTS

versus

Sri Raja VATSAVAYA VENKATA SUBHADRAYYAMMA JAGAPATI BAHADUR GARU—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 32, 55, 64, 65—Contract to finance litigation and to share in property decreed on success, nature of—Loan—Contingent contract - Construction of document—Champerty—Failure to advance full amount agreed upon, effect of—Breach of contract—Refund of consideration advanced, right of lender to—Stipulation for compromise in particular manner and charge on amount of compromise—Compromise effected differently—Charge, enforceability of—Assignment of future property, validity of—Benefit of contract, participation in, where no privity, effect of—Transfer of Property Act (IV of 1882), ss. 5, 6, 58—Registration Act (XVI of 1908), s. 49—Charge, unregistered, creation of, on moveables and immoveables, effect of.

Where a person agrees to advance moneys to another from time to time up to a certain limit with the object of financing a litigation by the latter, but fails or refuses to pay the full amount, he is, nevertheless, entitled, under section 64 of the Contract Act, to a refund of the amount actually advanced by him. [p. 574, col. 2.]

Chokalingam Mudaliar v. *Mahomed Sheriff Saheb*, 17 Ind. Cas. 894; 23 M. L. J. 680; 12 M. L. T. 594; (1912) M. W. N. 1212 and *H. Dakin & Co.* v. *Lee*, (1916) 1 K. B. 566; 84 L. J. K. B. 2031, followed.

Underwood v. *Lewis*, (1894) 2 Q. B. 306; 64 L. J. Q. B. 60; 9 R. 440; 70 L. T. 833; 42 W. R. 517 and *Sumpter* v. *Hedges*, (1898) 1 Q. B. 673; 67 L. J. Q. B. 545; 78 L. T. 378; 46 W. R. 454, distinguished.

It depends on the terms of the document whether the subject of it is to be treated as a loan. [p. 570, col. 2.]

Where the agreement is to finance a litigation against a person in possession of certain property and in favour of persons who are themselves unable to find the necessary funds, and the person financing is to get a share of the property in the event of the success of the litigation as if the full amount was paid and no provision is made for the refund of the amount in the event of failure, the transaction cannot be treated as a loan. [p. 571, col. 1.]

Such a contract is champertous, but the promisee is entitled to recover what he has advanced in the event of the litigation ending successfully to the promisor. [p. 571, col. 1.]

A person cannot be charged with liability merely on the ground that he has benefited by a contract entered into by another. [p. 575, col. 1.]

An assignment of future property is not invalid in India. Section 6 of the Transfer of Property Act does not contain a total prohibition against the assignment of all future property, but must be

construed as an exception to the general rule in favour of transfers of property, present and future. [p. 572, col. 2.]

Portions of a section should be construed *ejusdem generis* with the rest of the section. [p. 572, col. 2; p. 573, col. 1.]

The words 'of a like nature' in clause (*a*) of section 6 indicate that the '*possibility*' referred to therein must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy. [p. 573, col. 1.]

Under section 58 of the Transfer of Property Act, a property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. A transfer, therefore, if otherwise valid, is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement [p. 573, col. 1.]

Where a loan is charged on a property, a mere default of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced. There will be a lien *pro tanto*. [p. 573, col. 2.]

Where a loan advanced with the object of financing a litigation is charged on an amount which may be secured by a compromise in the suit to be effected in a particular manner, and the compromise is effected in a different manner, the lien will not attach itself to the substituted property, especially where the parties put an end to the contract before the compromise. [p. 573, col. 2.]

Where there is a blend of moveable and immoveable properties in respect of which a charge is created, if the document creating the charge is not registered, it will only deprive the promisee of his right in the immoveable property and will not affect his rights in the moveable property. [p. 574, col. 1.]

Palaka Veetil v. *Thiruthipalli*, 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584, followed.

Plaintiff's husband, agreed on 25th May 1903 to advance moneys up to a limit of Rs. 1,50,000 to defendants Nos. 2, 3 and 4 with the object of financing a suit by the latter to recover a Zemindari, in consideration whereof the latter agreed to convey to plaintiff a 3/16ths share in the property in the event of their succeeding in the litigation. It was stipulated that the defendants should not compromise the suit with their adversaries without the lender's consent. This agreement was varied in 1908 by another, whereunder the lender was to advance two lakhs of rupees and get a fourth share and no compromise was to be entered into by the defendants without the consent of the lender or of his Vakil. The amount advanced was charged on the amount which might be secured under the compromise. Plaintiff's husband, after advancing about Rs. 70,000, declined to advance any further sum as there were misunderstandings between himself and his debtors. The suit by defendants was compromised, but not in the manner specified in the agreement. Plaintiff's husband having died, plaintiff sued to recover the amounts actually advanced and interest thereon and to have it charged on the amount of the compromise:

Held, (1) that plaintiff was entitled to a personal decree for refund; [p. 574, col. 2.]

(2) that the lien created on property to come into existence in future was valid; [p. 573, col. 1.]

(3) but that the lien could not be fastened on the amount of the compromise as plaintiff's husband had, prior thereto, broken the contract and the compromise effected was not in accordance with the agreement. [p. 573, col. 2.]

Appeal against the decree of the Court of the Temprorary Subordinate Judge, Vizagapatam, in Original Suit No. 10 of 1913.

FACTS appear from the judgment.

The Hon'ble *S. Srinivasa Aiyangar* (Advocate-General), for the Appellants.—The agreement between the parties was not a loan. The object of the transaction was to finance a litigation in favour of persons who had no funds and, though the arrangement is beneficial to the lender in the event of the litigation ending successfully to the borrower, there is no provision for refund of the amount advanced in case of failure. The contract was distinctly champertous and unenforceable and plaintiff is not entitled to a return of even the amount actually advanced by her husband. The transaction should be treated as a contingent contract, which could be enforced only if the contingency provided for, *viz.*, the success of the litigation, happened: *Kalka Singh* v. *Paras Ram* (1).

Assuming that the transaction was a loan, no lien was created under the agreement on the amount of the compromise actually effected by the parties. The compromise contemplated by the parties and to which the lien was to attach was a compromise assented to by the lender or his Vakil, Mr. V. Krishnaswami Aiyar. The lien cannot fasten itself on the amount of the compromise which was different from what the parties intended.

No charge can be created on property which is not in existence on the date of the contract. In India, at any rate, future property cannot be assigned. In section 5 of the Transfer of Property Act, the comma after the word 'property' and before the words 'in present or in future' governs the word 'conveys' and not the word 'property'. Section 5 nowhere indicates that future property can be conveyed. Section 6 does not indicate it either. Clauses (*a*) to (*i*) of section 6 only illustrate the general principle that future property should

(1) 22 C. 434; 22 I. A. 68; 6 Sar. P. C. J. 545; 5 M. L. J. 14; Ratique & Jackson's P. C. No. 137; 11 Ind. Dec. (N. S.) 290 (P. C.).

not be conveyed. The present case falls under 'other mere possibility of a like nature' in clause (*a*) of section 6. The words 'specific immoveable property' in section 58 indicate that property not in existence cannot be the subject of transfer.

The lender in this case broke the contract and is not entitled to enforce the lien, if it can be validly enforced. Nor is the plaintiff entitled to a personal decree for the amounts actually advanced by her husband under section 64 of the Contract Act, as the agreement was to advance a specific amount, was one and indivisible and no apportionment could be claimed on the principle of *quantum meriut*.

Defendants Nos. 1, 5 and 6 were not parties to the contract and could not be made liable merely because they participated in its benefit.

Mr. *K. Srinivasa Aiyangar*, for the Respondent.—The transaction is a loan and the plaintiff is entitled to a refund of the amounts actually advanced by her husband. The written agreement between the parties expressly recites that the amount advanced was a loan and there is also mention of interest. Even were it champertous as a traffic in litigation, the promisee is entitled to recover sums actually advanced, in the event of its terminating in the borrower's favour.

The charge created on property to come into existence subsequently is not invalid. In *Tailby* v. *Official Receiver* (2) assignments of future property have been held to be vaild. The principle is applicable to India and section 6 of the Transfer of Property Act does not derogate from its applicability. The section must be construed as an exception to the general rule in favour of transfers of property, present or future.

The words 'specific immoveable property' in section 58 of the Act refer to property that is identifiable though not actually in existence on the date of the transfer, and a transfer is not invalid merely because the property is not then in existence.

The lien, though originally agreed to be attached to a compromise brought about with the consent of his lender or his Vakil, is not wiped out because the compromise was brought about differently. The provision for the lender's or his Vakil's assent was intended to safeguard the lender's interest and there was nothing to prevent the plaintiff's husband from accepting the compromise if it was for his benefit.

The plaintiff is entitled, under section 64 of the Contract Act, to a refund of the amount actually advanced even though it was short of the stipulated amount: *Chokalingam Mudaliar* v. *Mahomed Sheriff Saheb* (3) and *H. Dakin & Co* v. *Lee* (4), and the lien can also be enforced *pro tanto*: *Anakaran Kasmi* v. *Saidamadath Avulla* (5), *Chinnayya Rawutan* v. *Chidambaram Chetti* (6), *Tirumal Raju* v. *Pandla Muthial Naidu* (7), *Rashik Lal* v. *Ram Narain* (8) and *Munshi Bajrangi Sahai* v. *Udit Narain Singh* (9).

The breach of contract, on the part of the plaintiff's husband, did not put an end to the contract as a whole. The contract ended only in respect of moneys to be advanced after the date of the breach: *Freeth* v. *Burr* (10) and *Mersey Steel and Iron Co.* v. *Naylor* (11).

JUDGMENT.—This is an offshoot of the suit for Vizianagaram Zemindari, namely Original Suit No. 18 of 1903, on the file of the District Court, Vizagapatam. The present defendants were the plaintiffs in that suit, and it was instituted to recover the Zemindari of Vizianagaram. That suit was dismissed by the Court of first instance in 1908. An appeal was preferred to the High Court which was disposed of by a compromise in March 1913. The present

(2) (1888) 13 A.C. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

(3) 17 Ind. Cas. 894; 23 M. L. J. 680; 12 M. L. T. 594; (1912) M. W. N. 1212.

(4) (1916) 1 K. B. 566; 84 L. J. K. B. 2031.

(5) 2 M. 79; 3 Ind. Jur. 312; 1 Ind. Dec. (N. S.) 326.

(6) 2 M. 212; 5 Ind. Jur. 356; 1 Ind. Dec. (N. S.) 419.

(7) 9 Ind. Cas. 289; 35 M. 114; 21 M. L. J. 169; (1911) 1 M. W. N. 113; 9 M. L. T. 286.

(8) 13 Ind. Cas. 573; 34 A. 273; 9 A. L. J 198.

(9) 10 C. W. N. 932.

(10) (1874) 9 C. P. 208; 43 L. J. C. P. 91; 29 L. T. 773; 22 W. R. 370.

(11) (1884) 9 A. C. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.

suit is by the widow of the Zemindar of Tuni, who financed that litigation on behalf of the plaintiffs (the present defendants), for a sum of nearly two lakhs of rupees. The Subordinate Judge decreed the claim.

The negotiations which led to the contract need not be gone into in any detail. Up to May 1906 the expenses of the litigation were borne by the present defendants from their own pocket. On the 22nd May 1906 the first agreement Exhibit A was executed by the 2nd defendant and his sons, the 3rd and 4th defendants, to the then Zemindar of Tuni, by which in consideration of the latter agreeing to assist the defendants with money for the expenses of the litigation, they undertook to give him a certain share in the Zemindari. Exhibit A1 was also executed on the same day to sell a share of the estate. On the 14th August 1907 Exhibits B and B1 were executed, which altered the original agreement in some material particulars. We shall have to refer to these agreements at some length later on. After arguments had begun to be addressed by the Pleaders engaged in the Vizianagaram case, the Zemindar of Tuni complained that the funds supplied by him were being misspent by the defendants. This led to angry correspondence between the parties, and ultimately the Zemindar of Tuni refused to advance any further sums. This was about the end of February 1908. The suit was proceeded with with the help of others and judgment was pronounced against the present defendants on the 25th July 1908. It is common ground that the Zemindar of Tuni did not supply any funds for the appeal filed in the High Court, nor was he asked to do so. The amount advanced by the plaintiff's husband before February 1908 amounted to about Rs. 93,000. The Zemindar of Tuni died in 1911.

The plaint in this suit, as originally framed, alleged that the defendants broke the contract and that the plaintiff was entitled to be paid out of the moneys secured under the compromise the amount of principal and interest due to her for the moneys actually lent, and that she was also entitled to a 3/32nd share in the balance of the compromise amount and in the annuities secured under the compromise. The plaint was subsequently amended by alleging, in the alternative, that it having become impossible for the plaintiff's husband to be a party to the compromise owing to his death, and also because of the fact that Mr. V. Krishnaswami Aiyar on whose assent the compromise was to be effected died on the 22nd December 1911, the contract between the parties became void, and that under section 65 of the Indian Contract Act the plaintiff is entitled to a refund of the moneys actually advanced by her husband, although she may not be entitled to specific performance of the contract to give a share in the balance of the compromise amount and in the annuities. These new allegations are contained in paragraph 29 (*a*), (*b*) and (*c*) of the plaint and in prayer (*e*) of paragraph 38. The 2nd defendant's plea is that the plaintiff's husband broke the contract, and as the agreement was champertous she is not entitled to any relief whatsoever. He also pleads the bar of limitation. Defendants Nos. 1, 5 and 6 contend that they were not parties to the arrangement entered into by the 2nd defendant with the Zemindar of Tuni and that their share in the compromise amount is not liable for the plaintiff's claim. A large number of issues were framed by the Subordinate Judge. With most of them it is not necessary to deal in this appeal. His main conclusions are that the second agreement superseded the first; that the plaintiff's husband was justified in breaking the contract between him and the 2nd defendant; that the suit is not barred by limitation; that the share of defendants Nos. 1, 5 and 6 is also bound by the contract of the 2nd defendant. On the additional issues framed regarding section 65 of the Contract Act, his finding is that section 65 applies to the case and that the plaintiff is entitled to a refund of the amount actually advanced by her husband with interest thereon.

A number of interesting questions of law have been argued before us by the Advocate-General on one side and by Mr. K. Srinivasa Aiyangar on the other. Before dealing with the legal questions, we shall first consider the question as to who broke the contract. The Subordinate Judge's judgment is by no means full or clear. We

have been obliged to deal with the facts of the case as if we were hearing the case as the Court of first instance.

The main features of the two agreements should be set out before proceeding to examine the other documents bearing on the question of the breach of contract. Under Exhibit A the arrangement was that the Zemindar of Tuni should advance Rs. 1,50,000 for the expenses of the suit, and that 3/16th of the property in suit, namely the Zemindari of Vizianagaram, should be conveyed to the lender for that consideration. The sub-paragraphs of paragraph 1 refer to the mode of application of the money to be advanced. Paragraph 2, sub-paragraphs (*a*) and (*b*), deal with the mode of conveying 3/16th share. 2 (*c*) says that if the lender was unwilling to take either a sale-deed or a permanent lease of the Zemindari, the debtor shall pay the amount with interest at 3 per cent. per mensem thereon on the security of the Zemindari. There is a penal provision in 2 (*d*) which we need not refer to. Paragraph 3 is important. It provides for the creditor advancing not less than Rs. 50,000 and that if he was unwilling to lend further sums certain modified terms should be substituted. The 3rd clause of that paragraph says: "If you should yourself give up the conduct of the above said suit in the lower Court without spending the Rs. 50,000 as abovesaid, you shall forfeit all expenses incurred till then." Clause 5 of the same paragraph says that no compromise should be entered into without the consent of the creditor. Exhibit A1 is merely an agreement to convey the 3 16th share in case the Rs. 1,50,000 was advanced by the creditor. A and A1 were in May 1906. Apparently after the suit had proceeded for some months, it was found that more money would be required than was agreed upon in Exhibit A, and apparently also the parties intended to change the terms of the contract in some particulars. As a result of further negotiations, Exhibits B and B1 were executed on the 14th August 1907. Exhibit B correponds to Exhibit A1 and B1 to A. We are mainly concerned with Exhibit B1. The material changes introduced in the new agreement may be thus stated:—

(*a*) Instead of Rs. 1,50,000 the lender agreed to advance two lakhs of rupees if these were required.

(*b*) Instead of getting only a 3/16th share the lender secured a fourth share and also an additional property which was the summer residence of the Zemindar.

(*c*) The stipulation as to forfeiture was omitted.

(*d*) The old provision that there should be no compromise without the consent of the lender was re-inserted with a proviso that if Mr. V. Krishnaswami Aiyar advised that a compromise was beneficial, it should be agreed to.

These are the main differences between the first and the second agreements. At the time of the second agreement the plaintiff's husband had lent Rs. 66,000. In paragraph 2 of Exhibit B1 it is stated that Rs. 66,000 plus a sum of Rs. 5,500 spent by the lender himself had been advanced up to that date; and that a further sum of Rs. 16,000 would be paid almost immediately. The same paragraph says: "It is also agreed that we should be rendering accounts as stated above and you should be again giving money within a week after being asked for." There is a dispute as to whether the last portion of the 1st paragraph and the 2nd paragraph have been correctly translated. So far as the 1st paragraph is concerned, a fresh translation has been made which has been accepted by the learned Vakils as fairly accurate. As regards the 2nd paragraph the Chief Interpreter admitted that the language is so ambiguous that he is unable to say whether the parties intended to say that no further accounts regarding the Rs. 66,000 should be asked for or whether they stipulated for a fresh scrutiny of the accounts in respect of the sums already expended. Having regard to the fact that full accounts had not been furnished by this time, we are inclined to agree with the learned Vakil for the respondent, though not without some hesitation, that the parties did not understand by paragraph 2 that there should be no scrutiny of the accounts in respect of moneys already advanced. The Rs. 16,000 agreed to be lent immediately under the new agreement was given within three months of that agreement. Admittedly before the second agreement, Exhibit G was sent by the 2nd defendant to the plaintiff's husband. That

accounted for an expenditure of Rs. 49,117 and gave credit to a sum of Rs. 38,000 received. It showed a balance of Rs. 11,117-10-7 as being still due. This was on the 11th January 1907. Exhibit G1 is dated the 31st August 1907. Although it covers a period before the second agreement was entered into, it is clear that this account was not in the hands of the plaintiff's husband when Exhibit B1 was signed. G2, dated 6th January 1908, gives particulars of expenditure aggregating to Rs. 36,141-10-8 and acknowledges receipt of Rs. 27,000, leaving a balance of Rs. 9,141-10-8 to be paid by the creditor. Between the date of the second agreement and January 1908 the parties seem to have been working harmoniously. On the 19th January 1908 the first note of discord appears. Exhibit F written on that date by the Diwan of the Zemindar of Tuni to the 2nd defendant complains: "Contrary to the original agreement the amount of Rs. 10,450 for the day fees of M. R. Ry. B. Venkatapatiraju Garu and Rs. 2,165 for the fees of the said Venkatapatiraju Garu's younger brother are entered therein. These items were read out to Sri Maharajahvaru. He was pleased to say that settlement was not made to pay fees to these persons and that Rs. 12,615 specified as fees payable to those persons should be recovered from them, and expended for the costs of the suit in future". At the end of the letter it is stated: "In your credit and debit accounts, particulars of some items are not written. I shall write the letter soon about them. Immediately after this credit and debit are settled, I shall send the money required". By this time Exhibit G was in the hands of the Zemindar and his Dewan. Neither at the time of the second agreement nor until this date was any complaint made that out of the moneys advanced by the Zemindar of Tuni the two Vakils referred to in Exhibit F should not have been paid. It was conceded that there is no writing to show that these two gentlemen were not to be remunerated from the funds supplied just like other Vakils engaged in the case. We are referred to some evidence regarding an oral agreement between the Zemindar of Tuni and the 2nd defendant. We have not the least hesitation in saying that we do not believe this evidence. The reply to Exhibit F is Exhibit IX. It is dated the 27th January 1908. It draws attention to the fact that accounts had been sent containing entries of payments to the two Vakils and that those entries had not been objected to at the time of the second agreement; it also contains a denial of the suggestion that the two Vakils agreed to work *gratis*. One statement in that letter was somewhat sharply criticised by Mr. K. Srinivasa Aiyangar. About the end of this long letter the 2nd defendant says: "Moreover, I have sold some portion out of the land I am entitled to in the Vizianagaram Samasthanam and have deposited the said sale amount with you on account of the expenses of the suit, settling that you will give the money whenever asked by me. While so you cannot raise such objections as these." It is true that this is a rather extravagant way of stating that the indebtedness is on the side of the plaintiff. But if we look at Exhibit B, the language does not appear to be altogether irrelevant. This is what Exhibit B says: "We further hereby declare to have received from you the abovesaid amount, Rs. 2,00,000, and its interest as abovesaid for the necessary suit expenses as consideration of the abovesaid sale-deed as per this second agreement, dated this day, and therefore execute to you the same." Apparently the parties agreed to regard it on paper as if one-fourth of the Zemindari was sold to the plaintiff's husband and that he was to treat himself as being in possession of the two lakhs of rupees, the consideration amount, as a depositary from whom the money for the expenses was to be drawn from time to time. Apart from this sentence no objection can be taken to the tone of the letter, Exhibit IX. We do not think the suggestion is in any way grotesque, having regard to the language of Exhibit B. After Exhibit IX was received, Exhibit F2 was sent by the plaintiff's husband to the 2nd defendant. Here again objection is taken to the payment to the two Vakils: "Besides, some of your officials have told in person that no fees need be given to them". It then proceeds to say: "As the debit and credit accounts sent by you have not been examined previously, they have now been got examined.....At the time when you first submitted credit and debit accounts we have not only said in a definite

manner in the presence of many persons that fees should not be given to Sree Venkatapatiraju Garu and Sree Narasimharaju Garu, but your men also have told us from the very beginning that as they are persons connected with you they will work in connection with this suit without taking fees." The two statements are somewhat inconsistent, one statement saying that no accounts were looked into, the other that the accounts were looked into and that the defendants' men were told that these entries regarding payments to the two Vakils were objectionable. The letter winds up by saying: "If before this you spend this money (referring apparently to the money to be got back from the two Vakils), you give proper particulars for such of the items as regards which no details were given or with regard to which there are disputes, and also send receipts and vouchers for the remaining items, namely, fees for Madras Vakils, etc., we shall compare them, and if we find them correct and proper, we shall send money if any more money is still wanted for purposes of this suit." Here again for the first time we find objection is being taken to vouchers for payments made not being sent. Before considering the reply to this letter it must be mentioned that on the same day as Exhibit F2, F1 was sent in which objection was taken to the expenditure on out fees and other miscellaneous charges and also to the failure to furnish details, vouchers and receipts for sums debited. The sums objected to do not amount to any large figure. To these two letters Exhibit VIII was the reply. It is dated the 14th February 1908 and it says: "The necessary particulars and the credit and debit accounts, as well as the receipts with my signatures, were given already. There is no necessity for your asking again regarding the settled credit and debit accounts and they are not wanted. Without raising any objection at that time, you are now raising objections, keeping something in your mind. I have no objection whatever to your ascertaining the particulars hereof if you want to know them. They might have been ascertained correctly from the account sent already. When credit and debit accounts were sent with my responsibility and signature, there will be no proper grounds for the stoppage of the business". Apparently the 2nd defendant thought that some frivolous excuses were being offered to keep back the supply of money and that he was being unjustly suspected. That accounts for the tone of this letter. It is the letter of a man who felt that he was not in the wrong, and that the creditor was trying to find some excuse for breaking off the agreement. We do not understand this letter as a refusal to give the vouchers and receipts asked for in Exhibit F1. It naturally complains that the objections taken to the accounts already sent are not *bona fide*. The Dewan in the witness-box stated that although he was appointed at the time the second agreement was entered into, he had not looked into Exhibit G1 before writing Exhibit F. It is impossible to accept this story. It may be that Zemindars are not in the habit of examining accounts sent to them, but to ask us to believe that the Dewan of the lender did not satisfy himself that the entries in the accounts sent before the new agreement was entered into were proper, is something which we cannot agree to. To Exhibit VIII, Exhibit M was the final rejoinder. That is dated 21st February 1908. The burden of that letter is that the money paid to the two local Vakils was improperly spent. It ends by saying: "If you do not give a proper reply for this and as we consider that according to the terms of agreement without affecting our rights that the disputed terms are not properly debited under the suit costs, we shall take proceedings in the Court according to law for the recovery of the above sums from you and from those who have received the same from you." There can be no doubt that this letter was intended to finally break off the relationship between the parties. In our opinion there was no justification for such conduct on the part of the plaintiff's husband. The attempt to prove that there was no agreement to remunerate the local Vakils from the funds supplied by the lender has miserably failed. On the other hand we have the evidence of the 2nd defendant, who has deposed straightforwardly that it was part of the original agreement that the local Vakils should be remunerated from the borrowed money. We have the fact that Exhibit G was sent

containing various entries relating to payments to these two Vakils; it was in the hands of the plaintiff's husband and his Dewan long before the second agreement was entered into. We totally disbelieve the suggestion that the plaintiff's husband and his Dewan did not examine these accounts before Exhibit B1 was entered into. At the time of B1 at any rate a new Dewan had taken charge of the plaintiff's husband's estate. We cannot accept his evidence that he did not examine Exhibit G before the second agreement was entered into. There is no reason for presuming that the local Vakils were expected to work *gratis*. Mr. Srinivasa Aiyangar referred to the fact that the two Vakils were related to the defendants, and he also made a faint suggestion that the Vakils obtained a share of the money secured by the compromise. There is absolutely no reliable evidence for this latter suggestion. The fact that these Vakils were related is not a ground for holding that they agreed to work *gratis* in the suit. It seems to us that the objection to the payments made to these Vakils was only a pretext for breaking off from the contract. We can only conjecture the reasons, as the parties have not adduced all the evidence on the question of the motive which led the plaintiff's husband to refuse to finance the litigation any further. But we feel no hesitation in holding that the payment to these two local Vakils was not a good ground for refusing to carry out the terms of the contract. Mr. K. Srinivasa Aiyangar commented upon the entries contained in Exhibits G and G1 and argued that they are lacking in definiteness and that the creditor would be justified in objecting to the bald entries regarding large sums of money said to have been paid to Vakils. They may have furnished good grounds for asking for particulars and for objecting to make further payments unless these particulars were furnished. But it was not on these grounds that Tuni refused to advance further sums. We are, therefore, unable to accept these *post facto* comments as having influenced the plaintiff's husband's conduct in the step he took. Apparently until the time of Exhibit F, the plaintiff's husband trusted to the honesty of the 2nd defendant and never doubted that any payments made by him were otherwise than honestly spent. There is no evidence that the 2nd defendant ever refused to give particulars. We must, therefore, hold that the contract was broken by the plaintiff's husband and not by the 2nd defendant.

It was argued by the learned Vakil for the respondent that it was only a term of the contract that was broken and not the contract itself. Our reading of the correspondence does not lead to this result. Exhibits F series and M leave no room for doubt in our mind that the plaintiff's husband intended to break off further connection with the 2nd defendant and that he did convey that idea to him.

This being our view on the most important question of fact in the case, we now proceed to consider whether, even though the plaintiff's husband may have broken the contract, the plaintiff is not entitled to recover the moneys actually advanced.

It is not easy to understand on what basis the Subordinate Judge has given the decree in favour of the plaintiff. Mr. K. Srinivasa Aiyangar who appeared in support of the judgment contended that the money advanced by his client's husband was a loan, and that it was a charge upon the amount of the compromise. It may be that some such idea was present to the mind of the Subordinate Judge, as in paragraphs 2, 16 and 17 there is a reference to a lien. However, we have now to examine Exhibit B1 to ascertain whether the money advanced by the plaintiff's husband was regarded as a loan and whether it was made a charge upon the sum secured by the compromise. The learned Vakil for the respondent referred us to paragraphs 1, 4, 8 and 12 in support of his contention. In the 1st paragraph in more than one place the money to be advanced by the lender is spoken of as a loan. At the same time it must be mentioned that the vernacular expression used in the document is usually rendered as 'giving' or 'to give.' This is not seriously disputed. Therefore, too much importance cannot be attached to the use of the word 'loan' by the translator. The same observation applies to paragraph 4,

In paragraph 8 the amount advanced is spoken of as "principal and interest found due to you". Again in paragraph 12 the expression is, "the principal money advanced by you together with interest at Re. 1 per cent." If the document stood by itself, there would be great force in the contention for the respondent that the money advanced was a loan, but we have to take into account the fact that the avowed object of the transaction was to finance a litigation against a person in possession and in favour of persons who were themselves unable to find the necessary funds. There is the further fact that the document provides that, even though less than Rs. 2 lakhs was advanced for the purpose, the lender was entitled to the sale of the share as if the full amount was paid. There is the additional circumstance that no provision is made for the refund of the amount in case the suit is dismissed. As against these condsiderations Mr. K. Srinivasa Aiyangar pointed to the fact that the Zemindar of Tuni, though not a relation of the defendants, belonged to their caste, and that it was considered a meritorious act to help that caste in getting possession of the property which the late Raja of Vizianagaram had resolved upon giving to a person who did not belong to the family. Taking all these various elements into consideration, we are not satisfied that the object of the undertaking was to give a loan. The transaction is on the face of it champertous, although as has been laid down by the Judicial Committee, that would not prevent the promisee from recovering what he has advanced in case the litigation proved successful. The agreement between the parties partakes of the character of the contracts commented upon by the Judicial Committee in *Ranee Bhobosoonduree Dossee* v. *Issur Chunder Dutt* (12) and *Kalka Singh* v. *Paras Ram* (1), to which our attention was drawn by the learned Advocate-General, as contingent contracts whose enforcibility depended upon the happening of a particular event, namely, the success of the litigation. However, as the construction of the document is not altogether free from doubt, we do not propose to base our judgment on our surmise that the contract is not a loan.

Now we shall proceed to deal with the other arguments in the case on the basis that the plaintiff's husband advanced a loan to the 2nd defendant. The next question is whether a lien was created on the compromise amount by Exhibit B1. There was an interesting discussion by the learned Vakils on the question whether in India a charge can be created upon property which was not in existence on the date of the document. Mr. K. Srinivasa Aiyangar for the respondent relied upon the observations of Lord Watson in *Tailby* v. *Official Receiver* (2) for the proposition that an assignment of after-acquired property will be valid, provided it is identifiable. In the same case Lord Macnaghten points out:

"It was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal 'that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust'" The general trend of the views enunciated by the other noble Lords who took part in the case is in favour of holding that a transfer of property to come into existence at some future time is nothing more than an agreement to convey that property when it does come into being. This and other cases were considered very recently by the Court of Appeal in *Industrials Finance Syndicate Ltd.* v. *Lind* (13). The question there was whether a mortgage of an expectant share as one of the next-of-kin of a living person was good as against the trustee in bankruptcy. Warrington, J., held that it was, *Industrials Finance Syndicate Ltd.* v. *Lind* (14). In the appeal against the learned Judge's judgment, Phillimore, L. J., states the law thus: "Assignments of property not then in

(12) 18 W. R. 140; 11 B. L. R. 36; 2 Suth. P. C. 616; 3 Sar. P. C. J. 136 (P. C.).

(13) (1915) 2 Ch. 345; 84 L. J. Ch. 884.
(14) (1915) 1 Ch. 744; 84 L. J. Ch. 884.

existence pass, as such, nothing. 'A man cannot in equity, any more than at law, assign what has no existence.'" See per Jessel, M. R., in *Collyer* v. *Isaacs* (15). The assignment does, however, operate as a contract to assign if and when the property comes into existence, and to use the words of the same great Judge, "when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment." This is in effect what Lord Macnaghten said in *Tailby* v. *Official Receiver* (2). Swinfen Eady, L. J., says the same thing in *Hardy* v. *Fothergill* (16), Bankes, L.J., while affirming the above view, says at page 373 in *Industrials Finance Syndicate Ltd.* v. *Lind* (13): "It appears to me to be manifest from these statements of the law that equity regarded an assignment for value of future acquired property as containing an enforceable security as against the property assigned, quite independent of the personal obligation of the assignor arising out of his imported covenant to assign." It was argued that an assignment of future property does not merely amount to an agreement to convey when the property comes into existence, but it is a right *in rem*. There are observations in the judgment of Warrington, J., which lend support to this broader contention. But it is unnecessary to pursue this subject any further, because in either view, as pointed out by Phillimore, L. J., the right will not attach to the property if, when the property comes into existence, the contract had ceased to be enforceable. This is what the learned Lord Justice says at page 368: "I do not understand an assignment which at the time only operates as a contract, but when the property comes into possession operates without more as an actual assurance; and even if this were intelligible, I do not understand why in its chrysalis state it is not subject to the laws of a chrysalis, why, being still only a contract, it is not discharged by a discharge of contracts." The applicability of this doctrine to Indian conditions was hotly debated at the Bar. In the Transfer of Property Act, section 6 enunciates how far and to what extent properties can be transferred. In section 5 the expression "transfer of property" has been defined as "an act by which a living person conveys property, in present or in future, to one or more other living persons," etc. As pointed out by the learned Advocate-General, the existence of a comma after 'property' and before the words 'in present or in future' shows that these words 'in present or in future' govern the word 'conveys', and not the word 'property.' Therefore, there is nothing in section 5 to indicate that future property can be conveyed. The learned Advocate-General further argued that clauses (*a*) to (*i*) of section 6 are only illustrative of the general principle that future property should not be conveyed at all. There is great force in this contention. At the same time it must not be forgotten that the framers of the Indian Act were aware of the pronouncement in *Tailby* v. *Official Receiver* (2), wherein it was held that there can be a valid assignment of future property. It is more reasonable to hold that the Indian Legislature imposed restrictions upon the extent to which future property can be assigned. In other words, section 6 must be read as an exception to the rule that future property can be conveyed, and not as containing a total prohibition against all future assignments. We have in the Indian Contract Act provisions for transferring future property. As Mr. K. Srinivasa Aiyangar pointed out, the Indian Companies Act seems to contemplate the transfer of future property. Therefore, we incline to the view that section 6 must be construed as an exception to the general rule in favour of transfers of property, present and future. It is true, as the learned Advocate-General contended, the observations in *Sumsuddin* v. *Abdul Husein* (17) on this question are *obiter*, but having regard to the high authority of Sir Lawrence Jenkins who pronounced the judgment, and having regard to the other reasons indicated by us, we think that section 6 does not contain a total prohibition against the assignment of all future property. Nor are we prepared to agree with the contention that the words in clause (*a*) of section 6, "any other mere possibility of a like nature", would cover cases like the present. Apart from the general rule that portions of the same

(15) (1882) 19 Ch. D. 342 at p. 351; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70.

(16) (1888) 13 A. C. 351 at p. 359; 58 L. J. Q. B. 44; 59 L. T. 273; 37 W. R. 177; 53 J. P. 36.

(17) 31 B. 165; 8 Bom. L. R. 781.

section must be construed *ejusdem generis* with the rest of the section, there is a clear indication in the words "of a like nature" that the *possibility* must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy. We are, therefore, unable to find any restriction against a transfer of the kind now in dispute in section 6 of the Transfer of Property Act. On the question whether an immediate charge was created our attention was drawn to the decision in *Palaniappa* v. *Lakshmanan* (18), which seems to lay down the proposition too broadly. *Navagee* v. *Administrator-General of Madras* (19) expresses the law more guardedly and we are inclined to agree with the latter decision.

As regards the contention that section 58 of the Transfer of Property Act in speaking of mortgages uses the expression "specific immoveable property," it is enough to say that property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. Therefore, on this part of the argument we are inclined to agree with the contention of Mr. K. Srinivasa Aiyangar that the transfer, if otherwise valid, is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement.

The real difficulty arises from the use of the words "moveable and immoveable properties obtained by *such* compromise" in clause 12 of Exhibit B1. In clause 9 a right is given to a twelfth of the property in case the whole of the expense for the litigation in the first Court is borne by the lender. The clause says: "It has been agreed that you should without fail meet all the expenses incurred in the Original Court." Then comes clause 10, which prohibits any compromise without the consent of the lender. Clause 11 stipulates for an enforceable compromise in case Mr. Krishanaswami Aiyar gave his assent to it. Then follows the expression in clause 12 which we have quoted. The words "such compromise" can only refer to a compromise to which either the plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Aiyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two contingencies. The argument that although a compromise may be otherwise brought about, it was open to the plaintiff's husband to have accepted such a compromise because the provision for his assent and for Mr. Krishnaswami Aiyar's advice was for his benefit, does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan, in order that the lien may fasten upon the compromise amount, it must have relation to the two contingencies provided for in the agreement. The specific property or the identifiable property on which the lien is sought to be attached is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned Vakil for the respondent that the mere fact that only Rs. 93,000 out of the contemplated Rs. 2 lakhs was advanced would not derogate from the lien if it otherwise existed. It is settled law that a mere default on the part of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced. See *Anakaran Kasmi* v. *Saidamadath Avulla* (5), *Chinnayya Rawutan* v. *Chidambaram Chetti* (6), *Tirumal Raju* v. *Pandla Muthial Naidu* (7), *Rashik Lal* v *Ram Narain* (8) and *Munshi Bajrangi Sahai* v. *Udit Narain Singh* (9). These cases lay down that there will be a lien *pro tanto* notwithstanding default on the part of the lender. That principle would be applicable to the present case where the lender has advanced a portion of the amount which was agreed to be charged upon the property. But as we pointed out, the indentity of the property is wanting, as clause 12 creates a charge only on property secured by a compromise effected in one of the two ways suggested in the previous clauses. In this view our conclusion is that no lien was created over the money given by the plaintiff's husband. The theory that a lien on specific property would attach itself to the substituted property contemp.

(18) 16 M. 429; 5 Ind. Dec. (N. S.) 1005.
(19) 22 Ind. Cas. 566; 38 M. 500.

lates that the contract creating the original lien subsists. Granting for argument's sake that the lien on the compromise amount contemplated in clauses 10 and 11 will fasten itself upon the new compromise amount, the fact that before that compromise was effected the parties had broken off relations, would render this impossible. *Vide* observations of Lord Justice Phillimore already quoted. We might also say that the fact that the agreement was not registered would not affect the creation of a lien, because under the compromise it was moveable property. namely money, that was largely secured, and it is against such moveable property that the Subordinate Judge has created a charge. In our opinion, section 49 of the Registration Act leaves no room for doubt that where there is a blend of moveable and immoveable properties in respect of which a charge is created, if the document creating the charge is not registered, it would only deprive the promisee of his right in the immoveable property and would not affect his rights in the moveable property. See also *Pulaka Veetil* v. *Thiruthipalli* (20).

Mr. K. Srinivasa Aiyangar put forward an alternative argument, to the effect that the refusal on the part of the plaintiff's husband to pay money did not put an end to the contract. He referred to the language of section 55 of the Contract Act and argued that the contract was at an end only in respect of moneys to be advanced after the date of the breach. We agree, to this extent that it is not every repudiation that will entail a breach. See Chitty on Contracts, page 771. *Freeth* v. *Burr* (10) and *Mersey Steal and Iron Co.* v. *Naylor* (11), to which the learned Vakil drew our attention, relate to the performance of contracts on specified occasions. In those cases it was held that failure to perform the contract on one of the occasions would not necessarily put an end to the contract as a whole. But as we read Exhibit B1, this contract is not of that nature. It does not specify the dates or occasions on which the payments are to be made. Moreover Exhibit M finally and without reservation put an end to the contract as a whole. We do not think it is open to the plaintiff to say that the contract subsisted after the date of Exhibit M.

The next argument of the learned Vakil for the respondent is that section 64 of the Contract Act applies to the case. We think he is right in this contention. The decisions in *Chokalingam Mudaliar* v. *Mahomed Sheriff Saheb* (3) and in *H. Dakin and Co.* v. *Lee* (4) bear him out in this contention. Therefore, if the suit were in time, although the plaintiff may not be entitled to a charge upon the property, she would still be entitled to a personal decree against the defendants. The argument of the learned Advocate-General on this part of the case is that the agreement is one and indivisible and that consequently there can be no apportionment on the principle of *quantum meruit*. The decisions in *Underwood* v. *Lewis* (21) and *Sumpter* v. *Hedges* (22) and the citations from Leake on Contracts all relate to cases where the performance of the contract in its entirety is rendered impossible by the breach of a single condition. For example, the case of the painting of a picture or the building of a house entrusted to a person may become unenforceable if there is a breach in the course of the performance of the contract. The reference to solicitors' contracts is not in point, because, as is pointed out on page 38 of Leake on Contracts, under the English Law the solicitor can in equity claim payment for work done *pro rata*. In our opinion, an agreement to advance money from time to time bears no analogy to cases of painting or building contracts. Therefore, we think that under section 64 of the Contract Act the party who paid money would be entitled to a refund of it, even though he did not perform the whole of his part of the contract.

Accepting this view the difficulty is about limitation. A faint argument was put forward by Mr. K. Srinivasa Aiyangar that limitation would commence only from the date when the funds came into existence. We fail to see how the cause of action which accrued on the date of Exhibit M can be regarded as having been suspended or stopped and having

(20) 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584.

(21) (1894) 2 Q. B. 306; 64 L. J. Q. B. 60; 9 R 440; 70 L. T. 833; 43 W. R. 517.

(22) (1898) 1 Q. B. 673; 67 L. J. Q. B. 545; 78 L. T. 378; 46 W. R. 454.

started again when the compromise money was secured. We think that as soon as the contract was broken, the plaintiff had a cause of action, and if she brought a suit within three years of that breach she could have recovered the money advanced by her husband. We must, therefore, hold that her claim is barred by limitation.

As regards the liability of defendants Nos. 1, 5 and 6, there can be no doubt that the contract with the 2nd defendant is not binding on them. The learned Vakil for the respondent contended that the 2nd defendant was acting as their agent. There is no allegation about such agency in the plaint; there is no issue and there is no discussion in the lower Court's judgment on this question. Before the Subordinate Judge their liability was claimed on the ground that they benefited by the agreement of the 2nd defendant. The learned Vakil for the respondent frankly conceded before us that mere participation in the benefit will not render a party liable if he was otherwise not a party to the contract. We need only refer to *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (23), *Ruabon Steamship Co.* v. *London Assurance* (24), *Halima Bee* v. *Roshan Bee* (25) and *Abdul Wahid Khan* v. *Shalukha Bibi* (26) for the proposition that a party cannot be charged with liability merely on the ground that he has benefited by a contract entered into by another.

We must, in these circumstances, hold that the decree against defendants Nos. 1, 5 and 6 should be set aside.

If we were otherwise inclined [to give a decree to the plaintiff, we would have held that there is no substance in the argument that interest is not payable on the amount, although we would have been inclined to restrict the interest to 6 per cent. after the date of the suit. We have given anxious consideration to the case, having regard to the fact that the plaintiff's husband has advanced a large sum of money which undoubtedly has benefited the appellants The case for the plaintiff bristles with difficulties of various kinds. We have been reluctantly forced to come to the conclusion that the plaintiff's claim is barred by limitation. Therefore, we reverse the decree of the Subordinate Judge and dismiss the suit with costs throughout.

M. C. P.

Appeal allowed.

(23) 2 I. A. 131; 15 B. L. R. 208; 23 W. R. 305; 3 Sar. P. C. J. 477 (P. C.).

(24) (1900) A C. 6.; 69 L. J. Q. B. 86; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71; 16 T. L. R. 90.

(25) 30 M. 526; 17 M. L. J. 439; 2 M. L. T. 468.

(26) 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique & Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3083 OF 1915.

July 8, 1918.

Present.—Mr. Justice Walmsley and Mr. Justice Panton.

GIRIBALA DASI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KUDRUTULLA PARAMANICK AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 88—Ejectment of purchasers of occupancy holding on failure to attorn, suit for—Suit alleged to have been filed by agent of plaintiff without authority—Burden of proof.

Section 88 of the Bengal Tenancy Act does not warrant a decree in the landlord's suit for the ejectment of the purchasers of a holding on their failure to jointly and severally attorn to the landlord within a time to be fixed by the Court. [p. 577, col. 1.]

In a suit for the ejectment of the purchasers of an occupancy holding, the defendants pleaded that the suit was bad as it was instituted by the *naib* of the plaintiff without her knowledge:

Held, that as the plaintiff was a lady, the onus was upon the defendants to prove affirmatively that the plaintiff was ignorant of the suit and that it was not enough for them to point to a few facts which gave cause to suspect that it was the *naib* who instituted the suit and then to call upon the plaintiff to prove that she had authorised the institution of the suit. [p 576, col. 2.]

Appeal against the decree of the District Judge, Dinajpur, dated the 6th September 1915, affirming that of the Munsif, 2nd Court at that place, dated the 17th August 1914.

FACTS appear from the judgment.

Mr. *B. Chakravarty* (with him Babus *Ram Charan Mitter* and *Akhoy Kumar Banerjee*),

for the Appellants.—Division of a holding without the consent in writing of the landlord is not binding on the landlord. See section 88 of the Bengal Tenancy Act.

The onus is on the person who asserts that there is a sub-division of the holding to prove that the landlord consented. Defendants are asserting that proposition, so they must show that there was a sub-division with the consent in writing of the landlord. There was in fact no consent in writing and it has not been proved that the landlord did consent. *Rajani Sundari Dassi v. Hara Sundari Dassi* (1) is a strong case and is in favour of the appellants.

The section is clear and the suit ought to have succeeded.

Babu *Girija Prasanna Sanyal*, for the Respondents.—The cause of action stated in the plaint has been decided by the Courts below. The only prayer asked for was a prayer for ejectment. Relief now claimed is for a declaration that the sub-division is not binding. Therefore the contest is on a side issue. Both the Courts below find that the sub-division was made and fully recognised. The fact of consent is established on evidence. The case reported as *Rajani Sundari Dassi* v. *Hara Sundari Dassi* (1) comes under the amended section of the Tenancy Act. Section 88 of the Bengal Tenancy Act has not been amended in Eastern Bengal and Assam and therefore the case in *Rajani Sundari Dassi* v. *Hara Sundari Dassi* (1) has no application to this case. The case reported as *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (2) governs the present case.

Babu *Ram Charan Mitra*, in reply.—My friend's contention is that the suit was one in ejectment originally and therefore it could not succeed on the ground that the sub-division was not authorised. There is nothing in the written statement giving a lie to the statement in the plaint. The parties went on trial on the 7th issue as the main issue. On the question of recognition the law is clear. See section 88 of the Bengal Tenancy Act. The law is the same from 1885. Amendment was made in West Bengal and the law remained the same in East Bengal.

(1) 41 Ind. Cas. 501; 22 C. W. N. 693.
(2) 25 C. 531 at p. 534; 2 C. W. N. 375; 13 Ind Dec. (N. s.) 352.

[WALMSLEY, J.—We are concerned with the section which has no proviso.]

There is no room for the contention that a landlord would be bound by his agent's granting receipts as shewing that the tenancy had been sub-divided; that would not be tantamount to express consent of the landlord given in writing.

JUDGMENT.

WALMSLEY, J.—The plaintiff, now appellant, brought the suit, from which this appeal arises, to eject the defendants from a holding on the ground that the holding is an occupancy *raiyati*, which cannot be transferred without the consent of the landlord, and that the defendants by their purchase from the landlord's registered tenant had acquired no title.

The defendants replied that the holding was one at a fixed rate of rent and that they had with the consent of the landlord's *naib* divided the holding into three equal parts, each of which bore a third of the former rent of the whole. They also asserted that the suit was brought by a dishonest *naib* and without the knowledge of the landlord.

The first Court found that the holding was an ordinary occupancy holding, that is, a holding which cannot be transferred without the consent of the landlord, and the defendants do not appear to have challenged this finding in the lower Appellate Court.

Both Courts found that the suit had been instituted without the knowledge of the landlord, and that finding is one of the points pressed on appeal. It appears to me that the onus of proof has been placed on the wrong shoulders; the plaintiff is a lady and the defendants ought to have proved affirmatively that the plaintiff was ignorant of the suit; it was not enough for them to point to a few facts which give cause to suspect that it was the *naib* who instituted the suit and then to call upon the plaintiff to prove that she did authorize the institution of the suit.

The substantial question, however, is whether the plaintiff has a right to eject the defendants. The suit as framed was clearly based on the ground that the defendants had bought the holding from the registered tenant without the landlord's consent. The plaintiff's advisers, however, allowed themselves to be led away from th

main issue by the defendant's pleading, and the question which was discussed in the Courts below, and the question which forms the subject-matter of the grounds of appeal to this Court, is whether there had been a subdivision of the tenancy sanctioned by the landlord. It seems obvious to me that in allowing the seventh issue to be framed as it was, and in not asking for an issue upon the question whether the transfer required the landlord's sanction or had received the landlord's sanction, there was an implied admission that the defendants had become the plaintiff's tenants of the holding, provided it was kept entire. Be that as it may, however, the grounds of appeal do not raise the point that the transfer had not been recognised, so we cannot go into that question.

Then, if we assume that the subdivision has not been authorized, I do not see how the plaintiff can obtain a decree for ejectment. It is suggested that we should direct that if the defendants do not "jointly and severally attorn to the plaintiff" within a time to be fixed by the Court, they shall be ejected from the holding. But I cannot find in section 88 of the Tenancy Act any warrant for such a decree. Whatever view we take of the finding on the matter of the subdivision of the tenancy there cannot be an order for ejectment, and as that is the only form of relief mentioned in the plaint, we cannot pass a decree directing that the subdivision is not binding on the landlord.

The plaintiff's appeal is dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No 230 OF 1917.

April 25, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

MOHAMMAD ZAKI—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD OF MAINPURI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 8—Provincial Insolvency Act (III of 1907), s. 20—Leave to sue in forma pauperis—*Insolvency of plaintiff—Receiver, whether can continue suit.*

Where a plaintiff obtains leave to sue *in forma pauperis* and after the commencement of the suit is adjudicated an insolvent, the Receiver in insolvency is entitled to continue the suit just as the insolvent could have done.

Civil revision against the decree of the Subordinate Judge, Mainpuri.

Mr. *Baleshwari Pershad*, for the Appellant.

Mr. *A. E Ryves*, for the Respondent.

JUDGMENT.—We think that the order of the Court below was clearly wrong. One Nisar Ali brought a suit and made an application to sue *in forma pauperis*. Eventually he was permitted to bring the suit in this way. Meanwhile he was adjudicated an insolvent. The Receiver in the insolvency wished to continue the proceedings. The learned Subordinate Judge points out that he had never given leave to the Receiver to sue *in forma pauperis* and that the Receiver not being personally liable either to the Government or to the defendants, he ought to pay Court-fees. He accordingly made an order that the Receiver should pay the Court-fees on the plaint and on all the applications. We think that once Nisar Ali obtained leave to sue *in forma pauperis* in a suit which had been commenced before his insolvency, the Receiver was entitled to continue the suit just as Nisar Ali could have done, and in this respect the order of the Court below was wrong. The Court is, of course entitled, to order the Receiver to give security for t hecosts as required by Order XXII, rule 8. This matter is not now expressly before us. We have only to consider the legality of the order passed by the Subordinate Judge. We allow the application, set aside the order of the Court below and remand the case to that Court, with directions to re-admit the case and deal with it according to law as pointed out by us. Costs here and heretofore will be costs in the cause.

Appeal allowed; Case remanded.

RANGA ROW *v.* RANGANAYAKI AMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 767 OF 1917.

April 22, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

N. RANGA ROW—PLAINTIFF—APPELLANT

versus

RANGANAYAKI AMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 120, 125—*Alienation by widow, what amounts to—Mortgage by husband, suit on—Withdrawal of defence by widow—Collusion—Sale in execution of mortgage decree—Purchaser, whether alience from widow—Suit by reversioner—Limitation.*

A Hindu reversioner impeaching an alienation by a widow need not prove an actual transfer by the widow. It is enough if he proves that the widow had done an act which resulted in the transfer of the property. [p. 579, col. 1.]

Sheo Singh v. *Jeoni*, 19 A. 524; A. W. N. (1897) 141; 9 Ind. Dec. (N. S.) 339, followed.

The withdrawal by the widow of her defence to an action on a mortgage executed by her husband would not be tantamount to an alienation by her, and if a decree is passed in the suit and the mortgaged property is sold, the Court-sale cannot be treated as a private sale by the widow, unless it is shown that it was the necessary result of some collusive arrangement made by her to use the Court as a medium of transfer, *i. e.*, that she intended to transfer the property by means of a Court-sale and took steps to bring it about. [p. 579, col. 2; p. 580, col. 1.]

Bandon v. *Becher*, (1835) 3 Cl. & Fin. 479 at 511; 9 Bligh (N. S.) 532; 6 E. R. 1517, considered.

Sheo Singh v. *Jeoni*, 19 A. 524; A. W. N. (1897) 141; 9 Ind. Dec. (N. S.) 339, *Ram Sarup* v. *Ram Dei*, 29 A. 239; A. W. N. (1907) 33; 4 A. L. J. 160; 3 M. L. T. 59 and *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*, 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360, distinguished.

A suit by the reversioner to set aside such a sale is governed by Article 120 and not by Article 125 of the Limitation Act. [p. 579, col. 2; p. 580, col. 2.]

One *K.* executed a mortgage in favour of *R. R.* in 1883. In a suit by *K.*'s widow the mortgage was recognised as valid and in another suit by a subsequent mortgagee it was held to be valid against the widow. In execution of a decree against *R.R.*, his mortgagee interest was sold and purchased by *R. A.* *R. A.* brought a suit on the mortgage. The widow at first contested the suit but afterwards abandoned her defence. A decree was passed and the property was sold in Court auction and was purchased by 2nd defendant. In a suit by the plaintiff, the nearest reversioner to *K.*, to set aside the sale, impleading the widow as 1st defendant:

Held, (1) that the suit was not maintainable, as under the circumstances the Court-sale could not be treated as an alienation by the widow; [p. 579, col. 2; p. 580, col. 2.]

(2) that as the suit was brought more than 6 years from the date of the sale, it was barred under Article 120 of the Limitation Act. [p. 580, col. 2.]

Second appeal against the decree of the Court of the Subordirate Judge, Trichinopoly, in Appeal Suit No. 94 of 1916, preferred against the decree of the Court of the District Munsif, Namakkal, in Original Suit No. 1157 of 1913.

FACTS appear from the judgment.

Mr. *A. Krishnaswami Aiyar* (with him Mr. *B. Samayya*), for the Appellant.—Though there has not been an actual alienation by the widow, her conduct amounted to an alienation. She did not press her defence in the suit by Rama Aiyar, who purchased the mortgage interest of her husband's mortgagee. The lower Appellate Court has found that she received Rs. 900 to confess judgment and withdrew her defence from corrupt motives. Her action was such as to contribute to the Court sale of the property and should be treated as an alienation by her, though it was effected under colour of Court process. *Bandon* v. *Becher* (1) and *Sheo Singh* v. *Jeoni* (2).

The suit is governed by Article 125 of the Limitation Act and was in time.

Mr. *R. Kuppuswami Aiyar*, for the Respondents.—The Court-sale cannot be treated as an alienation by the widow. She had nothing to do with the mortgage, which was effected by her husband. The mortgage was found to be valid against the widow in prior judicial proceedings. Her withdrawal of the defence in the suit to enforce the mortgage cannot be said to be fraudulent or collusive. It was unlikely that she would have succeeded if she had pressed her defence. The Sub-Judge only says that she probably received Rs. 900. There is no distinct finding on the point. Unless it is shown that the Court-sale was the result of a collusive arrangement to which the widow was a party, it cannot be treated as her alienation.

The suit is clearly barred under Article 120 of the Limitation Act. In this view of the matter, Article 125 cannot apply.

JUDGMENT.

PHILLIPS, J.—Plaintiff's suit is brought to set aside an alienation made by 1st

(1) (1835) 3 Cl. & Fin. 479 at p. 511; 9 Bligh (N. S.) 532; 6 E. R. 1517.

(2) 19 A. 524; A. W. N. (1897) 141; 9 Ind. Dec. (N. S.) 339.

defendant, widow of one Krishna Ayyar, plaintiff being the nearest reversioner. Krishna Ayyar sold the property in 1883 to his concubine and another and they executed a hypothecation deed in favour of one Rama Rao in 1885. In a suit by the widow this mortgage was recognised as valid and in another suit by a subsequent mortgagee it was again held to be valid against the widow. A decree was obtained against Rama Rao, and in execution his mortgage-deed was sold and purchased by one Rama Ayyar, who brought a suit upon it. The widow at first contested the suit, but abandoned her defence. The mortgaged property was, therefore, brought to sale and purchased by 2nd defendant in October 1902. It is contended for the appellant that this sale in 1902 amounted to an alienation by the widow and that this suit brought in 1913 is within time. The only question that need be considered now is whether the facts of the case establish the fact that this sale amounted to an alienation by the widow. A statement by the widow (Exhibit D) admitting the claim has been found by the Subordinate Judge not to have been presented by the widow herself, but in other portions of his judgment he finds that she confessed judgment from corrupt motives. It is alleged that she received Rs. 900 as consideration for not contesting the suit, but the Subordinate Judge only finds this to be probable and does not say it was proved. It is sufficient for plaintiff's case to prove that the widow had done an act which necessarily resulted in the transfer of the property. [*Vide*, *Sheo Singh* v. *Jeoni* (2).] The question, therefore, for decision is whether the widow's withdrawal of her defence amounted to such an act. It must be remembered that the mortgage had already been held in judicial decisions to be valid and binding on the widow, and although the Subordinate Judge has now found that it is not valid, his decision is based on evidence given 30 years after the mortgage was executed, and his finding is merely that consideration has not been proved. Except for the allegation that the widow received Rs. 900, there is no evidence of collusion between her and the plaintiff in the suit on the mortgage-bond. In view of the previous proceedings it was most unlikely that a defence by the widow would have been successful. That being so, the sale would, in all probability, have taken place without any act on her part and, therefore, I am unable to say that the widow's action had, as a necessary result, the transfer of the property, nor can it be said that she materially contributed by her action to the transfer. Her action in 1900, more than 12 years before suit, followed by the sale in 1902 cannot, therefore, be said to amount to an alienation. Article 125 of the Limitation Act is, therefore, inapplicable and under Article 120 the suit is barred by limitation.

A number of other questions have been argued for respondents Nos. 2 and 3, which were decided against them by the Subordinate Judge, but it is unnecessary to discuss them in view of the above finding.

The second appeal fails and is dismissed with costs.

KRISHNAN, J.—The judgment of the lower Court that this suit is barred by limitation under Article 120 of the Limitation Act is, in my opinion, correct. The appellant's Vakil has contended that Article 125 applied but on the facts found the sale in question cannot, by any stretch of language, be considered as one "made" by the widow.

The sale impugned is the Court sale in 1902 in which the 2nd defendant purchased the plaint property for Rs. 3,100. Ordinarily a Court sale cannot be treated as a sale by a private individual. But the appellant's Vakil has relied on the case of *Bandon* v. *Becher* (1), to show that a Court-sale should be treated as a private sale where it is the result of a collusive suit or proceeding in Court. Assuming this argument is correct, to justify us in treating the Court-sale in this case as a private sale by the widow it must be shown that it was the necessary result of some collusive arrangement made by her to use the Court as a medium of transfer, or, in other words, that she intended to transfer the property by means of a Court-sale and took steps to bring it about. Any failure to defend on her part an action in which a decree was

passed in execution of which the property was sold by the Court, is insufficient to make the Court-sale her sale, unless the decree and sale were the necessary result of her action and unless the failure to defend was itself part of the contrivance adopted by her to bring about the intended Court-sale. The evidence in the present case falls far short of these requirements. The mortgage suit in which the sale took place was in no way a collusive suit. The widow had nothing to do with the original mortgage-deed itself. All that is proved is that, though the widow set up the defence in the mortgage suit that the mortgage sued upon was not valid and was without consideration, she subsequently did not appear and press her defence and that she acted thus from some 'corrupt motive," because the Subordinate Judge says she probably received some Rs. 900 from the plaintiff in that suit to abstain from defending. It is not shown that her defence would have succeeded and would have led to the suit being dismissed and the property being saved. It may be noted that, in a previous suit by one Peruma Goundan, she did press her present defence to a decision, but the decision was against her and in favour of the mortgagee. It is true that the Subordinate Judge now finds that it is not proved by the 2nd defendant, the auction-purchaser, that any money passed under the mortgage to Krishna Ayyar, the widow's husband and the original owner of the property. In the mortgage suit the burden was on the widow to establish that the mortgage had no consideration against the mortgagee's assignee, Rama Ayyar. It is one thing to find that an auction-purchaser, in a Court-sale, who is a stranger to the previous transactions, has failed to prove consideration in the suit and quite another thing to hold that the widow would have succeeded in establishing failure of consideration against the mortgagee's assignee, in the former suit, where the burden of proof was on her. The present finding, therefore, does not lead to any conclusion that the mortgage decree was the result of her failure to press her defence.

The plaintiff attempted to show that that decree was one passed on a confession of judgment by the widow and for the purpose he relied on a statement filed in Court, Exhibit D. But the lower Court has found that it is not proved that the widow either signed or presented it to Court. This is in accordance with what appears in the judgment in that suit, which shows that Exhibit D was neither noticed nor acted upon. In the above circumstances the lower Court was right in holding that the Court-sale could not be treated as an alienation by the widow.

The cases quoted by the learned Vakil for the appellant in *Sheo Singh* v. *Jeoni* (2) and *Ram Sarup* v. *Ram Dei* (3) are both clearly distinguishable as, in both of them, it was proved that the widow intended by the collusive proceedings, one being a decree for possession and the other an arbitration, to get her husband's property transferred to others and that she carried out her intentions by such means. In the present case the suit was not a collusive one and whatever collusion there might be in not pressing the defence, it is not shown that it was intended to, and did in fact, bring about the Court sale now sought to be avoided.

There being thus no alienation by the widow Article 125 of the Limitation Act cannot apply, and the suit being a declaratory one the only Article applicable is Article 120; and under it the suit is clearly barred, being more than 6 years from the date of sale.

The case mainly relied on by the Subordinate Judge, *Tallaparagada Sundarappa* v. *Boorugapalli Sreeramulu* (4), is not in point, as there was no alienation at all in that case as the property had only been attached and not sold, as appears from the statement of facts in the report. But apart from this his view of the law is correct and I accept it. He has discussed various other questions and given findings on them; and though the learned Vakil for the respondents has attacked those findings, it is quite unnecessary to consider them as the suit fails on the ground of limitation.

(3) 29 A. 239; A. W. N. (1907) 33; 4 A. L. J. 160; 3 M. L. T. 59.

(4) 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360.

I agree with my learned brother that the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 722 OF 1916.

February 19, 1918.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, Mr. Justice Shah and Mr. Justice Kemp.

NARSAGAUDA SAVANTGAUDA PATIL—DEFENDANT—APPELLANT

versus

CHAWAGAUDA ADGAUDA PATIL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 91, applicability of—Suit to recover possession of property sold during minority—Limitation.

Article 91 of Schedule I of the Limitation Act does not apply to a suit for possession, where the plaintiff alleges and proves that a sale-deed is void because it was executed by him while a minor, but does not claim expressly to have it cancelled or set aside. [p. 588, col. 1,p. 589, col. 1.]

Appeal from the decision of the District Judge, Satara, in Appeal No. 72 of 1915, confirming the decree passed by the Subordinate Judge, Tasgaon, in Civil Suit No. 286 of 1911.

The appeal was heard by Beaman and Marten, JJ., on the 18th December 1917, when their Lordships referred some questions to a Full Bench by the following

JUDGMENT.

BEAMAN, J.—The plaintiff-respondent in these two appeals sued to recover the plaint lands. The defendants relied principally upon two sale-deeds of the year 1903 executed to them by the plaintiff. These deeds were executed in March, while the plaintiff has since proved that he only attained majority the following June. But in the deeds themselves he is described as a man of twenty years of age.

The Court of first appeal has found as a fact that the defendants were not deceived by the false representation in the deeds, and that disposes of the issue of estoppel.

The principal question we have to answer is: whether, since the plaintiff admittedly did not sue to have the deeds of 1903 set aside or cancelled within three years, he can succeed in these ejectment suits, and so indirectly deprive these deeds of all legal effect?

It is clear that unless he could disprove the apparent rectitude of his own deeds, his suits would necessarily be defeated by their mere production. It is also quite clear that the onus of proving that he was a minor in March 1903 was upon the plaintiff. It is admitted that he was well aware of the grounds upon which he has, in effect, got these deeds cancelled or treated as void, from the date on which he attained his majority, the 10th June 1903. He brought these suits in 1911.

The first material proposition necessary to the success of the defendants' contention is that where the law of limitation compels a person to obtain the cancellation or setting aside of a deed within a certain time, and he fails to do so, he cannot, after the expiration of that time, challenge the deed. He must either show that it is void or voidable within three years or admit it to be valid in all respects. If that proposition is unsound, there is nothing left to argue about. It also becomes hard to discover any practical reason why Article 91 should not be wiped out.

If it be argued that while the affirmative right to have a deed set aside or cancelled is gone if not exercised within the prescribed period, that does not preclude a person, against whom the deed is set up by way of defence, from proving after the expiration of the former period that he might have got the deed cancelled, the answer is that, for all purposes of scientific theory and exact reasoning, no distinction can be drawn between cases of deeds under Article 91 and cases of adoption under Articles 118, 119.

The policy of the Statute is quite clear and the same in both cases.

If a man wishes to avoid his own deed (and I doubt whether Article 91 will

apply to any but a man's own deed) as void *ab initio*, or voidable for any reason, the law declares that he must prove all facts necessary to be proved before the deed is seen to be void or voidable, within three years.

If a man wishes to prove that an adoption never took place, or was invalid (here is a pretty close correspondence between void and voidable deeds under Article 91), he must do so within six years. If questions of that sort are to be left open for twelve, or, may be, sixty years, proof might be very difficult to get, and very unsatisfactory.

The second proposition which the defendants must establish is that Article 91 applies to void as much as to voidable deeds. If it does not, then, again, there is nothing left to argue about. No reason, theoretical or practical, for so restricting the operation of the Article occurs to me. If the need of the Article is to be sought in the expediency of adducing proof of these matters within a comparatively short time, it must be felt just as much where a man seeks to show that his deed was void *ab initio* as where he seeks to show that it has since become voidable, or was in its nature voidable from the first. Where upon the face of it a deed purports to have been made by a major, and he desires to prove that he was not a major at the time, the issue is as much one of fact, as much in need of proof, as an issue of fraud or undue influence.

This case is as good as any other for practical illustration.

It is everybody's case that the defendants were in possession of the land as mortgagees in 1901. In 1903, the plaintiff sold them the lands by registered deeds, in which he describes himself as being twenty years of age. Let us suppose that fifty-nine years after the date of the mortgage the plaintiff were to sue to redeem. The defendants would, of course, rely upon the sale-deeds of 1903. On any other view than that to which I incline it follows that the plaintiff might, fifty-six years after having executed these sale-deeds, go into the question of his minority at the time.

If we turn to section 39 of the Specific Relief Act, we find that the same relief is given against void and voidable deeds. I do not know that it has ever yet been suggested that Article 91 of the Limitation Schedule was not framed with special reference to all cases of the kind provided for in section 39 of the Specific Relief Act. Where proof must be given before a Court can know whether an instrument is void or not, then, regard being had to the object of Article 91, I do not think any valid reason can be given for saying that that Article was not intended to cover void instruments. There may be many void instruments which one, if not both parties to them, intended to be operative. *Benami* deeds are on a different footing, for the parties to them, *ex hypothesi*, never intended at any time that they should be operative *inter se*. So it was held in *Petherpermal Chetty* v. *Muniandy Servai* (1).

Neglecting exceptions of that kind and confining myself to deeds which would have to be proved to be void or voidable by one injuriously affected by them, it seems to me that the true principle governing all cases of the kind, no matter upon what facts they may arise, has been laid down in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (2) and for this High Court finally settled and most clearly stated by Jenkins, C. J., in the Full Bench case of *Shrinivas Murar* v. *Hanmant* (3).

That case arose upon Articles 118, 119, but "deed" might be substituted for "adoption" throughout the judgment without affecting the cogency of the reasoning, or the applicability of the principle in the slightest degree. As to earlier cases of this High Court, such as *Nabab Mir Sayad Alamkhan* v. *Yasinkhan* (4), the *dictum* of Sir Charles Sargent upon which the plaintiff relies was *obiter*. The reason given for it has no relevancy at all to

(1) 35 C. 551; 10 Bom. L. R. 590; 12 C. W. N. 562, 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 I. A. 98; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

(2) 15 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. s.) 705 (P. C.).

(3) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. s.) 709 (F. B.).

(4) 17 B. 755; 9 Ind. Dec. (N. s.) 496.

the principle I am discussing. For all purposes of Article 91 it cannot make the slightest difference whether possession were taken under deed, later impugned, or independently of it, so long as, if valid, that deed would confirm the possession and make it unassailable.

In many of the judgments to which we have been referred, I find a confusion of reasoning arising out of assuming that Article 91 has some theoretical connection with Articles 142 and 144. It is only where those Articles will not help, that recourse must be had to Article 91. I give this example. *A* takes possession of *B*'s land as a trespasser. Two years later, *B* sells his land to *A*. Five years later *B* sues in ejectment *A* could get no help from his adverse possession, which began before the sale-deed. But if my view of Article 91 be right, *B*'s suit would necessarily fail. He could not challenge the sale-deed, and as long as it stood unchallenged it is a complete answer to *B*'s suit. Probably no deed falling within the contemplation and intention of Article 91 would be found which, if it related to immoveable property, did not confer title, as from its date, and as soon as that is clearly realized all the confusion to which I have been alluding must disappear.

Where one principle is equally applicable to several groups of facts the establishment, of that principle upon one of those groups of facts must, by implication, if not expressly, overrule a decision upon another of those groups of facts, which rests upon a different and irreconcilable principle. Thus in my opinion even were it more than an *obiter dictum*, so much of Sir Charles Sargent's decision in *Nabab Mir Sayad Alamkhan* v. *Yasinkhan* (4) as the plaintiff relies on was overruled by the Full Bench decision in *Shrinivas Murar* v. *Hanmant* (3),

If we substitute "deed" for "adoption" in the first of the three questions in the answers to which Jenkins, C. J., thought that the principles deducible from *Jagadamba's case* (2) were best expressed, and I can discover no good reason why this substitution should not be made, the whole of the close and powerful reasoning of that judgment will apply *totidem verbis* to the case before us. Prior to that decision in 1899 there had been some conflict of judicial authority in this High Court, and there still is between the Bombay and other High Courts. But as a Bench of this Court we are, of course, bound by the decision of the Full Bench in *Shrinivas' case* (3), unless it can be distinguished. I do not think it either can, or ought to be. In my opinion, and speaking with all respect, the reasoning both of that and *Jagadamba's case* (2) is unanswerable. Nor do I think it prudent to strain ingenuity to find fine distinctions and so sow a crop of exceptions, impairing what would otherwise be a very simple, easily intelligible, and uniformly applicable principle to every case of the kind. I mention before concluding a certain amount of argument arising out of *non est factum* cases. A moment's reflection will show that they are utterly irrelevant, and I do not think any useful purpose will be served by examining that set of arguments. If the plaintiff cannot impeach his deeds of 1903 in these suits because he did not do so within three years, it is plain that he must fail. It is as plain that he cannot obtain the relief he asks in these ejectment suits without disturbing those deeds. In my opinion nothing, from the theoretical standpoint, turns upon the deeds which a plaintiff, situated as this plaintiff is, has to get rid of, being void or only voidable. The point, and the only point, is within what time can he be allowed to prove that his deeds are either void or voidable?

I would, therefore, hold that these suits are time-barred and must be dismissed with all costs. But since there might be a reasonable doubt whether such a decision does not conflict with *Nabab Mir Sayad Alamkhan* v. *Yasinkhan* (4) and further whether assuming that it does, the latter decision was not by necessary implication overruled by the Full Bench in *Shrinivas Murar* v. *Hanmant* (3) and, lastly, since the point is one of far-reaching importance, we would submit the following question to a Full Bench:—

"If a plaintiff in ejectment has executed a deed or deeds which, if legal, valid and in all respects binding upon him as upon their face they purport to be, would defeat the title upon which he sues in ejectment, the burden of proving that they are void or voidable being upon him, would

such ejectment suit be governed by Article 91 or by Article 142 or 144 of the First Schedule of the Limitation Act?"

MARTEN, J.—In this second appeal the real point depends on Article 91 of the Indian Limitation Act. Does Article 91 apply to a suit for possession, where the plaintiff alleges and proves that a sale deed is void because it was executed by him whilst a minor, but does not claim expressly to have it cancelled or set aside?

The plaintiff was born on the 10th June 1885. Whilst a minor he executed, or purported to execute, a sale-deed dated the 16th March 1903 in favour of the defendant. He filed the present suit on the 28th July 1911. The plaint merely prays for possession and ancillary relief. It pleads the void sale-deed, and the plaintiff's then infancy, but ignores a mortgage of 30th August 1901 executed by the plaintiff's guardian in favour of the defendant. The defendant appears to have taken possession under that mortgage.

In the Courts below, the case almost entirely turned on whether the plaintiff was estopped by a statement in the sale-deed that he was then twenty. Both Courts found that there was no estoppel, because the defendant was well aware of the true facts and was in no way deceived by the false statement. The estoppel point was again argued before us, but it is clear that on the facts as found in the Courts below the defendant must fail on that point. I will only add that if it was necessary to go into the facts, they are such as to arouse the greatest suspicion in a Court of Equity in considering the dealings between the infant and the defendant with whom he was living. The Court of first instance described the defendant as a perfectly unscrupulous man (see page 13, line 59) and the lower Appellate Court considered his conduct to be verging on fraud (see page 3, line 41). The Court of first instance treated the suit as in effect a redemption suit, and decreed possession on payment of Rs. 199 The lower Appellate Court held nothing remained due on the mortgage and decreed possession only. We must, I think, accept this finding of fact by the lower Appellate Court. So too I think that, in the absence of objection made in the Court below, it is not now open to the defendant to contend that the suit cannot be regarded as a redemption suit and must, therefore, fail. So far as mere recovery of possession, is concerned, the suit would appear to be one for recovery of possession whether regarded as an ejectment or a redemption suit: see *Hunt* v. *Worsfold* (5).

This leaves us then with the bare point of law under Article 91, a point which was practically taken for granted in favour of the plaintiff in the Courts below when once he had succeeded on the estoppel point. It is now settled by the Privy Council that in India a mortgage by a minor is void *ab initio:* see *Mohori Bibee* v. *Dharmodas Ghose* (6). On the other hand, a mere plea of *non est factum* appears to be insufficient in England, for, according to Simpson on Infants, page 4, the infancy must be pleaded specifically. The appellant says, however, this is because in England some minors' contracts are voidable only, and that in India a plea of *non est factum* would suffice. Assuming, however, that infancy ought to be pleaded, does such a plea involve in effect a claim to cancel or set aside the sale-deed under Article 91?

In *Petherpermal Chetty* v. *Muniandy Servai* (1) the Privy Council held that Article 91 only applied to suits in which the document sought to be set aside was intended to be operative against the plaintiff and would remain operative if not set aside. They further held that Article 91 did not apply to a *benami* deed, if I may properly use that expression. This decision has since been applied in *Jagardeo Singh* v. *Phuljhari* (7). The Calcutta Courts appear to consider that a void deed, as opposed to a voidable deed, does not require to be set aside or cancelled and consequently is not within Article 91 [see *Sham Lall Mitra* v. *Amarendro Nath Bose* (8), *Banku Behari Shaha* v. *Krishto*

(5) (1896) 2 Ch. 224 at p. 228; 65 L. J. Ch. 548; T. 456; 44 W. R. 461.

(6) 30 C. 539; 5 Bom. L. R. 421; 30 I. A. 114; 7 C. W. N. 441; 8 Sar. P. C. J. 374 (P. C.).

(7) 30 A. 375; A. W. N. (1908) 156; 5 A. L. J. 421.

(8) 23 C. 460; 12 Ind. Dec. (N. s) 306.

Gobindo Joardar (9) and *Harihar Ojha* v. *Dasarathi Misra* (10).] In this Court a similar view appears to have been taken in *Abdul Rahim* v. *Kirparam Daji* (11) by Birdwood and Parsons, JJ. Another distinction was taken by Sir Charles Sargent and Mr. Justice Candy in *Nabab Mir Sayad Alamkhan* v. *Yasinkhan* (4) *viz.*, that where a defendant did not get possession under the sale-deed but only used it to defend his title, Article 91 did not apply. That case followed *Bhagvant Govind* v. *Kondi* (12), a decision of Sir Charles Sargent and Mr. Justice Bayley. Standing alone these two latter cases would appear to govern the present case, for defendant's Counsel did not dispute that his client took possession originally under the mortgage and not under the sale-deed.

The cases above cited appear, however, to have been decided on a different line of reasoning to that which eventually prevailed in the adoption cases of *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (2) and *Shrinivas Murar* v. *Hanmant* (3), the former being a decision of the Privy Council and the latter of a Full Bench of this Court. The force of that reasoning in the adoption cases is apparent. Its reconciliation with the other line of cases, *viz.*, the deed cases, is not so apparent. Curiously enough the above authorities in the deed cases do not appear to have been cited in the adoption cases. As regards other cases under the Act, a suit to set aside a deed on the ground of undue influence must be brought within three years [see *Janki Kunwar* v. *Ajit Singh* (13)] as must a suit to set aside a bond for fraud: see *Bakatram Nanuram* v. *Kharsetji* (14). Even in forgery cases or in suits by a ward to set aside a transfer of property by his guardian the period of limitation appears in general to be three years: see Articles 92, 93 and 44. If then Article 91 does not apply in the present case, the plaintiff would have twelve years under Article 144 if the suit be regarded as an ejectment suit, or alternatively sixty years under Article 148 if the suit be regarded as a redemption suit.

The defendants further relied on section 39 of the Specific Relief Act, but as at present advised, I doubt whether that section carries the matter much further. It is a permissive and not an obligatory section.

Under the above circumstances I am of opinion that the case is one which by reason of its general importance and of the conflict of authority requires consideration by a Full Bench.

The questions to be submitted to the Full Bench should, I think, be as follows, *viz.*:—

1. Whether Article 91 of the Indian Limitation Act, 1908, applies to a suit for possession, where the plaintiff alleges and proves that a sale-deed is void because it was executed by him whilst a minor, but does not claim expressly to have it cancelled or set aside.

2. Whether in such a case as that mentioned in the last question, it makes any difference that the defendant originally obtained possession of the property under some instrument other than the void sale-deed?

Mr. *R. S. Navalkar*, for the Appellant.
Mr. *R. N. Koyajee*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

BATCHELOR, AG. C. J.—In this reference the facts are these: The suit, which was filed in September 1911, was brought to obtain possession of lands. The plaintiff attained majority on 10th June 1903: on the 16th March 1903, and consequently while he was still an infant, he executed a deed of sale in favour of the defendant. The defendant had obtained possession under a mortgage of 1901, executed by the plaintiff's guardian in his favour. In the plaint the sale-deed of 16th March 1903 is mentioned, and it is pleaded that the deed is void by reason of the plaintiff's then infancy: there is no prayer that the deed should be set aside or cancelled.

The question we have to decide is whether the suit is governed by Article 91 of the Indian Limitation Act of 1908.

(9) 30 C. 433.
(10) 33 C. 257; 9 C. W. N. 636; 1 C. L. J. 408.
(11) 16 B. 186; 8 Ind. Dec. (N. S.) 601.
(12) 14 B. 279; 7 Ind. Dec. (N. S.) 645.
(13) 15 C. 58; 14 I. A. 148; 12 Ind. Jur. 9; 5 Sar. P. C. 92; Rafique. & Jackson's P. C. No. 99; 7 Ind. Dec. (N. S.) 624 (P. C.).
(14) 27 B. 560; 5 Bom. L. R. 533.

if it is so governed, then it is barred; otherwise it is in time.

The sale-deed of March 1903 was, and is, void and inoperative by reason of the plaintiff's infancy. That being so, it is contended for the plaintiff that he was under no obligation to sue to get it set aside or cancelled, and that his omission to bring such a suit does not expose his present suit for possession to the bar created by Article 91 of the Indian Limitation Act.

I think that this contention should succeed, and, in my opinion, the question is in substance answered by decisions of the Privy Council. In *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (15) the heirs of a Hindu sued, first, for a declaration that an Ijara granted by the deceased widow had become inoperative against the plaintiffs after her death, and, secondly, for *khas* possession of the properties. Their Lordships held that the suit was substantially one for possession, and was governed by Article 141, not by Article 91. In delivering the judgment of the Board, Lord Davey said, speaking of the Hindu widow:—"Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir." Now if that is true even of a voidable transaction, subsequently avoided by the election of the party interested, it seems to me that it must *a fortiori* be true of a transaction which, as here, was void *ab initio*: in that case there was a real obstacle, which at least had temporary operation: here there never was at any time any real obstacle at all, but the thing which seemed to constitute an obstacle was in the eye of the law no reality at all. *Petherpermal Chetty* v. *Muniandy Servai* (1) is, I think, even more directly in point. There in a suit for the possession of land it appeared that the plaintiff's predecessor-in-title had, six years prior to the institution of the suit, executed a *benami* deed of sale of the land collusively and in order to defeat the claim of a prior equitable mortgagee. Counsel for the defendant contended—I quote the report—that "before he (the plaintiff) could recover the land, he must first set aside the conveyance, and a suit for that purpose was barred by Act XV of 1877, Schedule II, Article 91." Upon this argument a specific question was raised by Lord Atkinson, who answered it in these words, which I set out because they seem to me decisive of the point now under consideration:—"As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance ...being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th and not the 91st Article in the Second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time." It is important to observe that Article 91 was excluded, not in terms because the conveyance was *benami*, but because it was, as found in the suit, inoperative. So here, the deed of sale by the infant was inoperative and, consistently with these decisions, I think we are bound to hold that the present suit is not barred by Article 91. The same conclusion is suggested by *Beni Pershad Koeri* v. *Dudhnath Roy* (16), where a suit was brought in 1893 to recover possession of the village. The plaintiff's ancestors had parted with possession in 1836, when a grant for life had been made to another person. In 1849 the grantee executed a permanent *pottah* of it to one Ram Golam and in 1855 the grantee surrendered the village to the plaintiff's predecessor, who allowed Ram Golam to remain in possession paying rent as stipulated in the *pottah*. It was found that the *pottah* was void against he grantor. The question remained whether the plaintiffs were entitled to eject the t

(15) 34 I. A. 87; 9 Bom. L. R. 602 at p. 604; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 C. 329 (P. C.).

(16) 26 I. A. 216 at p. 224; 27 C. 156 at p. 165; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind. Dec. (N. s.) 103 (P. C.).

defendant, who claimed title under Ram Golam. It was contended that the suit was barred because the plaintiff's predecessors might and ought to have sued for a declaration of their right to possession on Ram Golam's death under section 39 of the Specific Relief Act, and that such a suit was barred under Article 91. But Lord Davey said: "It is sufficient answer to this argument to say that, though such an action might have been brought, the Maharajah was not bound to bring it, and there was no necessity for him to do so. According to their Lordships' view the *pottah* (whatever its construction) had become a spent instrument, and had no longer any vitality as a grant of the property." In our case the deed of sale can be in no better position, for it never had any vitality as a conveyance of the property. On the same principle the Indian High Courts, especially here and in Calcutta, have held that it is not necessary in the case of a void deed to sue to have it set aside or cancelled.

These decisions seem to me to require a conclusion in the plaintiff's favour. I need not refer to other decisions of the Judicial Committee which have been cited for the defendant, for in none of them was the Court concerned with a deed such as we have here. The only case where the facts bear a superficial resemblance to the present facts and where the decision went the other way is *Janki Kunwar* v. *Ajit Singh* (13). There the deed involved was a grant of land, alleged to have been obtained by fraud and undue influence from one of the plaintiffs. It was decided that the suit was governed by Article 91. But then their Lordships held that the suit was a suit, not to obtain possession but to set aside the grant, and—what seems to me of greater significance—it was never found that the deed was liable to be set aside: on the contrary, the Judicial Commissioner found no proof of undue influence or fraud, and their Lordships saw "no ground for thinking that on that matter he came to a wrong conclusion." The deed, therefore, was never ascertained to be even voidable.

If I am right in thinking that the point before us is concluded by the decisions of the Privy Council, it becomes unnecessary to consider whether the rulings of our own Court are consistent with the conclusion. This I say merely in order to explain the present judgment, and not with any desire to cast doubt upon these rulings. That most canvassed for the defendant was *Shrinivas Murar* v. *Hanmant* (3), a Full Bench decision where the leading judgment was delivered by Sir Lawrence Jenkins, C. J. As I have said, I am not concerned to reconcile this decision with the cited decisions of the Privy Council, but I may say that for my own part I can see no inconsistency. In *Shrinivas' case* (3) an essential part of the suit was a prayer for a declaration that an adoption was invalid. It was held that, this part of the claim being exposed to the bar of Article 118 of the Schedule, the whole claim was time-barred; but nothing was decided as to the applicability of Article 91, as it was nobody's case that that Article entered into the controversy. I need not say that I am very sensible of the weight of my learned brother Beaman's arguments that it would have tended to logical symmetry and simplicity of principle if the Legislature had treated adoptions and deeds on the same footing. But they have not done so, and separate Articles of the Limitation Act are provided for these separate cases. It is of course not for us to assign reasons for this action of the Legislature, but presumably it was thought that a substantial distinction existed between adoptions and deeds. Among possible grounds for such a distinction would be the greater publicity and the change of status consequent on an apparent adoption. This, however, is merely conjecture; whatever the reason for it may be, the difference of treatment is there and in a well-known passage in *Quinn* v. *Leathem* (17) the Earl of Halsbury, L. C., has warned us against the danger of applying rigorously logical tests to propositions of law: "A case", his Lordship there says, "is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must

(17) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

acknowledge that the law is not always logical at all."

On these grounds, and with sincere respect for the contrary view of Beaman, J., I conclude that the first of Marten, J.'s two questions should be answered in the negative. That is sufficient for present purposes, and I do not think we should decide more than that.

SHAH, J.—I agree.

KEMP, J.—The facts out of which this reference arises are few and simple in their inception. The plaintiff, who attained his majority on 10th June 1903, purported, on 16th March 1903, to execute a sale-deed of some of his lands in favour of this defendant, who was already in possession of those and other lands of the plaintiff by virtue of a mortgage of 30th August 1901 executed in his favour by plaintiff's guardian. The plaintiff filed this suit on 8th September 1911 for the lands, alleging that on the date of the sale-deed he was a minor. The matter comes before us on a reference from Beaman and Marten, JJ., who held divergent views on the question as to whether Article 91 of the Indian Limitation Act applied to plaintiff's suit. Both learned Judges have framed questions for decision by this Full Bench. With great respect to Beaman, J., I think the question framed by him is in too general terms. It proceeds on the assumption that there is no difference between a minor's deed and other deeds of the description mentioned in the question, and I take it he framed his question for decision in this form on the argument by way of the analogy of the principles governing adoption cases, which he considered applicable and which he applied to the facts of the present case. With great respect I am not prepared to adopt that line of reasoning, and I, therefore, personally must decline to answer the question in the wide terms in which it is framed.

The questions framed by Marten, J., appear to me to cover more appropriately the point for determination and I, therefore, confine myself to a discussion of the precise point raised by them. The question in short is: Whether Article 91 of the Indian Limitation Act, IX of 1908, applies to the plaintiff's suit?

Now, I may preface my remarks with the general view which I take of the scope of Article 91. In my opinion, it applies to suits the main object of which is to cancel or set aside an instrument not otherwise provided for by the Act. If there be any other substantial relief prayed for and the cancellation of the instrument be not actually necessary or merely auxilliary to the granting of such relief, Article 91 does not apply. It would be otherwise if the prayer for possession in a suit be merely consequential.

The further question, therefore, arises whether the plaintiff can escape the application of Article 91 by filing his suit for possession in this case.

The determination of this question may be considered from the point of view of all deeds or instruments which, like a minor's deed, are void at their inception, or it may be considered from the point of view of the peculiar position of a minor in the eye of the law, *i. e.*, by a consideration of arguments applicable to a minor's deed in particular. The adoption of this latter method is another reason for declining to answer the question in the form propounded by Beaman, J.

Now, as to the sale-deed in this case, regarded in common with other instruments which are declared by law to be void at their inception, I am entirely in accord with the judgment of my Lord as to the distinction pointed out by him between such instruments and adoptions and as to the result arrived at by him that Article 91 does not apply to such void instruments. I think the point is really concluded by authority: see the decisions of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (15) and *Petherpermal Chetty* v. *Muniandy Servai* (1).

I respectfully deprecate the application to other instruments of arguments based on the analogy of the principles in decided cases in adoptions. Analogy, like parity of reasoning may be a useful servant to invoke in the determination of complex questions of law but must be handled cautiously, and where legal problems can be solved by the application of straightforward principles of law, I fail to see any place for the application of any arguments based on analogy.

But a minor's deed stands on a particular footing by itself. It has been decided

by the highest tribunal that a minor's contract is null and void "*ab initio*": *Mohori Bibee* v. *Dharmodas Ghose* (6). The law protects minors and the disability of infancy goes no further than is necessary for the protection of the infant: *Burnaby* v. *Equitable Reversionary Interest Society* (18) per Pearson, J. at p. 424.

Unlike the law in England which, in certain cases, gives a binding effect after majority to a contract entered into by an infant during infancy, the law here declares the minor's contract void and incapable of ratification.

That being so, it can scarcely have been intended to impose an obligation on the minor, after attaining majority, to set aside a transaction entered into during minority and which it has expressly declared to be void and incapable of ratification. If that were its intention, the attitude of the law would be inconsistent and it would be inflicting an obligation upon the minor in consequence of an attempted contractual obligation entered into by him during minority. I think this is a sufficient answer to the defendant on this point.

Section 39 of the Specific Relief Act is permissive, not obligatory. There is, therefore, no obligation on the minor to sue under that section and if he does not need to sue under that section, it cannot be said by not suing he loses the right which he in common with every other person possesses to the period of limitation for a suit for land.

I, therefore, think that the answer to the first question asked by Marten, J., should be in the negative.

In the second question propounded by Marten, J., another consideration is introduced, *viz.*, the legal effect of the mortgage of 30th August 1901 executed by the minor's guardian. The determination of that question depends on whether the present suit can be treated as a suit by the plaintiff for redemption of the mortgage. The lower Courts have so treated it and the referring Bench apparently inclined to the same view. Apparently the plaintiff does not object to this and the mortgage must, therefore, be taken as established and binding on him. This question does not, therefore, to my mind arise for decision by us.

Appeal dismissed.

(18) (1885) 28 Ch. D. 416; 54 L. J. Ch. 466; 52 L. T. 350; 33 W. R. 639.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1962 OF 1915.

April 18, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

NAGAPPA AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

SIDDALINGAPPA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4 AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5, scope of—Minor, suit against—Omission to deny allegation of fact in plaint, effect of—Issues, framing of—Duty of Court.

The scope of Order VIII, rule 5, is only this that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants, and the rule has nothing to do with the conduct of the suit afterwards. For instance, if at the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact, it cannot be said that rule 5 in any way affects such admission. What the Legislature apparently contemplated by rule 5 was that if, for instance, the guardian of a minor defendant allowed a case to proceed *ex parte*, then the plaintiff must prove those facts alleged in the plaint which were not expressly denied in the written statement filed on behalf of the minor defendant. [p. 590, cols. 1 & 2.]

Courts are not bound to raise issues on questions of fact of their own motion where parties do not ask for them. The omission to raise such issues implies an abandonment of such questions by the party interested. Where, however, the question is one purely of law, such as limitation or jurisdiction, it is incumbent on the Court to frame proper issues on such question. [p. 590, col. 2.]

Second appeal against the decree of the District Court, Bellary, in Appeal Suit No. 101 of 1913, preferred against the decree of the Court of the District Munsif, Penukonda, in Original Suit No. 389 of 1912.

NAGAPPA *v.* SIDDALINGAPPA.

This second appeal coming on for hearing on the 16th and 17th August 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance, and the material papers in the suit and upon hearing the arguments of Mr. *L. Venkataraghava Aiyar* for the Appellants and of Mr. *S. Desikachari* for the 1st Respondent, and the other respondents not appearing in person or by Pleader, the Court delivered the following

JUDGMENT.—The suit was instituted by the 1st respondent in this appeal in order to recover a certain sum of money under a mortgage deed against the appellants, who are minors and who were represented in the suit by their guardian. The first question argued before us is that there was no proof as to the proper execution of the mortgage-deed and its attestation according to law. But the defendants appeared by a Pleader throughout the proceedings, the written statement did not raise any question as to the execution of the mortgage, there was no issue framed with reference to this point, and so far as we can gather from the record, no objection on that score was taken at the time of the trial. The learned Pleader for the appellants contends that, inasmuch as Order VIII, rule 5 of the Civil Procedure Code, says: "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability," it made it incumbent upon the Court to require proof of the execution of the mortgage before there could be any decree given against the minors. But the scope of Order VIII, rule 5, is only this, that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants, and the rule has nothing to do with the conduct of the suit afterwards. For instance, if at the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact, it cannot be said that rule 5 in any way affects such admission. What the Legislature apparently contemplated by rule 5 was that if, for instance, the guardian of a minor defendant allowed a case to proceed *ex parte*, then the plaintiff must prove those facts alleged in the plaint which were not expressly denied in the written statement filed on behalf of the minor defendant. In the case of a defendant who is a major, an *ex parte* decree could be based not only on facts expressly admitted in the written statement but also on those allegations of fact in the plaint which are not denied in the written statement. Here what happened was, the Pleader appearing for the defendant stated that he did not want to adduce oral evidence in the case; so also did the Pleader for the plaintiff. Then certain documents relevant to the issues raised were filed and apparently no objection was taken as to their admissibility and they were marked as Exhibits, we may take it, by consent. The issues that were raised relate to questions of limitation and *res judicata* and those were the points apparently argued at the trial. We think that we should be perfectly justified in this case in saying that any question as to the execution of the document was waived at the time of the framing of issues and the trial of the suit.

Our attention has been drawn to certain rulings, notably to one of the Bombay High Court reported as *Ganoo* v. *Shri Dev Sidheswar* (1), where Mr. Justice Fulton at page 362 lays down that it is the duty of the Court under the Civil Procedure Code to see that proper issues necessary for the decision of the case are framed. But there the question was as to whether the notice served by the landlord on the tenant in a suit for ejectment was a proper one, and as proper notice was a part of the cause of action it was held to be the duty of the Court to see whether in the plaint the cause of action was properly stated and that it was proved at the trial. The proposition, however, as to the duty of the Court to raise proper issues is laid down in broad terms. But we do not think that it was intended to lay down that upon questions of fact it is the duty of the Court, even though the party in whose interest it is to raise the necessary issue does not choose to do so, to frame such issues of its own motion. Any general proposition of that character

(1) 26 B. 360; 4 Bom. L. R. 58.

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would, in our opinion, be subversive of proper conduct of cases and we are unable to assume that the learned Judges of the Bombay High Court intended to lay down any such rule. On the other hand, we agree with the ruling of this Court reported as *Ponnusami Pillai* v. *Pasupathi Mudaliar* (2), where it is laid down that an omission to raise an issue on a question of fact implies an abandonment of that question by the party interested. No doubt, where the question is one purely of law, such as limitation or jurisdiction, it is incumbent on the Court to frame proper issues on such questions, but it would not be safe to extend any such rule to issues of fact. We, therefore, overrule this objection raised by the appellants' Pleader.

The next contention in the appeal relates to the admissibility of Exhibit D which is a deposition of the present guardian of the appellants in a former suit. The defendants' Pleader apparently consented to Exhibit D being admitted in evidence and the statement contained therein which amounts to an admission saving limitation that could have been proved if the guardian had been called. It was open to the Pleader for the defendants to dispense with any such proof. We, therefore, do not think that there is any force in this objection either.

On the next question as regards the amount of interest which has been allowed in the decree, that is, at the rate of Rs. 75 a year, it is difficult to ascertain from the records upon what material this sum was arrived at, and it would be necessary to call for a further finding on this point, allowing the parties to adduce evidence with respect thereto. But the learned Pleader for the appellants wants time to consider whether it would be desirable in the interest of his clients that a finding on this point should be called for. We, therefore, allow the case to stand over for two weeks.

This second appeal coming on for further hearing on the 3rd October 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of the Counsel for the appellants and of 1st respondent, and the other respondents not appearing in person or by Pleader, the Court made the following

ORDER.—The lower Court will submit a finding as to how much is payable on account of interest according to the terms of the bond Exhibit A. Fresh evidence may be taken. The finding will be submitted in 8 weeks and the parties will be at liberty to file objections to the same within 10 days after notice of return of the same shall have been posted up in this Court.

In compliance with the order contained in the above judgment, the District Judge of Bellary submitted the following

FINDING.—The High Court has called for a finding as to how much is payable on account of interest under the bond Exhibit A.

2. Under the mortgage bond Exhibit A one-fourth share of the grain produced on the mortgaged land was to be given by way of interest on the amount of the mortgage loan.

3. The amount of interest originally allowed is Rs. 300, at the rate of Rs. 75 per year for each of four years from 1908 to 1912.

4. The only evidence on the subject is given on the side of the plaintiff and this has all been given after the remand. It is the plaintiff's case that the lands mortgaged under Exhibit A form part of the lands since sold to him under Exhibit B. The extent sold under Exhibit B is 21·65 acres, while the extent of land mortgaged under Exhibit A is 5·16 acres (*plus* a small fraction), and so the yield on the mortgaged lands will be something under a fourth of the yield on the whole extent of the land sold. The calculation has to be made this way, as both plaintiff and P. W. No. 2 give the yield for the entire extent of the land sold under Exhibit B, while it is not made quite clear to what P. W. No. 3 refers; but it is not a very satisfactory way of making it, as according to the plaint-

(2) 5 Ind. Cas. 813; 7 M. L. T. 106.

iff's evidence 3 acres of the whole extent are wet and the rest dry, the lands hypothecated being well-fed. The plaintiff's evidence as P. W. No. 1 shows that two crops of grain were being raised on the whole land and that each crop would yield 24 to 20 Pallas, while he also says that he was getting 20 or 25 Pallas for his half share. This statement would make out that the produce yielded about 50 Pallas of paddy a year, and the plaintiff would be entitled to a fourth share or rather less than $\frac{1}{4}$th of this—that is, to only about 3 Pallas. P. W. No. 2 says that the plaintiff's $\frac{1}{4}$th share was about 6 Tooms (=4 4/5th Pallas) from each of the crops, and this is clearly with reference to the full extent of land sold, and so according to this witness plaintiff's fourth share on the mortgaged lands would be hardly $2\frac{1}{2}$ Pallas. P. W. No. 3 says that plaintiff was getting 6 or 7 Tooms for each of two crops per year from the hypotheca, and by the hypotheca I take it that he means the whole extent of lands sold and not merely the lands mortgaged, as otherwise his reckoning would be very much at variance with what is spoken to by P. Ws. Nos. 1 and 2. I would hold on this evidence that plaintiff for his fourth share of the mortgaged property is only entitled to $2\frac{1}{2}$ Pallas of grain per year.

5. As to the value of this grain, plaintiff says now that it is worth Rs. 6 or Rs. 6-8-0 a Palla; while P. W. No. 2 says that it fetches Rs. 5 or Rs. 5-8-0 a Toom, which comes to much the same thing. In a deposition (Exhibit D) in a previous suit, however, when speaking, as I understand, of the year 1907, he has said that the price per Palla was at that time Rs. 3-8-0. He has not been cross-examined as to this statement, and prices no doubt vary and tend to go up, but I do not think that they can have varied so much as to have nearly doubled since the date of Exhibit D. On the other hand, it has to be remembered that the defendants (appellants) have set up no counter-evidence to that put forward by the plaintiff. On the whole I think that it may be taken that the price per Palla for the four years has been on an average Rs. 5, and at this rate I find that the plaintiff is entitled to interest of Rs. $12\frac{1}{2}$ a year, representing $2\frac{1}{2}$ Pallas per year at Rs. 5 per Palla. He is, therefore, entitled to Rs. 50 in all for the four years.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The decree will be varied by allowing interest at Rs. 12-8-0 per annum on Rs. 200 from March 1908 till the time fixed for payment. Time for redemption will be extended to 18th August. In other respects the decree will be confirmed. There will be proportionate costs.

M.C.P.

Decree varied.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2845 OF 1917.

May 31, 1918.

Present :—Sir Henry Rattigan, KT., Chief Judge.

DALIPA—DEFENDANT—APPELLANT

versus

LABHU RAM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 60, 145, applicability of—Suit to recover money deposited with defendant—Limitation applicable.

Where money is sent by the plaintiff to the defendant to keep, on the understanding that it is to be returned when demanded, a suit to recover the money is governed by Article 60 of Schedule I of the Limitation Act. Section 10 of the Limitation Act has no application to such a suit [p. 593, col. 2.]

Article 145 of Schedule I of the Limitation Act does not apply to a deposit of money, except in the case of coins which are ear-marked and where it is the intention of the parties that the identical shall be returned to the depositor. [p. 593, col. 2.]

Second appeal from the order of the District Judge, Jullundur, dated the 20th August 1917, reversing that of the Munsif, 1st Class, Jullundur, dated the 20th February 1917, dismissing the claim and remanding the case for re decision.

Lala *Jagan Nath*, for the Appellant.

Lala *Faqir Chand*, for the Respondent.

JUDGMENT.—According to the allegations in the plaint, plaintiff, Labhu Ram, from time to time in 1907, 1908 and 1909, sent from America to his father-in law, Bhupa, sums of money aggregating to a total of 226 dollars or Rs. 694-15 0 with the request that the money should be kept for plaintiff by way of deposit (*amanat*) until required by him. It is alleged that plaintiff returned from America about six years or so before suit and shortly after his return demanded the money from Bhupa. Bhupa is said to have died a year or two before suit and in 1916 plaintiff preferred the present claim against Dalipa, defendant, as the adopted son of Bhupa, for recovery of the said amount of Rs. 694-15 0. As a preliminary objection defendant urged that the claim was time-barred. The Munsif was of opinion that Article 60 of the Indian Limitation Act applied to the case and that the suit was, therefore, barred by time, having been instituted more than 3 years from the date of demand. The District Judge on appeal held that section 10 of the Act was not applicable and that the suit was not barred and remanded the case under Order XLI, rule 23, for disposal on the merits. Defendant has preferred a further appeal to this Court and I have heard Mr. Jagan Nath on his behalf and Mr. Faqir Chand on behalf of the respondent.

It appears to me that the decision of the Division Bench reported as *H. H. Raja of Faridkote* v. *Sardar Gurdyal Singh* (1) is in point upon the question of law involved and that upon its authority I must hold that section 10 of the Indian Limitation Act has no application to the present suit. In that case the Division Bench expressly dissented from the proposition that the words in section 10, "in trust for a specific purpose," cover cases where money is held for the benefit of the creator of a so-called trust. "The effect of such construction (the learned Judges observe) would be that any person who entrusted money to another for his own uses could, after the lapse of any time, bring a money suit against him or his representative."

"This would, in our opinion, be opposed to the principles on which the law of limitation is based. It would render a large number of the Articles of Schedule II of the Limitation Act meaningless (*e.g.*, Articles 60, 62, 89, 90, 98, 100, 105, 133, 134, 145) as under the section so construed suits under these Articles would not be barred by any length of time."

This authority, though opposed to the rulings of the Bombay High Court cited by the District Judge, has the support of many decisions of the other High Courts and is of course binding upon me as a single Bench. Mr. Faqir Chand argued that in any event Article 145 of the Limitation Act was applicable to the present claim and cited in support of his argument *Gangahari Chakrabarti* v. *Nabin Chandra Banikya* (2) and *Lala Gobind Prasad* v. *Chairman of Patna Municipality* (3). With every respect, I cannot agree that this Article can be applied to a deposit of money, except in the case of coins which are earmarked and where it is the intention of the parties that the identical coins shall be returned to the depositor, and I prefer to follow the decision of Wallis, J., in *Balakrishnudu* v. *Narayanasawmy Chetty* (4).

In my opinion Article 60 of the Limitation Act (which is not one of the Articles included in the Schedule to the Punjab Loans Limitation Act of 1904) covers the facts of the present case. The money was sent by plaintiff and accepted by Bhupa by way of deposit and was repayable on demand. According to the plaint it was on these terms and conditions that the money was sent and as Bhupa accepted the money on those terms and conditions, he must be taken to have impliedly agreed to keep it in deposit and to repay it when required to do so. It follows that the present claim is time barred and the suit must be dismissed.

I accordingly accept the appeal and setting aside the order of the District Judge, I dismiss the suit, but under the circumstances of the case I leave the parties to bear their own costs throughout.

Appeal accepted.

(1) 34 P. R. 1898.

(2) 34 Ind. Cas. 959; 20 C. W. N. 232; 23 C. L. J. 145.

(3) 6 C. L. J. 535.

(4) 24 Ind. Cas. 852; 37 M. 175.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 264 OF 1916.

August 17, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

BOLUSAWMY AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

Sri Rajah VENKATADRI APPA RAO BAHADUR ZEMINDAR GARU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 3 (16), 20 —*'Tank-beds,' meaning of.*

In using the expression 'tank-beds' in section 3 (16) of Madras Act I of 1908 the Legislature was alluding to such class of tank-beds as are cultivable, *i.e.*, as are capable of being cultivated when the tank has become dry or when there is no water in the tank in certain years.

Where tank-beds are capable of being cultivated or used in any such manner, the rights of the land-holders over them are not affected by the enactment of section 20 of the Act.

Appeal against the order of the Court of the Subordinate Judge, Kistna at Ellore, in Miscellanous Appeal No. 61 of 1915, preferred against the decree of the Court of the District Munsif, Tanuku, in Original Suit No. 990 of 1912.

Mr. *Narayanamurthi*, for the Appellant.

JUDGMENT.—The Subordinate Judge in his judgment says: "The land involved in this appeal is admittedly cultivable tank-bed land and even at present admittedly the land is liable to submersion." The question is whether the land is a *ryoti* land within the meaning of section 3 (16) of the Estates Land Act, 1908. That clause says: "*Ryoti* land means cultivable land in an estate other than private land but does not include (*a*) tank-beds; (*b*) threshing floors, cattle-stands, village-sites, etc., etc." So far as tank-beds are concerned, what the Legislature was alluding to was such class of tank-beds as are cultivable, that is to say, as are capable of being cultivated when the tank has become dry or when there is no water in the tank in certain years. Mr. Narayanamurthi for the appellants contends that what the Legislature meant was the bed of a tank which is full of water. It is difficult, however, to assume that the Legislature was dealing with land that could not be cultivated at all.

Section 20 of the Act was also referred to by the learned Pleader. That section lays down: "Threshing floors, cattle-stands, village-sites and other lands situated in any estate which are set apart for the common use of the villagers shall not be assigned or used for any other purpose without the written order of the District Collector," but with reference to tank-beds the section says: "Nothing in this section shall apply to tank-beds in any estate or affect the rights of the landholders over them." That seems to be a quite clear provision that so far as tank beds are capable of being cultivated or used in any such manner, the rights of the land-holders over them are not affected by the enactment of section 20.

Then Mr. Narayanamurthi seemed to argue that since this class of land does not come within the definition of "private land" we must take it as *ryoti* land, but there is no warrant or authority for that proposition. In fact, the definition of "*ryoti* land" contemplates the existence of non-*ryoti* lands which are not private lands. If the land in suit is not *ryoti* the defendant is liable to be ejected, unless he could make out that all lands which are not private lands are to be treated on this same footing as *ryoti* lands. Such a presumption as we have said is clearly negatived by the wording of clause 16, section 3. We, therefore, hold that the decision of the Subordinate Judge is right, and the appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 708 OF 1917.

June 26, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge.

ATA ULLAH KHAN—PLAINTIFF—PETITIONER

versus

UMAR DIN—DEFENDANT—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 77—*Proviso added by Act III of* 1912—*Jurisdiction of Civil and*

KIZHEKKE MANJAMBRATH AVULLA *v.* KANNA KURUP.

Revenue Courts—Suit for possession -Pleadings—Examination of parties by Court—Defendants claiming occupancy rights.

In an ejectment suit the plaintiffs asserted in the plaint that the defendants were mere trespassers and the defendants in their written statement contended that the plaintiffs had no rights whatsoever in the land, but on examination by Court the plaintiffs urged that the defendants were their tenants-at-will and the defendants pleaded that they were occupancy tenants of the settlers of the village:

Held, that under the proviso added by Punjab Act III of 1912 to section 77 of the Punjab Tenancy Act the plaint must be returned for presentation to the Revenue Court.

Petition for revision of the order of the District Judge, Amritsar, dated the 14th May 1917, affirming that of the Subordinate Judge, 1st Class, Amritsar, dated the 26th January 1917, returning the plaint for presentation to the Collector.

Khwaja *Zia-ud-Din*, for the Petitioner.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The order in this case will dispose also of the petitions for revision Nos. 709, 710 and 711 of 1917. The Courts below have held that they have no jurisdiction under section 77 (3) of the Punjab Tenancy Act to entertain defendants' plea that they have occupancy rights in the land in dispute and have consequently returned the plaint to the plaintiff to be presented to the competent Revenue Court. The facts are fully stated in the judgment of the District Judge and it is unnecessary for me to repeat them. In the plaint and in the written statement filed by the defendants, no allegation is made that the defendants are the tenants of the plaintiffs, on the contrary the plaintiffs in their plaint assert that the defendants are mere trespassers and the defendants in their written statement contend that plaintiffs have no right whatsoever in the land. In the circumstances, I should have been prepared to hold that section 77 of the Punjab Tenancy Act was inapplicable to the case, inasmuch as this could not, upon the written pleadings, be regarded as a suit between a landlord and a tenant. It appears, however, that plaintiffs' next friend and the defendants were examined by the Court upon their pleadings and that plaintiffs then urged that the defendants were their tenants-at-will, and the defendants pleaded that they were the occupancy tenants of Muhammad Bakhsh and the other settlers of the village.

It is clear, therefore, that the plaintiffs, at all events, have not abandoned the position that the defendants are their tenants. It is urged on behalf of the plaintiffs that the Revenue Courts have already found in the previous case between the parties that the relationship of landlord and tenant does not exist between the parties and that it is consequently futile to refer the case again to the Revenue Courts. On the other hand, it is impossible for the Civil Courts in a case of this kind to ignore the plea put forward by the defendants, and the only course open to them is to act under the proviso which was appended to section 77 of the Punjab Tenancy Act by the Punjab Act III of 1912. The whole case will thus be triable by the Revenue Courts, and it will be for them to decide how they ought to deal with the defendants' plea regarding the acquisition of occupancy rights. In my opinion, there is no ground for interference in any of these cases, and I accordingly reject these petitions with costs.

Petition rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1671 OF 1916.

February 12, 1918.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

KIZHEKKE MANJAMBRATH AVULLA —PLAINTIFF—APPELLANT

versus

C. K. P. KANNA KURUP AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXXIV, r. 1—Suit for redemption of kanom—*First suit against* karnavan *personally—Subsequent suit against* tarwad, *maintainability of.*

Where a mortgagor brings a suit for redemption against some of the co-owners of the equity of redemption and obtains a decree, a subsequent suit on the mortgage against the other co-owners is barred under Order II, rule 2 of the Code of Civil Procedure. [p. 596, col. 1.]

Plaintiff sued the *karnavan* of a *tarwad* in his personal capacity for redemption of a *kanom* and obtained a decree. He then had knowledge of the *tarwad's* interes in the *kanom*. Subsequently

HARGOPAL *v.* HARISH CHANDAR.

he brought another suit for redemption against all the members of the *tarwad*:

Held, that the subsequent suit was barred by the provisions of Order II, rule 2, Civil Procedure Code.

Govinda v. *Mana Vikraman*, 14 M. 284 at p. 289; 5 Ind. Dec. (N. S.) 200, explained and distinguished.

Second appeal against the decree of the Court of the Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 95 of 1914, preferred against the decree of the Court of the District Munsif, Tellicherry, in Original Suit No. 538 of 1912.

Mr. K. P. M. Menon, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.

BAKEWELL, J.—The question argued before us is, whether the plaintiff is debarred from bringing his suit by reason of the omission of some of the co-owners of the property in his previous suit for redemption in contravention of the provisions of Order XXXIV, rule 1.

The plaint states expressly that the previous suit was against the 1st defendant in his personal capacity and this also appears from the order dismissing the 4th defendant from that suit; there is, accordingly, no question of the members of the 1st defendant's Tarwad other than the 4th defendant being bound by the previous decree.

The plaint does not allege that the plaintiff was ignorant of the claims of those persons to the Kanom right, and I think that there was sufficient evidence to support the finding of the learned Subordinate Judge that he had notice of that claim when he brought the previous suit.

It is obvious that if a mortgagor were at liberty to bring separate suits for redemption against several co-mortgagees under the same mortgage, in which separate accounts would have to be taken, there would be an unnecessary multiplicity of proceedings and great confusion might arise: see *Nilakant Banerji* v. *Suresh Chandra Mullick* (1), and such a course is in contravention of Order II, rule 2.

The plaintiff's claim is against all the co-owners that they shall jointly deliver up possession of the mortgaged property and is based on the Kanom deed, and I think that this constitutes "the whole of the claim" which he was entitled to make in the previous suit within the meaning of Order II, rule 2, and that this rule prohibits another suit against the other co-owners.

For these reasons I would dismiss this appeal with costs.

PHILLIPS, J.—The finding of the Subordinate Judge must be accepted that plaintiff had knowledge of the fact that the 1st defendant's Tarwad had a Kanom right in the property in respect of which 1st defendant the Karnavan executed the Marupat, Exhibit B. The case, however, appears to be somewhat similar to the case of *Govinda* v. *Mana Vikraman* (2). It is contended that, in that case, the first suit was for rent while the second suit was on the mortgage, but the second suit also included a claim for the rent decreed in the first suit, and it was held that the claim was neither *res judicata* nor barred under section 43 of the Civil Procedure Code corresponding to Order II, rule 2 of the present Code. That case is, however, distinguishable from the present case, on the ground that in the second suit the basis for the claim for rent was the mortgage, whereas in the first case the claim was based on a lease. In the present case, the second suit is based on the same cause of action as the first. In the first suit plaintiff, knowing that the Tarwad had a right in the Kanom, sued the Karnavan alone in his personal capacity, and omitted to sue in respect of his claim against the Tarwad. I, therefore, agree that the present suit is barred under Order II, rule 2.

M.C.P.

Appeal dismissed.

(1) 12 C. 414 at p. 423; 12 I. A. 171; 9 Ind. Jur. 439; 4 Sar. P. C. J. 685; 6 Ind. Dec. (N. S.) 281 (P. C.).

(2) 14 M. 284 at p. 289; 5 Ind. Dec. (N. S.) 200.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1971 of 1915.

July 22, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

HARGOPAL—PLAINTIFF—APPELLANT

versus

HARISH CHANDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 3—Dismissal for default—Procedure where both rules applicable.

MAMIDI APPAYYA *v.* YEDAN VENKATASWAMI.

Where a default takes place within the meaning of both rule 2 and rule 3 of Order XVII of the Civil Procedure Code and there is not enough material on the record to enable the Court to proceed to judgment, the Court should proceed under rule 2.

Second appeal from the decree of the District Judge, Amritsar, dated the 28th April 1915, affirming that of the Subordinate Judge, 1st Class, Amritsar, dated the 19th December 1913, dismissing the suit with costs.

Dr. *Nand Lal*, for the Appellant.

Mr. *Santanam*, for Nand Singh, defendant No. 2, Respondent.

JUDGMENT.—The summons of plaintiff's witnesses had been returned unserved for want of correct addresses and on the 16th November the first Court directed plaintiff to give correct addresses within three days. It is apparent that these correct addresses were not given as ordered although the exact facts are impossible to verify, the necessary papers having been destroyed. From the grounds of appeal to the District Judge which are silent on this subject and from his decision, there can be no doubt that they were not furnished as ordered. An adjournment was granted for the 19th December, on which date plaintiff and his Pleader failed to appear and the suit was dismissed under rule 3 of Order XVII. The lower Appellate Court has also held that rule 3 is applicable to the case and against this decision the plaintiff has preferred this second appeal.

It is clear to us that a default took place within the meaning of both rule 2 and rule 3 of Order XVII; and the only question for decision is under which rule the suit should have been dismissed. Although there is a conflict of authority among the High Courts whether rule 2 or 3 should be applied where there is material on the record to enable the Court to pronounce judgment, there is no such conflict where such material does not exist, as was the case in the present suit. The Calcutta High Court judgments published as *Mariannissa* v. *Ramkalpa Gorain* (1), *Kader Khan* v. *Juggeswar Prasad Singh* (2) and *Enatulla* v. *Jiban Mohan Roy* (3) are sufficient authorities that, where there is no sufficient material on the record to enable the Court to proceed to judgment, rule 2 should be applied. The same appears to be the view of the only published authority of this Court, *Ramrattan* v. *Hyat Muhammad* (4). We hold, therefore, that the suit should have been dismissed under rule 2 of Order VII.

We, therefore, accept the appeal and set aside the decision of the lower Appellate Court and remand the case for trial on its merits. As, however, the plaintiff appears to have been guilty of dilatory tactics so as to defeat the claim of Nand Singh, defendant, we order that plaintiff shall pay the costs incurred by Nand Singh up to date.

Appeal accepted.

(1) 34 C. 235; 5 C. L. J. 260.
(2) 35 C. 1023.
(3) 23 Ind. Cas. 769; 41 C. 956; 18 C. W. N. 775; 19 C. L. J. 535.
(4) 41 P. R. 1880.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 1394 AND 1393 OF 1916.

February 18, 1918.

Present:—Mr. Justice Spencer.

MAMIDI APPAYYA AND OTHERS—PETITIONERS

versus

YEDAN VENKATASWAMI, MINOR BY HIS NEXT FRIEND PILLIMETLA NANNI, AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 12, 14, 15—Arbitration—Absence of some arbitrators at meetings, effect of—Award signed by some only of several arbitrators, legality of—Time for taking objections and for remission of award—Limitation Act (IX of 1908), Sch. I, Art. 158.

For a final award by arbitrators to be valid, it is essential that all the arbitrators should have been present at all the meetings including the last, that witnesses should have been examined in the presence of all and that all should have consulted together as to the form that their award should take. [p. 598, col 2.]

The period of ten days' limitation for applying to set aside an award prescribed under Article 158 of the Limitation Act is not applicable to proceedings under para. 12 or para. 14 of Schedule II of the Civil Procedure Code, and there is no limitation for making an application to remit an award for reconsideration of the arbitrators owing to some illegality being apparent on the face of it. [p. 598 col. 2.]

MAMIDI APPAYYA *v.* YEDAN VENKATASWAMI.

Hyder Sahib v. *Giria Chettiar*, 19 Ind. Cas. 496; 24 M. L. J. 483; (1913) M. W. N. 338; 13 M. L. T. 349, followed.

The fact that when an award is presented, it bears the signature of some only of the arbitrators is an illegality on the face of the award which should lead the Court to remit it for re-consideration of the arbitrators. [p. 599, col. 1.]

Petitions, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated 24th July 1916, of the Court of the Principal District Munsif, Bezwada, in Civil Miscellaneous Petition No. 1918 of 1916, in Original Suit No. 574 of 1914, and the decree dated 4th February 1916 of the said Court in the said Original Suit No. 574 of 1914 respectively.

FACTS appear from the judgment.

Mr. *T. Ramachandra Row*, for the Petitioners.—The award is invalid because all the arbitrators were not present at all the meetings. It is an indispensable requisite that all the arbitrators should consult together and the award should be the outcome of their joint deliberations.

The award was signed by only two out of the three arbitrators. That is an illegality on the face of the award which should, therefore, have been remitted for re-consideration.

The lower Court was wrong in thinking that Article 158 of the Limitation Act applied and that objections should have been taken within 10 days from the sub mission. The Article does not apply to Schedule II, Civil Procedure Code.

Mr. *V. Ramadoss*, for the Respondents.—The award was signed by the majority and was valid. No objection was taken by the petitioners within 10 days of the submission, after which date the award became final.

JUDGMENT.—These civil revision petitions arise out of a suit in which there was a reference made by consent of the parties to three arbitrators and a decree was passed by the Court on the award of two of them.

The parties agreed to abide by the decision of the majority, but the petitioners seek to impugn the legality of the award which two out of the three arbitrators have signed because the arbitrators did not all meet together and deliberate upon the matter submitted to them, as appears from the 3rd arbitrator's separate award or report and from the 2nd defendant's affidavit. It is a well-established principle in regard to arbitration that for the final award to be valid, it is essential that all the arbitrators should be present at all the meetings including the last, that witnesses should be examined in the presence of all, and that all should consult together as to the form that their award should take [*vide Nand Ram* v. *Fakir Chand* (1), *Thammiraju* v. *Bapiraju* (2) and *Abu Hamid Zahir Ala* v. *Golam Sarwar* (3) Also Banerji's Law of Arbitration in India, 2nd edition, page 225]

After the District Munsif had passed a decree in the terms of the award of the majority of the arbitrators, the defendants Nos. 2, 4 and 5 presented a review petition which was rejected without going into the question of the legality of the award, mainly for the reason that the review petition was put in nearly three months after the decree had been passed, while Article 158 of the Limitation Act allows only ten days' time to apply to set aside an award from the date of its submission to the Court.

The respondents support the District Munsif's order declining to review his own judgment on the ground of limitation, and further raise the same objection against the High Court's entertaining the present petition and quote *Ghulam Khan* v. *Muhammad Hossain* (4) in support of their contention.

It has, however, been held in this Court that the period of ten days' limitation for applying to set aside an award prescribed under Article 158 of the Limitation Act is not applicable to proceedings under section 12 or 14 of Schedule II of the present Civil Procedure Code and that there is no limitation of time for making applications to remit an award for re-consideration of the arbitrators owing to some objection to the legality of the award being apparent on the face of it [see *Hyder Sahib* v. *Giria Chettiar* (5)].

(1) 7 A. 523; A. W. N. (1885) 139; 4 Ind. Dec. (N. S.) 539.

(2) 12 M. 113; 4 Ind. Dec. (N. S.) 428.

(3) 40 Ind. Cas. 424; 25 C. L. J. 396; 92 C. W. N. 301.

(4) 29 C. 167, 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(5) 19 Ind. Cas. 496; 24 M. L. J. 483; (1913) M. W. N. 338; 13 M. L. T. 349.

BALWANT SINGH *v.* JOTI PRASAD.

I think that the fact that the award, when presented, bore the signatures of only two out of the three arbitrators was an illegality on the face of the award [see *Ramesh Chandra Dhur* v. *Karunamoyi Dutt* (6)] and that this omission should have attracted the attention of the Court and should have led to consideration whether the award should not be remitted under section 14, clause (*c*), of Schedule II of the Civil Procedure Code for re-consideration by the arbitrators.

The Pleader for defendants Nos. 2, 4 and 5 filed an affidavit in which he explained that he did not file objections to the award of the two arbitrators, as he thought that the award of the third arbitrator, which was favourable to his clients, was the only award on the record. The District Munsif observes that the latter cannot strictly be termed an award and that the Pleader had no good reason for being misled and was negligent. He should have lost no time in filing objections and he should have been present at the hearing on February 3rd, 1916, when he would have known about the award of the two arbitrators dated 9th January and filed on January 12th. He has not scrupled to suggest that this award was subsequently written and ante-dated, although the Court stamp shows it to have been filed in Court on the 12th. But the mention in the Court's B diary of the receipt of only one award without an entry being made when the 3rd arbitrator's report was received on the 17th has given occasion for the Pleader to say that he only knew of one award and he has thus taken advantage of the Court's omission to mention both awards. It would, in my opinion, have been unfair to the defendants to put them on terms owing to their Pleader's neglect to look into the award and to give them another chance of objecting to the award which was unfavourable to them, on condition of their paying the plaintiff's costs for the hearing on February 3rd and 4th.

Accordingly I set aside the order and decree of the lower Court and direct that, if the petitioners pay into Court such costs as the District Munsif may allow to the plaintiff for the hearings of February 3rd and 4th and if within ten days of the receipt of this order in that Court the defendants file objections to the award filed on January 12th, the District Munsif will consider those objections and if he finds them to be true and substantial objections to the legality of the award, will remit the award for re-consideration of the same three arbitrators. In case the arbitrators refuse to consider it, it will then be time for the lower Court to determine whether it will set aside the award under section 15 of Schedule II of the Civil Procedure Code and decide the case itself.

Costs of Civil Revision Petition No. 1394 of 1916 will be costs in the cause and will abide and follow the result.

(6) 33 C. 498.

These civil revision petitions having been posted to be spoken to this day, the Court delivered the following further

JUDGMENT. In the event of the petitioners failing to file objections and to deposit the plaintiff's costs, as above mentioned, within the time allowed, these petitions will stand dismissed with costs of Civil Revision Petition No. 1394 of 1916 as from that date.

M.C.P.

Cases remanded.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 160 OF 1918.

July 15, 1918.

Present :—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

BALWANT SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

JOTI PRASAD AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Hindu Law—Adoption by widow—Widow allowed to remain in possession of estate—Adopted son, position of—Transfer of interest, validity of—Transfer of Property Act (IV of 1882), s. 6 (a).

Where on an adoption being made by a Hindu widow it is agreed between the widow and the natural father of the adopted son, acting on the latter's behalf, that the widow should remain in possession of her husband's estate till her death, a vested right in the estate is created in favour of

the adopted son and merely his right of enjoyment and possession is postponed till after the death of the widow. A transfer of such vested right by the adopted son during the widow's lifetime is unaffected by section 6 (*a*) of the Transfer of Property Act. [p. 605, col. 1.]

Execution first appeal from a decree of the Subordinate Judge, Saharanpur.

Mr. *Nehal Chand*, for the Appellant.

Messrs. *B. E. O'Conor* and *Lakshmi Narain*, for the Respondents.

JUDGMENT.—This appeal arises out of an execution proceeding under two decrees, dated (1) the 22nd of June 1917 and (2) the 15th of December 1917, both of which were passed in one and the same suit No. 63 of 1915, (1) Rai Bahadur Lala Joti Prasad, (2) Lala Raghunath Singh and (3) Lala Beni Prasad, plaintiffs *versus* (1) Choudhri Balwant Singh, (2) Rana Indar Singh defendants. The application for execution was made on the 17th of December 1917, and the prayer made was that possession over Talluqa Naogawn, entered in the list annexed to the application, be delivered to the decree-holders against the judgment-debtors Nos. 1 and 2. A further prayer was that the Collector of Saharanpur, who was in possession of the property as a Receiver, be asked by a Rubkar to deliver possession of the said property to the decree-holders and to hand over to them such sums of money as may be with him in deposit, on account of the profits of the said property. Objections were raised by Balwant Singh, judgment-debtor, to the execution of the decree. Those objections have been disallowed by the learned Subordinate Judge of Saharanpur by his judgment, dated the 5th of April 1918. Choudhri Balwant Singh, judgment-debtor, has appealed and in the memorandum of appeal has raised pleas embracing almost all the objections which he had raised in the Court below. In order to appreciate the pleas raised and the argument addressed to the Court on behalf of the appellant it is necessary to state shortly the previous history of the litigation.

One Raja Raghubir Singh was the owner of a considerable property known as the Landhaura Estate. He died in the year 1868, leaving Rani Dharamkuar, who was pregnant at the time, as his widow. It is an admitted fact that before his death he permitted and authorized his widow to adopt a son for him, in case the child born of the widow died in its infancy. He further gave permission to adopt another son in case the one adopted was to die in his childhood, in her life time.

A child was born after the death of Raghubir Singh, but he having died, Rani Dharamkuar adopted one Indar Singh, in 1877. The latter having died, she adopted one Rambadan Singh in 1883, who also having died in 1885, one Bharat Singh was selected in 1893 for adoption, but before his adoption had taken place, he died in 1896. Eventually, Choudhri Balwant Singh, the appellant in this appeal, was adopted on the 13th of January 1899 and a deed of adoption was executed on that date and was formally registered. The material portions of the said deed having a bearing upon the questions in dispute in this appeal are these :—

In paragraph 3, it is stated that on the death of the Raja, Rani Dharamkuar entered into proprietary possession of all kinds of property (*Har qism matrukah ki malik o mustahiqq o qabiz hui*) and that she was in possession of all the property belonging to the Reyasat of the said Raja Saheb at the time of the execution of the document. In paragraph 4, it is stated that being the owner of a considerable property, the Raja in his lifetime, owing to religious needs and other requirements, was anxious to have a son born who may fulfil the religious needs and who may be the owner of the Reyasat. In paragraph 5, it is stated that as the lady, at the time of his last illness, was pregnant, he did not adopt a son himself in his lifetime. In paragraph 6, it is stated that during his last illness, having suddenly become hopeless of his life, he, by way of precaution, directed the lady, "That in case a daughter is born or if a boy having born dies, I enjoin upon you and order you that you should adopt a boy for me, so that he may keep our name alive and after your death may be the absolute owner and possessor of my entire estate and if perchance, the son adopted, according to this permission, dies in your lifetime then you will continue to have the power of

urther adoption" In paragraph 10, it is stated that she in June 1898 selected Choudhri Balwant Singh, son of Choudhri Ramnawaz, for the purpose of adoption and from that date the said Balwant Singh came under her-protection and was brought up by her. In paragraph 11, it is stated that the executant adopted Choudhri Balwant Singh on the 13th of January 1899. In paragraph 12, it is stated that "The said Balwant Singh will be considered the adopted son of Raja Raghubir Singh and of the executant and he will perform all the religious duties towards the said Raja Saheb and the executant after the death of the executant, and after her death he will be the absolute owner of the property of the Reyasat Landhaura." The most important provision is contained in paragraph 13, which runs thus:

"That during her lifetime the executant will continue to have all the rights over all the properties of the Reyasat of Landhaura left by Raja Raghubir Singh which a Hindu widow has over her husband's estate according to the Hindu Law and that she will continue to be the owner and in possession as before, that the said Balwant Singh, my adopted son, will have no right to interfere with my rights of ownership and with the management and supervision of the Reyasat during my life. But the said adopted boy will be maintained according to his position and status and he will be properly brought up and that she has adopted Balwant Singh on these conditions and Choudhri Ramnawaz, the father of Balwant Singh, has given him in adoption on these very conditions and this was in accordance with the wish and permission of the Raja Saheb....." On the same date Choudhri Ramnawaz Singh executed an *iqrarnama* in which, after mentioning that he had willingly given his son Choudhri Balwant Singh, aged 16 years, in adoption, to Rani Dharamkuar, he stated "that from this date the son ceases to have any connection with his natural family and that the said son will, from to-day, acquire all the rights which an adopted son has under the law in all the property left (*matrukah*) by Raja Raghubir Singh deceased and which are in the possession of the Rani Saheba. But it has been agreed between me and Rani Saheba that according to the wish and permission of Raja Raghubir Singh the Rani Saheba will continue to be *malik aur kabiz* (owner and in possession) of the entire Reyasat during her life....."

Disputes having arisen between Choudhri Balwant Singh and his adoptive mother, Rani Dharamkuar, the latter instituted a suit against him in 1905 with the object of getting rid of him. It is unnecessary to give the details of that litigation; it is enough to state that the suit was dismissed and Choudhri Balwant Singh was successful. His position as the adopted son of Raja Raghubir Singh was made secure.

In 1911 Choudhri Balwant Singh filed a suit No. 1 of 1911 against Rani Dharamkuar for possession of the properties of the Reyasat Landhaura, but the defendant having died during the course of the suit, in the month of November 1912, the further prosecution of the suit became unnecessary.

During the course of the litigation with Rani Dharamkuar, Balwant Singh had to mortgage and sell portions of the property of the Reyasat in order to procure funds to carry on the fight with his adoptive mother. The property, the subject-matter of the present dispute, *viz.*, Mauza Ahmadpur Naogawn, was sold to the present respondents, (1) Lala Joti Prasad, (2) Lala Raghunath Singh and (3) Lala Beni Prasad, sons of Lala Bansi Lal, under a sale deed, dated the 3rd of March 1911.

After selling the property in dispute to the respondents, Balwant Singh leased the property by a deed of lease, dated the 2nd of August 1913, to Rana Dharam Singh, the father of Indar Singh, the judgment-debtor No. 2.

In 1914, Choudhri Balwant Singh filed a suit No. 61 of 1914 against the present decree-holders, in which he assailed the sale-deed, dated the 3rd of March 1911, in favour of the respondents on the ground of fraud, want of consideration, etc., and prayed that it be set aside. That suit was referred to arbitration on the 17th of September 1914, and when the award was filed in Court certain objections were taken to its validity but eventually a decree was passed on the award on the 3rd of February 1915 against Balwant Singh, whose suit

was dismissed on that date. In pursuance of the decree passed on the award, the present respondents decree holders deposited Rs. 65,000 in Court to be paid to Balwant Singh. Against this decree, Chouduri Balwant Singh filed an appeal in the High Court which was registered as First Appeal No. 121 of 1915. In the meantime the present respondents filed a suit No. 63 of 1915 in the Court of the Subordinate Judge of Saharanpur against Choudhri Balwant Singh in which they impleaded Rana Dharam Singh, the lessee of the property in dispute, under the lease, dated the 2nd of August 1913. Subsequently, the name of Rana Indar Singh, his minor son, was added to the array of defendants, under the guardianship of *Musammat* Sukhdevi, the grandmother of Rana Indar Singh.

The reliefs claimed in the plaint were (*a*) that the lease, dated the 2nd of August 1913, be declared invalid and possession be delivered to the plaintiffs as against the defendants Nos. 1 and 2, (*b*) that mesne profits be awarded against the defendants, (*c*) that a sum of money by way of damages for the price of trees cut down by the defendants be awarded against them.

Thus in addition to First Appeal No. 121 of 1915, Choudhri Balwant Singh appellant *versus* Rai Bahadur Lala Joti Prasad and others, two other matters between the parties were pending in the High Court, *viz.*, First Appeal No. 123 of 1915, Civil Revision No. 2 of 1917, and as mentioned above the Original Suit No. 63 of 1915, Rai Bahadur Joti Prasad and others plaintiffs *versus* Choudhri Balwant Singh and Rana Indar Singh defendants, was pending in the Court of the Subordinate Judge of Saharanpur. The respondents in this case and Choudhri Balwant Singh filed a compromise in the High Court by which they settled all their disputes. Two paragraphs of this compromise, which have a material bearing upon the present proceedings were these :—

"(1) That if Balwant Singh pay, on or before 19th September 1917, in the Court of the Subordinate Judge of Saharanpur for payment to Rai Joti Prasad and others aforesaid the following sums *viz.*,

(*a*) Rs. 2,50,000 with simple interest thereon at the rate of 6 per cent. per annum from 18th January 1915 up to the date of payment.

(*b*) Rs. 65,000 with simple interest thereon at 6 per cent. per annum from 17th March 1915 up to the date of payment.

(*c*) The amount due under decree No. 51 of 1915 with interest as provided in the said decree up to the date of payment, the said Rai Bahadur Lala Joti Prasad, Lala Raghunath Singh and Lala Beni Prasad shall and do hereby abandon all claim and interest under the sale of March 1911 and their suit for possession of the Taluqa Naogawn shall stand dismissed, parties bearing their own costs throughout the litigation, and the Collector of Saharanpur as the Receiver of the property shall deliver Naogawn to Choudhri Balwant Singh together with all profits in his hands.

(2) That if the said Choudhri Balwant Singh does not pay into Court the amount aforesaid in terms of the preceding clause on or before the 19th of September 1917, his suit and First Appeal No. 121 of 1915, First Appeal from Order No. 123 and Civil Revision No. 2 of 1917 shall stand dismissed, both parties paying their own costs, and the Original Suit No. 63 of 1915 shall stand decreed with costs and the Collector of Saharanpur, who is in possession of Naogawn as Receiver appointed by the Court, shall deliver possession of the said Taluqa together with profits thereof in his hands to Rai Bahadur Lala Joti Prasad and others plaintiffs in that case." It was further stated in the compromise that "This compromise is filed in the three cases pending in this Hon'ble Court and the parties will file a copy of this compromise in Suit No. 63 of 1915 within one week from this date, and apply to the said Court to decree the claim in accordance therewith." It appears that a copy of this compromise was filed in the Court of the Subordinate Judge of Saharanpur in which the Suit No. 63 of 1915 was pending and the learned Subordinate Judge was requested to pass a decree in the suit in accordance with the terms of the compromise. No objection was raised on behalf of Balwant Singh but Rana Indar Singh objected that, as he was not a

party to the compromise, a decree could not be passed as against him on the compromise and that as separate decrees could not be passed against the two defendants no decree should be passed even against Balwant Singh. The learned Subordinate Judge, however, overruled the objections of Indar Singh and passed a decree against Balwant Singh on the basis of the compromise on the 22nd of June 1917, ordering that a copy of the above-mentioned compromise be attached to the decree.

Subsequently a compromise was also effected between the plaintiffs Rai Bahadur Lala Joti Prasad, etc., and Rana Indar Singh, under the guardianship of Rani Sukhdevi, his grandmother, and under the terms of the compromise a decree was passed by the Additional Subordinate Judge of Saharanpur in the suit against defendant No. 2 also on the 15th of December 1917. Choudhri Balwant Singh did not deposit the amount which he was required to do, on or before the 19th of September 1917, under the compromise. The necessary result of which was that the suit of Balwant Singh No. 61 of 1914 stood dismissed, and Suit No. 63 of 1915 of the plaintiffs against Balwant Singh and Indar Singh stood decreed. Hence this application for execution of the two decrees passed in the Suit No. 63 of 1915 was made and the Court was asked to deliver possession to the plaintiffs, decree-holders, over Taluqa Naogawn. The judgment debtor No. 1 objected to the execution of the decree on the grounds :—

(1) That at the time of the execution of the sale-deed, on the basis of which the decree under execution had been obtained the objector had merely a chance of succession after the death of Rani Dharamkuar which could not be transferred under the law and having regard to the provisions of section 6 (*a*) of the Transfer of Property Act, no right vested in the transferees under the sale.

(2) That the transfer being contrary to law, the compromise between the parties and the subsequent decree passed on the compromise could not validate the transfer.

(3) That the compromise ought not to have been accepted and a decree ought not to have been passed on its basis, under Order XXIII, rule 3 of the Code of Civil Procedure.

(4) That as the compromise was not filed in Court within a week, as provided by the compromise, a decree ought not to have been passed on it.

On behalf of the decree-holders it was urged that the provision of section 6 (*a*) of the Transfer of Property Act was not applicable to the facts of this case.

That the decree passed in the Suits Nos. 61 of 1914 and 63 of 1915 operated as *res judicata*.

That the judgment-debtor, in his Suit No. 61 of 1914 himself, had accepted the award inspite of an objection by the decree-holders and that he had benefited under the award by receiving Rs. 65,000 under it and that he was now estopped from objecting to the award and the compromise.

The learned Subordinate Judge of Saharanpur decided that the case of an adopted son, where the adoption was made by a widow on the condition that the adopted son would have no right during her life to the ownership or possession of the property, was distinguishable from the case of a mere Hindu reversioner who is to succeed after the death of a widow. In his opinion inspite of a condition postponing the rights of an adopted son, till after the death of the widow, the adopted son would have a vested interest in the property left by the deceased owner. In this view, apparently, he did not think it necessary to deal with the question of estoppel and *res judicata* raised in the pleadings. He was of opinion that the interest acquired by Balwant Singh, being of a higher character than the mere contingent reversionary interest of a collateral to succeed to property on the death of a Hindu widow, he was capable of dealing with it effectively, though the operation of the transfer made by him may be postponed till after the death of the widow. He based his judgment on the general principles of the Hindu Law and disallowed the objections raised by the judgment debtor. Towards the end of his judgment, there is an indication that he was also of opinion that the objection now raised by the judgment-debtor ought to have been raised

by him at the time the compromise was filed and before a decree was passed on it. The pleas raised in the memorandum of appeal presented to this Court raise two main questions :—

(1) Whether the transfer made by Balwant Singh was ineffective as being opposed to the provisions of section 6 (*a*) of the Transfer of Property Act? and

(2) Whether the subsequent compromise effected in the Suits Nos. 61 of 1914 and 63 of 1915 had the effect of removing any defect existing in the sale? Only these questions were argued before us.

In order to determine the first question, we think it necessary first to examine the provisions of the deed of adoption together with those of the agreement executed by the natural father of Balwant Singh. In doing this we ought to keep in mind the general rules of the Hindu Law, as applicable to an adoption. The adopted son on his adoption leaves his father's *gotra* and cannot take his estate nor does he offer *pindas* to him. As soon as the adoption is made, he is transferred to the family of the adoptive father. He stands exactly in the same position as if he had been born to his adoptive father. He divests the estate of any person in possession of the property of the adoptive father. If a widow happens to be in possession of the estate the result of the adoption is that her limited estate at once ceases. He becomes the full owner of the property and the widow's rights are reduced to a mere claim of maintenance. Such being the law, it lies upon the judgment-debtor to establish beyond doubt that the deed of adoption contained such valid conditions as to prevent the operation of the law. He will have, in the first instance, to show that there was an intention to prevent the vesting of the right to property in the adopted son and that intention was given effect to by some legal and valid provision in the deed of adoption. On a consideration of the terms of that deed we find that there is nothing in it which would prevent the vesting of the right in the adopted son. It is provided in the deed that the son would leave the family of his natural father and would live with his adoptive mother. He would be brought up under her guardianship and would be supported and maintained according to his position and status, *mortaba aur hasiyat ke muwafiq*. This would show that Balwant Singh was to be treated as an adopted son and his position and status was to be maintained as such. In this view, the condition reserving to the widow the right of ownership and possession during her lifetime would simply mean that though Balwant Singh was to be the rightful owner as an adopted son, the widow was to remain in possession during her life, exercising all the powers of ownership as an ordinary Hindu widow. This construction, to a large extent, derives support from the clear wordings of the agreement executed by Ramnawaz Singh, the natural father of Balwant Singh:—

"*Tarikh imroza se pisr-i-mastur ka apne khandan se kuchh taluq nahin raha hai aur pisr mazkur ko woh haquq jo qanunan pisr-i mutabanna ko hasil hote hain aj ki tarikh se kul jaidad wa matruka Raja Raghbir Singh Sahib marhum wa maqbuza junabah Rani Sahiba masufah men hasil honge, lekin yih shart mabain manmoqir aur junabah Rani Sahiba masufah hasab mansha wasiyat-o-ijazat Raja Raghbir Singh Sahib marhum qarar pai hai keh junabah Rani Sahiba masufah apni zindgi tak badastur malik aur qabiz kul reyasat rahaingi.*"

viz., "From this date the son ceases to have any connection with his natural family and that the said son will, from to-day, acquire all the rights which an adopted son has under the law in all the property left (*matrukah*) by Raja Raghubir Singh deceased, and which are in the possession of Rani Saheba. But it has been agreed between me and Rani Saheba that according to the wish and permission of Raja Raghubir Singh, the Rani Saheba will continue to be *malik aur qabiz* (owner and in possession) of the entire Reyasat during her life."

In this view of the construction of the deed of adoption it becomes unnecessary to consider the question whether it is lawful for a Hindu widow to make a conditional adoption so as to prevent the adopted son from taking possession of, and enjoying rights of ownership over, the

property of the adoptive father during her life and whether such a condition creates an interest in favour of an adopted son, of the nature which is contemplated by clause (*a*), section 6 of the Transfer of Property Act.

It has been held in several cases that an agreement depriving an adopted son of his right to take possession of the property of the adoptive father is not prohibited by the law and such an agreement has been given effect to. See for example *Kali Das* v. *Bijai Shankar* (1) and *Visalakshi Ammal* v. *Sivaramien* (2). But we have not been referred to any case in which it has been held that the interest of an adopted son under such a conditional adoption is exactly similar to the interest of a contingent collateral Hindu reversioner. The latter kind of interest has been held to be a mere chance of an heir-apparent succeeding to an estate, and as such has been held to be non-transferable. Irrespective of the construction which we have put on the terms of the deed of adoption, we are of opinion that it has not been shown that the interest created in favour of Choudhri Balwant Singh under the conditional adoption in question was a mere possibility of succession to the Landhaura Estate after the death of Rani Dharamkuar. In our opinion both according to the interpretation of the deed of adoption and the law, a vested right was created in his favour, and merely his right of enjoyment and possession was postponed till after the death of the lady. Such being the case, we are of opinion that the transfer of Taluqa Naogawn in favour of the decree-holders under the sale-deed, dated the 3rd of March 1911, was unaffected by the provisions of section 6 (*a*) of the Transfer of Property Act.

We agree with the lower Court that on this finding alone the objections of the judgment-debtor were bound to fail, but we are also of opinion that the subsequent compromise and the decrees passed thereon left no room for any contention on the point. Rani Dharamkuar having died in November 1912, the property vested in Choudhri Balwant Singh. He was at the time a married man 29 years old and could deal with it as he liked. Under the compromise he entered into a new agreement, according to which the property sold was to vest in the decree-holders in the event of his failing to pay to them certain sums of money before the 19th of September 1917. The parties understood their positions fully and by a lawful agreement completed a binding contract. A decree was passed on the compromise which put an end to all disputes between the parties. It is too late now to try to go behind the compromise and the decree. It has, however, been argued on behalf of the appellant that if it was a mere expectancy that was transferred by the sale-deed in question it was open to him to impugn both the compromise and the decree when possession was claimed in execution. In support of his contention the learned Counsel for the appellant relied upon the case of *Ramasami Naik* v. *Ramasami Chetti* (3). That was a case relating to an impartible and inalienable *zemindari*. The nature of the interest which was transferred in that case by mortgage and the circumstances under which the consent decree had been obtained are stated at page 261* of the report in these words :—

"We now come to the most serious objection urged by the appellant. It is said that by the suit mortgage and the consent decree the 2nd to the 5th defendants purport to transfer only their chance of succeeding to the *zemindari*, and that such a chance or mere possibility is incapable of transfer in India by virtue of section 6 (*a*) of the Transfer of Property Act. As pointed out by Muttusami Ayyar, J. [*Sivasubramania Naicker* v. *Krishnammal* (4)], in the case of this *zemindari* the interest to which each *zemindar* succeeds is his separate property and consists of his right to the income of the *zemindari* as beneficial owner for life. This is the interest which defendants Nos. 2 to 5 have sought to transfer by the mortgage and the consent decree. At the dates of mortgage and decree they had a mere chance of succeeding to this interest dependent in the case of each on his surviving all the male members of the family older

(1) 13 A. 391; A. W. N. (1891) 141; 7 Ind. Dec. (N. S.) 250.

(2) 27 M. 577; 14 M. L. J. 310 (F. B.).

(3) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.

(4) 18 M. 287 at p. 291; 5 M. L. J. 168; 6 Ind Dec. (N. S.) 549.

*Page of 30 M.—*Ed.*

than himself so as to make him for the time being the oldest member."

At the bottom of page 262* the learned Judges who decided the case remarked :—

"It is further urged that the defendants cannot go behind the decree. If, however, the mortgage did not operate as a transfer of interests of defendants Nos. 2 to 5, neither could the consent decree in the circumstances of the present case."

Now, what were the circumstances to which the learned Judges referred? The circumstances were these :—

The only interest which the defendants Nos. 2 to 5 in that case had, was a mere chance of succeeding to a life-interest on the happening of a certain event as described at page 261* above mentioned. In that case there can be no doubt that the interest transferred was of a kind contemplated by section 6, clause (*a*) of the Transfer of Property Act. The mortgage was made of such interest and *at the time the consent decree was passed it was still a mere chance.* In the present case irrespective of the nature of interest which Choudhri Balwant Singh possessed at the time of the sale-deed, he had a full and complete interest which had come into existence before the compromise and the consent decree. If the widow had been alive at the date of the consent decree, in that case the ruling might have had a bearing on this question. No case has been cited having a direct bearing upon the facts of the present case. In our opinion it is not open to the judgment-debtor to go behind the compromise and consent decree in this case.

Over and above all that we have mentioned above there is the fact that what Choudhri Balwant Singh purported to transfer both by the deed of sale and the compromise was not a mere expectancy but the full right of ownership; even assuming that he had no vested interest at the date of sale he subsequently became the full owner and was such at the date of the compromise. He had received the sale consideration and the respondents had also paid a further sum of Rs. 65,000 and they are entitled to the estate which subsequently became vested in the minor after the death of the Rani. At the date of the sale Choudhri Balwant Singh claimed to be the full owner and was actually suing the Rani for possession and he purported to transfer the full right. We think that the decision of the Court below is right and the appeal should be and is hereby dismissed with costs.

Appeal dismissed.

*Page of 30 M.—*Ed.*

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1824 OF 1916.

April 17, 1918.

Present :—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield, Mr. Justice Sadasiva Aiyar, Mr. Justice Spencer and Mr. Justice Bakewell.

Sree Rajah VASIREDDI VENKATA LAKSHMI NARASAMMA BAHADUR MANNE SULTAN GARU, DHARMAKARTHA OF BHAVA NARAYANASWAMY DEVASTANAM—

PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR, GUNTUR—DEFENDANT—RESPONDENT.

Grant, construction of—Water rights—Grant of land bounded by non-navigable river—Ownership of bed of river—Presumption—Burden of proof.

Where a grant is made of land which is bounded on one side by a non-navigable river, the onus of showing that the grant did not cover the bed of the river *ad medium filum aquæ* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly. [p. 610, col. 1.]

(Authorities reviewed.)

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Guntur, in Appeal Suit No. 187 of 1915, preferred against the decree of the Court of the Additional District Munsif, Bapatla, in Original Suit No. 10 of 1913.

This second appeal coming on for hearing on the 10th December 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Messrs. *T. V. Venkatrama Aiyar* and *R. Rajagopala Aiyar* for the Appellant, and of the Government Pleader on behalf

of the Respondent and the case having stood over for consideration till 13th December 1917, the Court (Seshagiri Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

This is a suit by the trustee of a temple for a declaration that the lands belong to him and that the Secretary of State is not entitled to put up the grass thereon to auction or to interfere in any manner with the rights of the plaintiff. The plaint, as originally instituted, contained the statement that the Inam granted to the temple comprised lands on both sides of the Tungabhadra river and that consequently the entire bed of the river belonged to the temple. It has been found by the Subordinate Judge, and we see no reason for not accepting that finding, that the boundary of the Inam village is the river itself and that no lands on the other side of the river were granted to the temple. On this finding it has been argued before us that the plaint temple is entitled to half the bed of the river. The learned Government Pleader took exception to this change of case on the part of the plaintiff; but we think that in the circumstances of the case the plaintiff should not be refused relief because he put his case too high.

The point for consideration, therefore, is where a grant is made fixing one of the boundaries of the lands granted as a river, whether the grantee is entitled to half the bed of that river. The decisions of the English Courts seem to be uniform in this respect. *Lord* v. *Commissioners for the City of Sydney* (1) and *Maclaren* v. *Attorney-General for Quebec* (2) and other cases referred to in these two decisions have accepted the principle that where the lands are bounded by a river, the grantee is entitled to lands *ad medium filum aquæ*. In *City of London Land Tax Commissioners* v. *Central London Railway* (3) the House of Lords applied this principle to the case of highways. All the learned Lords who took part in the decision affirm that it is an established principle of law that the "ownership of frontages on either side of the street extended *ad medium filum viæ*, just as, had the division or boundary between two subjects been a stream, the ownership of the riparian proprietors would have extended *ad medium filum flaminis*". In *Whitmores (Edenbridge) Lim.* v. *Stanford* (4) this rule was extended to artificial channels. In this country, *Balbir Singh* v. *Secretary of State for India in Council* (5) accepts the principle of the English decisions. *Powell* v. *Powell* (6) is to the same effect. In *Secretary of State* v. *Kadirikutti* (7), the learned Judges say that the rule that riparian proprietors are entitled to the bed of the river *ad medium filum* is not applicable to navigable rivers. That is an indication that if it is a non-navigable river, the principle of English Law would be applied in this country. In *Sundaram Ayyar* v. *Municipal Council of Madura* (8), Justice Bashyam Aiyangar extended the doctrine to highways. The matter was recently discussed by three Judges of this Court in *Secretary of State* v. *Janakiramayya* (9). Mr Justice Oldfield seems to doubt whether the principle referred to is applicable to India. Mr. Justice Sadasiva Aiyar on the other hand apparently sees no objection to the applicability of that doctrine to India. Mr. Justice Bakewell expressed no opinion on that question. The learned Government Pleader referred us to two cases decided by the Judicial Committee as throwing some doubt upon the applicability of a similar principle to Indian conditions. In *Sri Balusu Ramalakshmamma* v. *Collector of the Godavari District* (10), the decision turned upon the fact that the ownership of the bed of the river was not the question raised for decision in the Courts below. In rejecting the contention which was put forward for the first

(1) 12 Moore P. C. 473; 33 L. T. (o. s.) 1; 7 W. R. 267; 14 E. R. 991; 124 R. R. 113;

(2) (1914) A. C. 258; 83 L. J. P. C. 201; 110 L. T. 712; 30 T. L. R. 278.

(3) (1913) A. C. 364; 82 L. J. Ch. 274; 108 L. T. 690; 77 J. P. 289; 11 L. G. R. 693; 57 S. J. 403; 29 T. L. R. 395.

(4) (1909) 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169.

(5) 22 A. 96; A. W. N. (1899) 194; 9 Ind. Dec. (N. s.) 1093.

(6) 36 Ind. Cas. 567; 14 A. L. J. 684.

(7) 13 M. 369 at p. 375; 4 Ind. Dec. (N. s.) 969.

(8) 25 M. 635; 12 M. L. J. 37.

(9) 30 Ind. Cas. 609; 29 M. L. J 389 at pp. 421, 430; 2 L. W. 763; 18 M. L. T. 277; (1915) M. W. N. 671.

(10) 22 M. 464; 1 Bom. L. R. 696; 3 C. W. N. 777 26 I. A. 107; 7 Sar. P. C. J. 534; 8 Ind. Dec. (N. s.) 332 (P. C.).

time before the Board, Lord Hobhouse made use of these observations: "The result is that their Lordships, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, would require to know much more about the river in question and the mode in which it has been dealt with, before deciding as to the presumption or its rebuttal." In a more recent case reported as *Raja Srinath Roy* v. *Dinabandhu Sen* (11), in which the question related to the right of fishery possessed by a riparian proprietor, Lord Sumner in delivering the judgment of the Judicial Committee says at page 531* after reviewing at considerable length the English and American Law on the subject: "In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted."

Having regard to the observations of the Judicial Committee and to the difference in opinion between two learned Judges of this Court, we do not think it desirable that we should finally dispose of this matter. The question is of very great importance to the Government as well as to private proprietors, and we think it desirable that the opinion of the Full Bench should be invited on the subject. We, therefore, propose the following questions for the opinion of the Full Bench ;—

Whether, when Government makes a grant in India of a village which is described as bounded by a non-navigable river, the right of the grantee extends to half the bed of the river, and

Whether the onus of proving that the grant did not cover the bed of the river is on the grantee or on the grantor.

This last question has become necessary having regard to the observations of Lord Hobhouse in *Sri Balusu Ramalakshmamma* v. *Collector of the Godavari District* (10), wherein he says the question of *presumption or its rebuttal* in a country like India would depend upon considerations different from those which obtain in England.

This appeal came on for hearing before the Full Bench on the 8th and 9th April 1918.

Mr. *T. V. Venkatrama Aiyar*, for the Appellant.—The English rule that a grant of land bounded by a non-navigable river gives the ownership in the bed to the grantee applies to India, in the absence of a statutory provision to the contrary. The rule which had its origin in the theory of convenience has become settled law. It is only in the case of navigable rivers that the bed vests in the Crown and does not pass to the grantee. This rule is unaffected by the rights of the Crown to regulate the distribution of water supply.

The soil of the river belongs to riparian owners *ad medium filum*. That is the common law of India. Reference was made to Bengal Regulation XI of 1825. The rule of construction is also the same. Referred to *Hunooman Doss* v. *Shamchurn Bhutta* (12), *Bhageeruttee Dabea* v. *Greesh Chunder Chowdhry* (13), *Rojah Neelamund Sing* v. *Rajah Teknarain Singh* (14), *Khagendra Narain Chowdhry* v. *Matangini Debi* (15), *Baban Mayacha* v. *Nagu Shravucha* (16), *John Doe* v. *East India Company* (17), *Mickletwait* v. *Newlay Bridge Co.* (18), *Powell* v. *Powell* (6), *Balbir Singh* v. *Secretary of State for India in Council* (5), *Secretary of State* v. *Kadirikutti* (7), *Sundaram Ayyar* v. *Municipal Council of Madura* (8), *Sri Balusu Ramalakshmamma* v. *Collector of the Godavari District* (10), *Secretary of State* v. *Janakiramayya* (9), *Secretary of State* v. *Maharaja of Bobbili* (19) and *Kesava Pillai* v. *Pedu Reddi* (20).

Mr. *V. Ramesam* (Government Pleader), for the Crown.—The English rule is an artificial rule of conveyancing. It should not be applied to India, especially where the grant was made long before the rule became settled. The question is one of intention and

(11) 25 Ind. Cas. 467; 42 C. 489; 18 C. W. N. 1207; 20 C. L. J. 385; 27 M. L. J. 419; 16 M. L. T. 319; 1 L. W. 733; (1914) M. W. N. 654; 16 Bom. L. R. 901; 12 A. L. J. 1193; 41 I. A 221 (P. C.).

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(12) 1 Hay 426.
(13) 2 Hay 541.
(14) Cal. S. D. A. R. (1862) 160.
(15) 17 C. 814; 17 I. A. 62; 5 Sar. P. C. J. 528; 8 Ind. Dec. (N. S.) 1087 (P. C.).
(16) 2 B. 19; 1 Ind. Dec. (N. S.) 441.
(17) 6 M. I. A. 267 at p. 288; 10 Moo. P. C. 140; 1 Sar. P. C. J. 540; 19 E. R. 100; 110 R. R. 21.
(18) (1886) 38 Ch. D. 133; 55 L. T. 336; 51 J. P. 132.
(19) 32 Ind. Cas. 279; 30 M. L. J. 163 at p. 178; 19 M. L. T. 6; 3 L. W. 119; (1915) M. W. N. 1025.
(20) 1 M. H. C. R. 258.

the fact that the grant was of a small strip of land in a *ryotwari* village has to be taken into consideration. The Crown could not be presumed to have parted with what was useful for it, river beds being valuable property which could be used for grazing. The intention of the parties has to be taken into account.

Bengal Regulation XI of 1825 affords no parallel. The rule might hold good in the case of *zemindaries* and large *inam* villages. The common law of India, which has been recognised in Madras Act III of 1905, is that the bed of a natural stream vests in Government and the onus is on the persons disputing it. The contrary theory is inconsistent with the rights of the Crown to regulate and distribute the supply of water in rivers. A distinction must be made between the rivers in Bengal which are full and the rivers in Madras where the river-beds are cultivated and yield good returns.

OPINION OF THE FULL BENCH.

In Bengal Regulation XI of 1825, the Legislature, acting, as recited in the preamble, on reports from the law officers as to the provisions of the Muhammadan and Hindu Laws and on a consideration of the decisions of the Sudder Adalut, proceeded in section 4 to make a distinction as to the ownership of Churs in navigable and non-navigable rivers, which, in the opinion of Sir M. R. Westropp, C. J., in *Baban Mayacha* v. *Nagu Shravucha* (16) raised an inference, though not conclusive, that the beds of non-navigable rivers are generally private property. The observation of the Judicial Committee in *John Doe* v. *East India Company* (17) appears to proceed upon the same view. The law was laid down in the same way in *Rajah Neelamund Sing* v. *Rajah Teknarain Singh* (14) and by the Calcutta High Court in *Hunooman Doss v. Shamchurn Bhutta* (12) and *Bhageeruttee Dabea* v. *Greesh Chunder Chowdhry* (13), where the Court held that "by the common law of this country the right to the soil of the bed of a river, when flowing within the estates of different proprietors, belongs to the riparian owners, *ad medium filum aquæ*."

In this Presidency the decisions of the Sudder Court in *Sree Rajah Ooppalapaty Jogee Jaganadheruze* v. *Sub-Collector of Rajahmundry* (21) and of the High Court in *Subbaya* v. *Yarlagadda* (22) were to the same effect. It is only in the case of navigable rivers that the presumption has been laid down the other way by the Judicial Committee in *Eckowri Sing* v. *Heeralall Seal* (23), *Felix Lopez* v. *Muddun Mohun Thakoor* (24) and *Nogender Chunder Ghose* v. *Mahamed Esoff* (25), while in *Forbes* v. *Meer Mahomed Hossein* (26), it appears to be assumed that in the case of non-navigable rivers the ownership of the bed is in the riparian owners. The decision of the Judicial Committee in *Kali Kissen Tagore* v. *Jodoo Lal Mullick* (27) and *Khagendra Narain Chowdhry* v. *Matangini Debi* (15) appears to proceed on the same basis. In *Sri Balusu Ramalakshmamma* v. *Collector of the Godavari District* (10), where the appellant before them sought to base her title to the Lanka in question on the presumption arising from the fact that she was the owner of both banks of the river, their Lordships observed that such a claim was not made by the pleadings or by the issues, and was one about which much evidence might and probably would have been given if it had been raised; and they accordingly declined to discuss the question because it was not relevant to the case made by the plaintiff, and merely observed that, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, they would require to know much more about the rivers in question before deciding as to the presumption or its rebuttal. This reservation, in a case in which the question in their Lordships' opinion did not arise and in which the authorities above referred to were apparently not cited, cannot be taken as a ruling that the presumption is generally inapplicable in the case of non-navigable rivers in this part of India. Certain dicta as to the ownership of river-beds were also cited from recent cases in this Court, but they are far from uniform and in none of these cases was the present question con-

(21) S. D. A. (1858) 180.

(22) 1 M. H. C. R. 255.

(23) 2 B. L. R. (P. C.) 4; 12 M. I. A. 136; 11 W. R. (P. C.) 2; 2 Suth. P. C. J. 171; 2 Sar. P. C. J. 399; 20 E. R. 292.

(24) 5 B. L. R. 521; 13 M. I. A. 467; 14 W. R. (P. C.) 11; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

(25) 10 B. L. R. 406; 18 W. R. 113.

(26) 12 B. L. R. 210; 20 W. R. 44.

(27) 5 C. L. R. 97; 6 I. A. 190; 4 Sar. P. C. J. 61.

sidered in the light of the authorities. We, therefore, consider it unnecessary to refer to them. The result of the authorities in our opinion is that, as regards a grant of land in India described as bounded by a non-navigable river, the onus of showing that the grant did not cover the bed *ad medium filum aquæ* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly. We do not think it desirable to attempt to lay down any more definite rule. Reference has been made to The Madras Land Encroachment Act, Act III of 1905, but that Act cannot affect the pre-existing rights, if any, of the grantee in this case.

M. C. P.

Reference answered.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 114 OF 1918.
July 23, 1918.
Present :—Mr. Justice Abdul Raoof.
MAKHAN LAL PARSOTTAM DAS
—DEFENDANT—APPLICANT
versus
CHUNNI LAL BRIJ LAL
—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Causes Courts Act (IX of 1887), s. 25—Jurisdiction, question of, decision of—Revision, whether lies.

A suit for compensation for breach of contract having been brought in the Court of Small Causes at Agra, a preliminary objection was raised that the alleged breach having taken place at Allahabad, the Court at Agra had no jurisdiction. The Court, after taking evidence, held that it had jurisdiction:

Held, that no revision lay against the order, inasmuch as the case had not been decided on the merits nor had it been 'disposed of' within the meaning of section 25 of the Provincial Small Causes Courts Act. [p. 611, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes, Agra.

Mr. *Damodar Das*, for the Applicant.

Mr. *Narain Prasad Asthana*, for the Opposite Party.

JUDGMENT.—A preliminary objection is raised on behalf of the opposite party to the hearing of this application. The facts of the case are these:—The plaintiff brought a suit in the Court of Small Causes at Agra, claiming compensation for an alleged breach of contract by the defendant. The suit was contested by the defendant on two grounds, namely, (1) that the suit was not cognizable by the Small Cause Court at Agra as the alleged breach of contract had taken place at Allahabad; (2) that there was no breach on the part of the defendant and that the suit was not maintainable against him. As regards the first point the learned Judge of the Court below took evidence and came to the conclusion that the suit was rightly instituted in the Court of Small Causes at Agra. It appears that the parties had requested the Court to decide the first point at that stage before taking up the question raised on the second plea in defence. The defendant has filed this application for revision against the decision of the Court below on the question of jurisdiction. Mr. Narain Prasad argues that under section 25 of the Provincial Small Causes Courts Act in order to entitle a party to come up in revision it is necessary that the case must have been decided by the Court below. That section runs thus:—"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit." The learned Vakil who appears for the applicant replies that there has been a decision in the case by the Court below within the meaning of section 25, and he relies upon two cases, namely *Ramanathan Chetty* v. *Maruthappa Kone* (1) and *Umesh Chandra* v. *Rakhal Chandra* (2). The particulars of the latter case are clearly distinguishable from the facts of the present case. In that case what happened was that in a suit filed in a Court of Small Causes a question of title arose on the allegation contained in the plaint and the Court was of opinion with reference to the provisions of section 23 of Act IX of 1887 that the suit should be tried by a Civil Court on the regular side. The plaint was, therefore, returned for presentation to a regular Civil Court.

(1) 25 Ind. Cas. 643; 16 M. L. T. 502.
(2) 10 Ind. Cas. 8; 15 C. W. N. 666; 14 C.L. J. 118.

It was against the order returning the plaint under section 23 of the aforesaid Act that a revision was applied for and it was argued by the opposite party that as the case had not been decided on the merits, the High Court had no power under section 25 of the Act to revise the order. It was held by the Calcutta High Court that it was not contemplated by the word "decided" that the case should have been decided on the merits. The learned Judges observed in their judgment as follows:—"We are not prepared as at present advised to put this narrow construction upon the terms of section 25 nor to adopt the view suggested by the learned Vakil, for the opposite party, that the term 'decided' in section 25 means 'to adjudicate finally on the merits.' Besides in so far as the Small Cause Court is concerned the case has been decided."

In the case of *Ramanathan Chetty* v. *Maruthappa Kone* (1), the learned Judge who decided the case observed:—"Mr. Seshagiri Shastri raises a preliminary objection before me that this petition does not lie under section 25 of the Small Causes Courts Act because there is no 'case decided' by the Subordinate Judge sitting on the Small Cause side, and he quoted *Subal Ram Dutt* v. *Jagadananda Majumdar* (3) for the position that unless there has been a decision on the merits section 25 has no application. With all respect I am unable to follow this decision. The word 'decided' in section 25 means 'disposed of.' It does not mean that there must be a decision upon the merits." In the present instance the case has neither been decided on the merits nor has it been disposed of in any other manner. It is still on the file of the Court awaiting decision. Merely a preliminary issue as to jurisdiction has been decided and the application for revision is made against this decision of the preliminary issue. None of the cases cited are, therefore, applicable. The preliminary objection must prevail and the application must be rejected. Over and above this, having regard to the circumstances of this case, I do not think that this is a proper case for revision. I accordingly dismiss the application with costs. The stay order is hereby discharged. The record of the case will be sent back to the Court below.

Application dismissed.

(3) 1 Ind. Cas. 288; 13 C. W. N. 403.

MADRAS HIGH COURT.

CIVIL APPEAL No. 226 OF 1916.

April 25, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

MUTHUKRISHNA NAICKEN —DEFENDANT No. 1—APPELLANT

versus

RAMCHANDRA NAICKEN AND OTHERS —PLAINTIFFS—RESPONDENTS.

Will, construction of—Bequest, religious, for performance of thaligais *in temples—Allocation of income not indicated—Uncertainty—Surplus income, appropriation of, for religious instruction, legality of—* Cy pres, *doctrine of, applicability of, to Indian conditions—Appointment of* vars (*successor*) *for conducting charity, effect of—Trust, creation of—Evidence Act (I of 1872), ss.* 6, 32 (3), (7)*—Statements by testator in judicial and other proceedings, admissibility of—Civil Procedure Code (Act V of* 1908), *s.* 92*—Scheme for application of surplus income—Compromise of scheme suit, validity of.*

One *A.* a Hindu, left a Will appointing his brother's son as his *vars* "to conduct charities Tiruvedanthai, Tirukkadalmalai and Tirupathi with the help of my properties." The mode of conducting the charity was specified to be the giving of *thaligais* in the temples on the Tirunakshatram day, but no special allotments were made for the purpose. At the registration of the Will in his house the testator declared before the Registrar that he intended by the Will to bequeath properties to charities. It also transpired that, in a suit against the testator for a declaration that part of the properties in dispute and some other properties did not belong to him solely, the testator had filed a written statement stating that he acquired the properties for charity and intended to make a testamentary disposition in that behalf. In a suit instituted under section 92, Civil Procedure Code, for removal of the 1st defendant, the *vars* aforesaid, from trusteeship and for a scheme for the management of the trust:

Held, (1) that the dedication was definite and not void for vagueness or uncertainty.[p. 616, cols. 1 & 2.]

Runchordas Vendravandas v. *Parvatibai*, 23 B. 725; 1 Bom. L. R. 407; 3 C. W. N. 62.; 26 I. A. 71: 7 Sar. P. C J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.) and *Parthasarathi Pillai* v. *Thiruvengada Pillai*, 30 M. 340; 2 M. L. T. 198; 17 M. L. J. 379, distinguished.

(2) that the mention of the word '*vars*' in the Will did not make the 1st defendant the sole owner of the properties subject to the carrying out of the directions relating to charity, but only constituted him trustee for the charities; [p. 615, col. 1.]

MUTHUKRISHNA NAICKEN v. RAMACHANDRA NAICKEN.

Chunilal v. *Bai Muli*, 24 B. 420; 2 Bom. L. R. 46; 12 Ind. Dec. (N. S.) 812 and *Surajmani* v. *Rabi Nath Ojha*, 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.), distinguished.

Venkata Narasimha Appa Row v. *Parthasarathy Appa Row*, 23 Ind. Cas. 166; 37 M. 199; 18 C. W. N. 554; 15 M. L. T. 285; (1914) M. W. N. 299; 26 M. L. J. 411; 19 C. L. J. 369; 12 A. L. J. 315; 16 Bom. L. R. 328; 41 I. A. 51 (P. C.), followed.

(3) that the direction as to the performance of *thaligai* was not meant to be exhaustive but only illustrative and that it was competent to the Court, after the allotment of a particular fund for the *thaligai*, to direct the rest of the income to be devoted for imparting religious instruction; [p. 622, col. 2; p. 623, col. 1.]

(4) that statements made by the testator at the registration of the Will and in judicial proceedings relating to the properties comprised in the bequest were admissible under sections 6 and 32 of the Evidence Act; [p. 617, col. 2; p 618, col. 1.]

(5) that the trust was a public and not a private trust. [p. 618, col. 1.]

Sathappayyan v. *Periasami*, 14 M. 1; 5 Ind. Dec. (N. S.) 1, *Trimbak* v. *Lakshman*, 20 B 495; 10 Ind. Dec. (N. S.) 894 and *Srirangu Chariar* v. *Pranatharthihara Chariar*, 30 Ind. Cas. 74; 18 M. L. T. 122; (1915) M. W. N. 531; 2 L. W. 632, distinguished.

A Court should not sanction a compromise of a suit under section 92, Civil Procedure Code, under which any portion of the trust properties is given to any of the parties. [p. 614, col. 2.]

Per *Abdur Rahim*, J.—The rule as to *cy pres* is quite in harmony with the teachings of Hindu Sastras and has been applied in many cases relating to charitable gifts by Hindus. [p. 614, col. 1.]

Per *Seshagiri Aiyar*, J.—The principal consideration where the object mentioned does not exhaust the corpus of the fund, is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite, if the law will not allow the application of the fund for the purpose, it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purposes of a charitable kind. [p. 616, col. 2.]

The primary rule is to ascertain whether the object aimed at by the testator could be carrid out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended that the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not misappropriate the funds. [p. 617, col. 1.]

If the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income, will not be any reason for holding that the bequest failed in whole or in part. If it appears that the donor intended that, in any event, the fund should be devoted to charity and that a particular institution was named merely as the channel by which that intention was to be effected, the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of *cy pres*. [p. 617, cols. 1 & 2.]

The rule of English Law that even answers to interrogatories may be regarded either as a codicil or a Will may not apply to testamentary dispositions in India. Under the Hindu Wills Act and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as testamentary. [p. 617, col. 2.]

There is nothing in the religion of the Hindus, in their traditions and in the consciousness of the people, which will compel Courts to respect prejudices which sap at the root of religion and which pervert and not advance its precepts. Therefore, whenever grants made to religious institutions are not ear-marked or, if ear-marked, are not intended to exhaust the recurring income, and whenever they are made as a general thanksoffering, it is proper and legitimate to direct their application to the promotion of knowledge. [p. 621, col. 2.]

Indian Courts have ample powers to give directions towards the application of the trust income, even though the trustee may not himself be competent similarly to apply it. The doctrine of *cy pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated. [p. 622, col. 1.]

Under section 92, Civil Procedure Code, the Court can sanction a scheme on a *cy pres* application of a charitable trust. [p. 623, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Original Suit No. 13 of 1916.

FACTS appear from the judgment.

The Hon'ble Mr. *T. Rangachariar*, for the Appellant.— The suit is not maintainable under section 92, Civil Procedure Code. The 1st defendant was appointed the testator's *vars* under the Will. The term *vars* is a well-known Hindu expression and connotes that 1st defendant became the owner of the properties and was the sole beneficiary under the Will. The devise was burdened with an obligation to perform the charities. The language of the Will 'in order that the charity to these places' made it clear. There was no direction as to the utilisation of the properties comprised in the Will.

The dedication was vague and indefinite and the bequest for charity was, therefore, void. It followed that either the entire property comprised in the Will or the unspent balance after meeting the objects of the charity should be treated as the un-

disposed of residue. The direction as to the doing of *thaligais* in the temples could not be understood as meaning that the consecrated food should be distributed to the poor. The food is offered to the deity and generally returned afterwards to persons giving the *thaligai*. That is the popular acceptance of *thaligai*. Reference was made to *Runchordas Vandravandas* v. *Parvatibai* (1) and *Parthasarathi Pillai* v. *Thiruvengada Pillai* (2).

The statement made by the testator before the Registrar and his written statement in the previous suit are inadmissible.

The trust was a private and not a public trust. The *thaligai* was only intended for 1st defendant's benefit. The bequest was to an individual who was directed to do certain religious acts. *Sathappayyar* v. *Periasami* (3), *Trimbak* v. *Lakshman* (4) and *Sriranga Chariar* v. *Pranatharthihara Chariar* (5).

The doctrine of *cy pres* cannot be applied to this particular Will. The testator's intention is specific and, that is, to do *thaligais* in temples. The Court has no jurisdiction to restrict the fund for that purpose and misapply the income for purposes not indicated by the testator.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.—The trust is public, not private. The charities are distinctly specified. There is no ambiguity or vagueness in the dedication. The testator was a religious man and a *sanyasi* and he directs that the charities he was conducting should be continued after his death by the person appointed by him. The intention of the testator was clear. The use of the word '*vars*' should not be taken as implying that the 1st defendant was to have absolute control of the properties. *Vars* means successor, and the 1st defendant is only appointed trustee. There are expressions in the Will negativing the conferring of absolute rights on 1st defendant. The testator says that his brother's son 'has no share or right'. The object of the charity, the places and the occasion for its performance are all definitely indicated.

The testator's statement before the Registrar may be treated as a Will or codicil. Answers to interrogatories are regarded as Wills. Jarman on Wills, page 35.

As to utilization of the funds for religious instruction, the direction by Court should not be understood as proceeding on the consent of parties.

JUDGMENT.

ABDUR RAHIM, J.—I agree in the conclusions arrived at by my learned brother in his learned and exhaustive judgment which I had the advantage of reading. On the question of the interpretation of the Will of Alavandar, there can be little doubt that he intended to devote all his properties to charity and did not desire to make a gift of them to the appellant. It will be superfluous on my part to add anything to the reasons given in my learned brother's judgment on this point. Nor can I usefully add anything to what he has said on the question whether the provisions of the Will constitute such a definite and certain gift to religious and charitable objects as the Courts could give effect to. The testator was a religious minded and charitable person and was particularly attached to certain temples at Mahabalipuram and Tirupathi; and, reading the Will in connection with the other relevant evidence in the case and in the light of the history of Alavandar's life, it seems to me that his intention was clearly to further the interests of Hindu religion by endowing certain forms of worship in connection with those temples.

The third question relating to the scheme and the application of the doctrine of *cy pres* has, I must admit, given me some difficulty. This is not a case of an ancient foundation where, owing to changes in the circumstances since the date of the foundation, surplus income has become available that was not in the contempla-

(1) 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 6 I. A. 71: 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.).
(2) 30 M. 340; 2 M. L. T. 198; 17 M. L. J. 379.
(3) 14 M. 1; 5 Ind. Dec. (N. S) 1.
(4) 20 B. 495; 10 Ind. Dec. (N. S.) 894.
(5) 30 Ind. Cas. 74; 18 M. L. T. 122; (1915) M. W. N. 531; 2 L. W. 632.

tion of the founder and about which he has given no specific directions. The suit has been instituted immediately after the death of the founder and the question is whether he intended that the entire income of the property should be devoted to the performance of Thalikai in the temples mentioned in the Will or not. My learned brother has described in his judgment what a Thalikai consists in. But there is nothing clearly to show either that Alavandar himself devoted all the income of the property merely to offerings of food to the deity or that he intended that the entire income should be devoted to that purpose alone. My learned brother is of opinion that Alavandar could not have intended that the income of the property, however much it might increase in course of time, should be spent in Thalikais alone, and having regard to his intimate knowledge of these matters I should not be justified in suggesting any doubt as to the soundness of this conclusion. I accept his conclusion that the mention of Thalikai was, to use his own language, meant to be illustrative and not exhaustive, and I have no hesitation in holding that a general charitable intention is apparent from Alavandar's Will. In that view of the intentions of the donor, the application of the surplus income in the way outlined in my learned brother's judgment would be substantially carrying out the testator's intentions. As to the law on the question of the doctrine of *cy pres*, whether the ancient texts of Hindu Law clearly enunciate such a doctrine in so many words or not, I am persuaded that the rule is quite in harmony with the teachings of Hindu Sastras and has been applied in many cases relating to charitable gifts by Hindus. I, therefore, agree in the decree proposed.

SESHAGIRI AIYAR, J.—One Alavandar left a Will appointing his divided brother's son, the 1st defendant herein, as his *vars*. The Will is dated the 22nd June 1914. The testator died on the 8th August of the same year. The present suit was brought under section 92 of the Civil Procedure Code in December 1914, alleging that the property left by Alavandar was dedicated to charity, that the 1st defendant had misappropriated the funds, that therefore he should be removed from the trusteeship of the charity, and that a scheme should be framed for its management. The 1st defendant contended that the dedication was incomplete and ineffective and that consequently he was entitled to the property left by the Will. The Subordinate Judge came to the conclusion that the property was dedicated to certain charities and that the 1st defendant was guilty of acts of malversation. In the result he held that it was not necessary to remove the 1st defendant from his position as trustee, but that a co-trustee should be appointed with him and that a scheme should be framed for the management of the trust properties. The 1st defendant has appealed. It may be stated at the outset that the plaintiffs, who obtained the sanction of the Advocate-General for instituting the suit, presented a compromise along with the 1st defendant in this Court. As, in our opinion, the compromise was aimed at giving a portion of the trust property to the 1st defendant, we refused to accept it and directed the case to be argued on the merits.

The main question relates to the construction of the Will. In that document the testator says that he left the family while he was young and became a Sanyasi. The evidence shows that all the properties were his self-acquisition. It is unnecessary to consider whether he was really a Sanyasi as mentioned by him. The Will states: "As I am now infirm and weak in body, I, in order that charities may be continued after my life (with) the undermentioned immoveable and moveable properties *to* the following places, *viz.*, Tiruvedanthai, Tirukkadalmalai and Tirupathi, have by this Will appointed my younger brother Veerasami Naicken's son Muthukrishna Naicken who has no share or claim as my "*vars*," and have given him all affairs after my life." Mr. Rangachariar first contended that under the Will his client, the 1st defendant, became the owner of the properties, subject to the carrying out of the directions relating to the charity. I am unable to agree with him. The learned Vakil argued that the language of the Will was ambiguous. He referred to the expression "in order that the charity *to* these places." There can be no doubt that

what the testator meant was that the charity should be performed *in* those places. The next suggestion was that there was no direction as to the utilization of the properties mentioned in the Will, because there is no participle governing the words "under-mentioned properties". The word 'with' has been added by the translator. We asked the Bench Clerk to translate it, and he agreed with the previous translation. From my knowledge of Tamil I feel no doubt that these two translators are right in introducing the word "with" before the words "under-mentioned properties." Alavandar was an illiterate man, and in construing the Will of persons of that class, we must put ourselves in their position.

The next contention was based on the use of the word "*vars*" in the Will. The contention of the appellant's Vakil was that the 1st defendant was instituted heir to the whole property, the suggestion being that the term "*vars*" was used in its technical sense. I do not think that this contention is well-founded. The word "*vars*" in the context only means "successor." The testator says in the previous portion that he himself has been conducting the charities. In the very next sentence the testator takes care to say that this brother's son "has no share or right", this indicates that it is not a beneficial interest in or ownership of the property that Alavandar was giving to his brother's son, but only the privilege of conducting the charities which he had been pe forming during his lifetime. He further says that the *patta* should remain in his name notwithstanding that his brother's son was to be his successor. The expression "I give him all power" does not mean that rights of disposition over the property are given, but only rights of managing the property as trustee. I feel no doubt that the property was dedicated to charity and that the 1st defendant was appointed as the first trustee. Mr. Rangachariar referred to two cases to explain the meaning of the term '*vars*', *Chunilal* v. *Baimuli* (6) and *Suraj Mani* v. *Rabi Nath Ojha* (7). If we accepted the contention of the learned Vakil, we would be making a Will for Alavandar from the language employed under very different circumstances by a testator in Bombay and by another living on the banks of the Ganges, a procedure not only repugnant to all ideas of construction but to the decision of the Privy Council in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (8). In the expressive language of Lord Moulton in that case, what the Court has to do is "to put itself into the testator's arm-chair, to look to the surrounding circumstances consistent with his race and religious opinions" but not to add under any circumstances to the testamentary disposition. The following sentence is peculiarly applicable to the present case: "That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions, but those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from." Applying this test I agree with the opinion of the Subordinate Judge that the bequest was to the charity and not to the 1st defendant subject to the performance of certain charities.

The next point argued by the learned Vakil was that the dedication was vague and indefinite, and that consequently either the whole of the property or such portion of it as would remain unspent after meeting the special purpose mentioned in the Will should be regarded as undisposed of residue. Before dealing with the cases quoted in this connection, I might refer to the language itself in which the bequest is clothed. I have already mentioned the fact that the testator referred to the circumstance that he himself was performing the charities in the three shrines already referred to. At the end of the Will he

(6) 24 B. 420; 2 Bom. L. R. 46; 12 Ind. Dec. (N. S.) 812.

(7) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

(8) 23 Ind. Cas. 166; 37 M. 199; 18 C. W. N. 554; 15 M. L. T. 285; (1914) M. W. N. 299; 26 M. L. J. 411; 19 C. L. J. 369; 12 A. L. J. 315; 16 Bom. L. R. 328; 41 I. A. 51 (P. C.).

says: "after my lifetime Thaligai shall be given in Swami Kovil at the Tirunakshatram every month". The contention for the appellant was that Thaligai referred to was not intended for distribution to the poor or in the temple. I am to a certain extent conversant with observances in Vishnu temples. I am aware that when a rich man speaks of giving a Thaligai in a temple, he very often stipulates that the food should be offered to the deity, and that after deducting certain Swatantrams, the rest of it should be returned to him for use in his house. But ordinarily when a devotee establishes a fund for Thaligai in a temple, it means that the consecrated food is to be distributed among the 'Desantries', as they are called, or the worshippers who might assemble at the time of the Aradhanam. The ordinary significance of making Thaligai is the latter and not the former one. I must, therefore, refuse to accept the contention that the Thaligai was intended to be offered by the 1st defendant in order to be utilised by him in any way he liked later on. There is force, however, in the contention of the learned Vakil about the way in which the ubordinate Judge has read the sentence referred to above. The Subordinate Judge seems to think that the word Swami Koil only refers to Mahabalipuram or Tirukkadalmalai. I think he is wrong here. The testator meant to refer to all the three temples mentioned by him and not to one alone. I am also satisfied that the Subordinate Judge is wrong in thinking that the Tirunakshatram referred to was the birth-star of the deceased testator. I cannot accept the view that the testator was speaking of his birth star as Tirunakshatram. Tirunakshatram in the chief Vishnu temples is the birth star of the deity. Every month that Nakshatram falls on a particular day, and that is generally a day in which the god is taken out in procession, or some special ceremonies are conducted. Therefore the Tirunakshatram referred to by the testator is the birth-star of the deities in the three temples. Subject to these corrections in the view taken by the Subordinate Judge, I agree with him that there is no vagueness in the dedication. The three places in which the charities are to be performed are mentioned; a particular form of charity is indicated, and the particular occasion in which such a charity is to be performed is also mentioned. I see nothing vague in such a disposition.

Now I shall examine the cases quoted by the learned Vakil for the appellant. In *Runchordas Vandravandas* v. *Parvatibai* (1) there was no specification of the charity or of the locality in which the charity was to be performed. In that case the Judicial Committee quoting *Morice* v. *Bishop of Durham* (9) stated: "Unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the Court can neither reform mal-administration nor direct a due administration." That defect does not exist in the present case. Here the subject and the objects are both ascertained and specified. In the other case, *Parthasarathi Pillai* v. *Thiruvengada Pillai* (2), Subramania Aiyar, J., in a very learned judgment, pointed out that a bequest for Dharmam would not by itself be invalid, but felt bound, by reason of the decision of the Judicial Committee in *Runchordas Vandravandas* v. *Parvatibai* (1), to hold that the bequest in that particular case was void for uncertainty. In this Madras case beyond saying that the executors shall utilise the properties for Dharmam no place and no mode of charity were indicated. On the other hand the decision in *Suraj Kunwari* v. *Pande Har Narain Ram* (10) shows that dispositions like the present are enforceable.

The principal consideration where the object mentioned does not exhaust the corpus of the fund is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite, if the law will not allow the application of the fund for the purpose, it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purposes of a charitable kind. That was in effect the decision in *Doraisawmy Pillai* v. *Sandanatham-*

(9) (1805) 10 Ves. Jun. 522 at p. 540; 32 E. R. 947; 7 R. R. 232

(10) 38 Ind. Cas. 166; 39 A. 311; 15 A. L. J. 182.

mal (11) to which the learned Vakil drew our attention. In that case the properties were endowed for a Chatram which the testator intended to build. Before his death the Chatram was not built. The learned Chief Justice and Coutts Trotter, J., came to the conclusion that as the object for which the endowment was made had failed, the property lapsed into the residue. But here, as I pointed out already, the places wherein the charities are to be performed are in existence.

In recent years the Engish Courts have viewed with less disfavour similar bequests to charities. In *Wordie's Trustees* v. *Wordie* (12) it was held that "a bequest to such charitable institutions or societies which existed for the benefit of women and children requiring aid or assistance of whatever nature but the said institutions and societies to be under the management of Protestants" was not void for uncertainty. Again in *Cameron's Trustees* v. *Mackenzie* (13) "a bequest of residue to trustees to distribute the same among such charitable institutions, persons, or objects as they might think desirable "was held enforceable. And in *Bannerman's Trustees* v. *Bannerman* (14) 'a power in favour either of religious or charitable institutions, one or more, conducted according to Protestant principles" was held good. The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not misappropriate the funds. *The Corporated Society* v. *Price* (15), *Bunting* v. *Marriott* (16), *Biscoe* v. *Jackson* (17) and *Attorney-General* v. *Laures* (18) all show that if the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed either wholly or in part. As was pointed out in *Loscombe* v. *Wintringham* (19), if it appears that the donor intended that in any event the fund should be devoted to charity and that a particular institution was named merely as the channel by which that intention was to be effected, the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of *cy pres*. The decision in *Abdul Kader* v. *Bai Safiabu* (20) is to the same effect. My conclusion on this part of the case is that there is a general charitable intention in the Will of Alavandar that the property left by him should be appropriated for the performance of charities in the three temples already mentioned, and, therefore, no part of the bequest fails for want of definiteness.

There is also another consideration which induces me to hold that the bequest is valid. Exhibits A (1) and B, two statements made by the testator, show that he intended to make a Will like the present one and that he intended by that Will to bequeath properties to the charities. Mr. Rangachariar objected to receiving these two documents in evidence. I think both the documents were properly admitted by the lower Court. It may be that the suggestion of Mr. T. R. Ramachandra Aiyar that Exhibit A (1) should be regarded as a codicil is somewhat far-fetched. The citation from Jarman on Wills, olume I, page 35, that even answers to interrogatories may be regarded either as a codicil or Will may not apply to testamentary disposi ions in this country. Under the Hindu Wills Act and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as testamentary. But I think Exhibit A (1) is admissible in evidence under section 32, clause 7) of the Evidence Act. It is a statement taken by the Sub-Registrar in

(11) 30 Ind. Cas. 225; (1915) M. W. N. 478; 2 L. W. 577.

(12) (1915) S. C. 310.

(13) (1915) S. C. 313.

(14) (1915) S. C. 398.

(15) 1 J. & La. T. 498.

(16) (1854) 19 Beav. 163; 52 E. R. 311; 105 R. R. 108.

(17) (1887) 35 Ch. D. 460; 56 L. J. Ch. 540; 56 L. T. 753; 35 W. R. 554.

(18) (1849) 8 Hare 32; 19 L. J. Ch. 300; 14 Jur. 77; 68 E. R. 261; 55 R. R. 181.

(19) (1850) 13 Beav. 87; 51 E. R. 34; 88 R. R. 432.

(20) 12 Ind. Cas. 702; 36 B. 111; 13 Bom. L. R. 1025.

the house of the testator before registering the Will, and it was made two days after Exhibit A. I think the language of clause 7 of section 32 covers this case. I also think that this statement is part of the *resgestæ* and as such receivable in evidence under section 6 of the Evidence Act. As regards Exhibit B it was a written statement filed by Alavandar in a suit brought against him to declare that part of the properties in dispute and some other properties did not solely belong to him. In his written statement he said that he had acquired the properties for the purposes of a charity and that he intended to make a testamentary disposition in that behalf. This is certainly a statement which was opposed to the pecuniary interest of the person making it and as such is covered by section 32 (3) of the Evidence Act. Reading Exhibits A (1) and B along with Exhibit A, I am of opinion that the testator had a clear testamentary intention in favour of charity.

The next point for consideration is whether the trusts declared by the testator are public trusts or only private trusts as contended for by Mr. Rangachariar. I have already pointed out that the use of the word "*thaligai*" should not mislead us. The charities were intended to be performed in three public religious institutions. One of the objects was to feed the devotees. I fail to see how this can be regarded as a private trust. The decision in *Sathappayyar* v. *Periasami* (3), which related to a gift by the then Zemindar of Sivaganga to his own religious preceptor with a view to the property being utilised for a special purpose, has no bearing upon this question. In that case it was held that the gift was primarily to the preceptor and that there was only a direction or a suggestion that the property should be appropriated in a particular manner, and that consequently the beneficial interest vested in the preceptor. Nor has *Trimbak* v. *Lakshman* (4) any bearing on the present question. In *Sriranga Chariar* v. *Pranatharthihara Chariar* (5) the grant was to a person and an object was specified. It was held that it was not a public trust. These authorities are not applicable to cases where there is no bequest to any individual but only to charity.

Before dealing with the question as to how the funds should be appropriated, I might deal with the contention of Mr. Rangachariar that his client should be the sole trustee. It is true that the suit was instituted within six months of the death of the testator. Nonetheless the evidence in this case shows that the personal habits of the 1st defendant are of such a nature as would justify co-adjutors being appointed along with him. Moreover, I cannot shut my eyes to the fact that the 1st defendant claimed in this suit that no part of the property should go to the trust. At the same time I am in agreement with Mr. Rangachariar that the 1st defendant should not be wholly removed. The best course will be to appoint two more trustees, of whom one at least should be a non-Brahmin, to co-operate with him in the management of these properties. It is desirable also that the 1st defendant should be given a salary to see that the charities are properly conducted. The details of the scheme will be left to the lower Court.

This brings me to the last question, whether it is open to us to direct the application of the income to objects other than the performance of Thaligai in the temples. I do not at present propose to do anything more than indicate in the general way the objects on which the fund may be spent. On a rough calculation the income which is likely to be derived is about Rs. 8,000 a year. After paying the expenses of the management and the remuneration of the trustee, there may be a balance of about Rs. 6,000. In my opinion one-fourth of it, namely, Rs. 1,500 should be spent in the three temples, Rs. 500 in each, for the purpose of feeding people and conducting Utsavams. The balance should be utilised for giving religious instruction. Mr. T. R. Ramachandra Aiyar, without seriously objecting to the allocation, of any portion of the income to education, made us understand that such a provision in the scheme must not be taken to have been made by consent of the parties. As the question regarding the application of surplus income comes up before the Courts very often, I propose to deal with the jurisdiction of the Court in such matters.

Although the extent of jurisdiction over temples exercised by the ancient kings of the

land is not traceable in any of the writings handed down to us, there can be no manner of doubt that the affairs of religious institutions were directly under the control of the sovereigns. The Muzerai Department of Mysore, and the conduct of temple affairs in Travancore and Cochin all point to the conclusion that the administration of Devastanams has been and is a department of the State. Even Mutts are subject to Governmental supervision. The Mutt properties in Mysore often pass into the hands of the Government with a view to their more efficient management. There is no reason for presuming that a different state of affairs prevalied in ancient India. Regulation VII of 1817 states in the preamble that "it is the duty of the Government to provide that all such endowments be applied according to the real intent and Will of the grantor." It is not unreasonable to assume that such a duty was inherited from the acient sovereigns of the land, although the notion that the sovereign is bound to administer ecclesiastical affairs properly is an English idea as well. In Koutilya's Arthasastra, in the chapter headed "Replenishment of the treasury," some Machiavellian advice is tendered to the king regarding the appropriation of the temple income. The minister, like those that served some of the English Kings, seems to have been concerned only with aiding the king in securing money for temporal purposes without reference to the morality or legality of the attempts. I have referred to Chanakya's disingenuous advice to the sovereign only for the purpose of showing that the revenues from the temples were indented, upon rare occasions, for the general administration of the land. There is evidence that in the days of the East India Company the surplus income from the temple properties was appropriated to general purposes. Controversies are still carried on by individual institutions claiming a refund of such income. In more recent years, the Legislature has enacted a law (*vide* the Tirupati Devastanam Act) authorising the utilisation of a portion of the temple income for the purposes of advancing secular education. Courts have sanctioned expenditure for imparting instruction in Sanskrit and Tamil (*vide* the scheme for the Rameswaram Devastanam). I see no reason for holding that these instances have been considered by religious devotees as amounting to a misapplication of the temple income. A remarkable letter by the Rajah Sarabhoji of Tanjore, dated the 28th January 1801, addressed to the then British Resident shows in what spirit and with what intents religious charities were gifted and administered. After referring to the fact that persons from all over India travel by foot to Rameswaram where Chatrams have been built, the letter says: "For the accommodation of these travellers principally, the Chatrams have been established and to each of them a pagoda, choultries and schools are annexed." Then the nature of the charities is explained. Then follow these sentences: "In each Chatram, a teacher to teach the four Vedams is appointed and a school master and doctors skilful in the cure of diseases, swellings and the poison of reptiles. All the orphans of strangers who may come to the Chatram are placed under the care of the school-master. They are also fed three times a day and once in four days they are anointed with oil. They receive medicine when they require it. Clothes also are given to them and the utmost attention paid to them. They are instructed in the sciences to which they may express a preference and after having obtained a competent knowledge of them the expenses of their marriage are defrayed." The above extract explains with what eye ancient kings looked upon the dispensation of charities.

I have been at pains to find out whether the Hindu Shastras countenance the distinction between religious and charitable purposes. My research shows that in India religious purposes have been considered only as a branch of the charitable purpose. Jaimini in his Sutras says "* * * * * * * *" "Dharma or charity is that which is ordained" K. L. Sarkar in his Mimamsa Rules of Interpretation rightly points out that this ordaining is not from the Vedas alone, it may be from the Smritis and some of the accepted Itihasas and Puranas as well. When the Tanjore Rajah in providing for the safe conduct and comforts of the pilgrims considered that education is a form of charity which would enable the donor to attain salvation, he interpret

ed truly the Shastraic injunctions in this behalf. Vaidyanatha Dikshitar, who has in his monumental work prescribed the duties of house-holders, discusses at some length the form and nature of charity best calculated to lead a man to Heaven. He first quotes a very well-known text from Taittiriya Upanishad on the excellence of Dharma:—

"* * * * * * * *
* * * * * * * *"

Then he quotes a few very apt *slokas* from Manu:—

"* * * * * * * *
* * * * * * * *"

In the matter of Danam the Veda says: "All beings praise Danam. * * *

"Everything rests on Danam. Therefore, it is said that Danam (gift) is the noblest and the supreme."

Manu says:—"There are three classes of the highest gifts: namely, the gift of cows, land and *saraswathi*, *viz.*, (learning). Gift of learning is more praiseworthy than giving of food. In learning, *Para Vidya* (knowledge relating to the *Para Brahman*)—is considered to be superior. And, therefore, Swarga (Heaven) and Moksha (salvation) are vouchsafed to the donor of such knowledge. He who imparts knowledge to the ignorant or constructs rest houses, attains the same merit as a person who has gifted land."

From the above extract it will be seen that among all the commendable gifts the gift of a cow, of a piece of land and of education are considered to be the noblest. Of these three, the gift of education is more praiseworthy than the other two. In education, "that which imparts to the donee a knowledge of the Supreme is to be preferred." It is clear from the above Smriti text that Manu regarded *vidya dharmam* or gift of education of any kind as conducive to salvation. His preference of *Para Vidya*, education relating to a knowledge of *Para Brahman*, shows that in his opinion every endeavour to remove ignorance and to infuse light is acceptable to God. In the face of such a pronouncement, it would be absurd to argue that a general gift by a devotee intended as a propitiatory offering to God would be misspent if a portion of it is utilised for giving secular education. The final scheme approved by the District Board of Tanjore for the utilisation of the surplus funds shows that they carried out the letter and spirit of the instructions given by Rajah Saraboji in the letter already referred to. What the District Board and the Legislature have done is not beyond the competence of Courts which act as the sovereign's delegated authority in conserving and properly administering charitable gifts.

The difficulties we are experiencing are traceable to the constitution of committees under Act XX of 1863. The supervision of the sovereign power ceased, and with it the power to apply the surplus income to purposes most conducive to the general welfare and comforts of the devotees. The first committees applied their minds to conserving the income and to spending it on rituals and ceremonials which the common people most desired. They were not given the powers which the sovereign exercised. The Act was so drawn up as to leave most essential matters unprovided for. The earlier trustees owed their appointments, in not a few cases, to the accident of being temporarily in charge of the affairs of an institution. The result has been disastrous. When an ineffective law is administered by a person anxious to be maintained as trustee, and who feels that he is responsible to no one, there is bound to be peculation and mismanagement. The multiplication of Utsavams is due more to a desire to find channels of expenditure which might give a profit to the spender than to serve the legitimate wishes of the devotees. Moneys have been recklessly allotted for these *tamashes*, not in a few instances, to the detriment of the more legitimate ceremonials in the temple. I am glad that it has been recently ruled that money borrowed for fireworks is not chargeable on the trust. See *Adiraja Arsu* v. *Sheik Bydan Sahib* (21). I do not believe that sane men would seriously advance the theory that it is more pleasing to God that

(21) 44 Ind. Cas. 815; 23 M. L. T. 278; 34 M. L. J. 358; (1918) M. W. N. 331.

moneys should be spent in fireworks and in engaging dancing girls than in imparting education to the sons of the devotees. There can be no manner of doubt as to the wishes of the people on such matters. But we have unfortunately a machinery for the administration of religious institutions which gives scope for abuses of a serious kind on the part of those entrusted with the management of such institutions.

The Hindu Shastras, as I pointed out, attach great importance to the imparting of knowledge. True religiousness, according to Hindu notions, is possible only to those who are learned. I fail to see why the application of temple income to the promotion of knowledge, which in the main must lead a man aright, should be considered improper. No doubt when a devotee ear-marks the offering for a particular purpose, it is not open to the authorities to divert it to other purposes. Even here, when the purpose is legitimately satisfied by the application of a portion of the income, the balance can be devoted to the promotion of useful knowledge. But in the vast majority of cases where the offerings are contributed without any set purpose, the management will be justified in applying them to purposes connected with the diffusion of knowledge. A sufficient portion of the income may be spent on spectacular demonstrations which attract and please the ordinary worshipper. He often desires that the deity should have such accompaniments to festivals and ceremonies as would please the eye and give an air of magnificence and of sumptuousness. But panderings to such cravings should have limits. I do not say that a Puritanic standard of religiousness should be imposed. But it is not the function of the managers to encourage observances which have no connection with the fundamentals of religious worship. In very many instances, expenditure on *tamashes* produces the opposite effect. The worship of the deity is lost sight of, in the desire to witness the amusements; and not infrequently, vice is encouraged and spread by these practices. I have no hesitation in saying that the modern developments regarding processions lead the people far away from the paths of religion and are calculated to bring it into disrepute. I think there is nothing in the religion of the Hindus, in their traditions and in the consciousness of the people, which will compel Courts to respect prejudices which sap at the root of religion and which pervert and not advance its precepts. Therefore, whenever the grants made to religious institutions are not ear-marked or, if ear-marked, are not intended to exhaust the recurring income, and whenever they are made as a general thanks-offering, it is proper and legitimate to direct their application to the promotion of knowledge.

There is one other aspect of the question. The donations made to a deity often take the strictly legal aspect of charity as understood by English lawyers. Grants for feeding the devotees, for giving them shelter, for giving them water are made in connection with religious institutions. Grants are frequently made to reward persons who chant the Vedas or the Prabhandam when the Utsavams are in progress. I cite these instances to show that in the eyes of a donor, the feeding of the poor and the encouragement of educated men are regarded as purposes gratifying to the deity? If that is so, how can a management be charged with misapplication, if it uses the surplus funds to enable young men to gain knowledge or to give them food while reading in schools and colleges? In England it has been held that the advancement and propagation of education and learning are charitable purposes. See *Whicker* v. *Hume* (22). I think this principle is applicable with greater force to Indian conditions. In *Thompson* v. *Thompson* (23) it was held that where the gift is general and indirect, its application to provide a fund for unsuccessful literary men would be valid. Where the relief of poverty is the object of the donor, it has been held that the object can be effectuated by the apprenticing of poor children or by giving pensions to destitute men. See *Attorney-General* v. *Minshull* (24) and *Attorney-General*

(22) (1858) 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933; 11 E. R. 50; 31 L. T. (O. S.) 319; 115 R. R. 70.

(23) (1844) 1 Coll. 331; 8 Jur. 830; 63 E. R. 434; 66 R. R. 109.

(24) (1793) 4 Ves. Jun. 11; 31 E. R. 6.

v. *Wansay* (25). In *Estlin, In re; Pritchard* v. *Thomas* (26), appropriation of such funds for founding homes for lady teachers was upheld. In *Hall* v. *Derby Sanitary Authority* (27) the establishment of orphanages from such funds was held to be proper.

Further, as pointed out by Mr. Ganapathi Aiyar in his Hindu and Muhammadan Endowments, page 58, the Hindu Shastras do not draw a sharp line of distinction between religious and charitable grants. The word "Poorta" which signifies pious acts open to all classes of society connotes both religious and charitable acts. See also West and Buhler, pages 205 and 207. It would, therefore, be idle to impute to Hindu devotees an intention that in making offerings or donations they contemplated purely religious purposes as opposed to charitable purposes.

I have thus far endeavoured to show that the trustees of a temple would be acting well within their powers in using temple income to promote knowledge. As regards the functions of the Court in such matters, there can be no doubt. I pointed out in *Sitharam Chetty* v. *Subramania Aiyer* (28) that the Courts in this country have inherited the jurisdiction of the Chancery Courts in England. In a Tinnevelly case, *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (29), which I decided sitting with the learned Chief Justice, I held that just as a Court of Chancery would not allow a trust to die for want of a trustee, so also the Indian Courts have ample powers to give directions towards the application of the trust income even though the trustee may not himself be competent similarly to apply it. The doctrine of *cy pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated.

(25) (1808) 15 Ves. Jun. 231; 33 E. R. 742.
(26) (1903) 72 L. J. Ch. 687; 89 L. T. 88.
(27) (1886) 16 Q. B. D. 163; 55 L. J. M. C. 21; 54 L. T. 175; 50 J. P. 278.
(28) 32 Ind. Cas. 211; 39 M. 700; 30 M. L. J. 29; 19 M. L. T. 25; 3 L. W. 43.
(29) 42 Ind. Cas. 366; 41 M. 124; 33 M. L. J. 357; 22 M. L. T. 218; 6 L. W. 666.

It was pointed out in *Attorney-General* v. *Lawes* (18) the jurisdiction of the Courts of Chancery should be exercised with a view to prevent the failure of the donation altogether. Courts in this country should act on the same principle.

In the present case I have held that there is a general charitable intention. The mode of carrying it into effect is not provided for with any certainty. It would be absurd to suggest that the Rs. 6,000 should be wholly spent in Thaligais. The truth is that the donor intended that his earnings should be spent in the temples without taking care to provide how they should be spent. His mention of Thaligai was meant to be illustrative and not exhaustive. The evidence to which Mr. Ramachandra Aiyar drew our attention shows that in his lifetime, Alavandar spent monies for other religious purposes than giving Thaligais. Very likely the testator did not expect such a large income from the properties. He was not educated enough to give the necessary directions in his Will for the proper allocation of the income. That duty can be performed by the Court. As was pointed out in *Ommanney* v. *Butcher* (30), Courts have often to supply defects of this nature in a trust bequest. A I pointed out before, when the mode indicated by the donor cannot reasonably exhaust the income, the doctrine of *cy pres* can be invoked.

In England, the appropriate mode of effectuating a charitable trust is by sanctioning a scheme. The case-law on the point is thus summarised in 4 Halsbury, paragraph 316. As this judgment has already become lengthy I shall content myself by extracting the passage here: "A scheme is generally necessary on any *cy pres* application of a charitable trust unless the trust is altered merely in detail.

"Schemes are also required where the trusts of the instrument of foundation are ambiguous or insufficient and no particular objects are defined, or where there are no trustees, or the trustees are dead or refuse to act or where there has been an increase in the revenue of the charity, or the persons managing the charity have misapplied its property, or where for any other reason

(30) (1823) Turn & R. 260; 37 E. R. 1098.

it is thought expedient to regulate the administration of the charity."

In my opinion section 92 of the Code of Civil Procedure gives Indian Courts similar powers. In the present case, the scheme should be of such a nature as to give effect to the expressed intention of the testator and to apply the surplus income for educational purposes. Without unduly fettering the discretion of the lower Court, I may indicate the main lines on which the scheme should be framed:—

(*a*) An establishment for collecting the income should be sanctioned, not exceeding Rs. 500 a year.

(*b*) The 1st defendant should be paid Rs. 40 a month for superintending the charities.

(*c*) With him should be associated two more trustees of whom one at least should be a non-Brahmin.

(*d*) Rs. 1,500 out of the net income should be spent in Thaligais and Utsavams; Rs. 500 in Tiruvedanthai and Mahabalipuram to be spent on the Tirunakshatram day; and Rs. 500 to be utilised for purchasing Prasadam in Tirupati during Brahmotsavam to feed non-Brahmin worshippers.

(*e*) The balance should be spent for giving religious education in Tamil Prabandam.

With these suggestions, the appeal is dismissed. Costs of both parties in both Courts will come out of the trust fund.

M.C.P.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 67 OF 1916.
March 19, 1918.
Present:—Mr. Justice Beaman and
Mr. Justice Heaton.
KARBASAPPA GOOLAPPA NAREGAL
—DEFENDANT—APPELLANT
versus
KALLAVA GOOLAPPA NAREGAL
—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Maintenance, arrears of—Court, power of, to award arrears—Demand, whether necessary.

In dealing with claims for arrears of maintenance made by Hindu widows Courts possess a large discretion to grant or withhold those arrears with special reference to the urgent needs and necessities of the widow. [p. 623, col. 2.]

As soon as the widow satisfies the Court that she was in want at the time at which she was entitled to maintenance, provided that time is within the period of limitation, the Court might in any given case award her arrears to that extent, and that would be quite independent of any demand on her part. In other words, while a demand is allowed to be *prima facie* evidence of need on the widow's part, it is not in a demand that the right to obtain arrears of maintenance is rooted. Nor is any demand necessary. [p. 623, col. 2.]

First appeal against the decision of the First Class Subordinate Judge at Dharwar, in Suit No. 470 of 1914.

Mr. *V. V. Bhadkamkar*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.—On the point of arrears of maintenance the case-law, to which we have been referred, yields, as far I can see, no definite principle upon which all cases of the kind can be decided. The most that can be said of it, I think, is that the highest authority sanctions a very large discretion in Courts dealing with claims for arrears of maintenance to grant or withhold those arrears with special reference to the urgent need and necessities of the widow, and this amounts virtually to saying that every such case must be decided upon its own facts. It is very clear that as soon as the widow satisfies the Court that she was in want at the time at which she was entitled to maintenance, provided that time is within the period of limitation, the Court might in any given case award her arrears to that extent, and that would be quite independent of any demand on her part. In other words, while a demand is allowed to be *prima facie* evidence of need on the widow's part, it is not in a demand that the right to obtain arrears of maintenance is rooted. Nor indeed is any demand necessary.

In the facts before us, therefore, we have no guide in the authorities to any principle which could be uniformly used in deciding whether arrears of maintenance ought or ought not to be granted. Here, the plaintiff has asked for six years' arrears and the lower Court has awarded them, though at

a lower rate than the maintenance it has decreed to her in future. We are in some doubt, however, whether the facts warrant this liberality. It must always be a factor in dealing with the merits of a particular case that the plaintiff has postponed making her claim. If during a period of six years she has been living in her father's house, while it would not be safe to conclude that she was not in want and forced by want to continue to depend upon her father's bounty, it may be the ground of a reasonable inference that she was not driven by absolute necessity to enforce her rights of maintenance against her husband's family. Then, again, in cases of this kind the criterion cannot be that the woman had found a shelter somewhere and bare subsistence. For that would not be incompatible with her having been in real want, and, as far as I can see, no very adequate ground for transferring the responsibility for her maintenance from her husband to her natural family. But one would suppose that if the pinch of want was being very severely felt a Hindu widow would insist upon her rights, particularly if her husband's family were well-to-do, while her father's family were extremely poor, long before six years had elapsed. It can only be upon the most general ground and a balance of the most general and shifting considerations of this kind that we can come to what must be called rather a commonsense than any other conclusion upon the point before us. Treating the case in that manner, we have decided that justice does not require that the widow here should have more than three years' maintenance, and to that extent we amend the decree of the Court below.

As regards the quantum of her maintenance in the future, where we find a Hindu Subordinate Judge treating a Hindu widow with so much liberality as in the present case, we should be very reluctant indeed to interfere and so suggest that we generally agree with the extremely harsh and rigorous attitude of the Hindu mind towards women so unfortunately situated as Hindu widows often are. We have heard all the arguments that could be addressed to us upon the somewhat meagre evidence recorded, and while on that evidence the scale of maintenance might appear to be unduly liberal, one cannot say that the learned Judge is wrong in conjecturing that the defendant has managed to conceal his true means, which are very likely much more ample than is revealed in the evidence.

We do not, therefore, think it right to interfere upon that part of the case, and we would, with the slight variation suggested above, confirm the decree of the lower Court and dismiss this appeal with all costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 821 OF 1917

March 20, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RAMALINGAM AYYAR AND OTHERS—DEFENDANTS NOS. 5, 6 AND 7—APPELLANTS,

versus

S. SUBBAIER—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 4, 14, scope of—Limitation, expiry of, on holiday—Plaint, presentation of, on succeeding day, in wrong Court, effect of—Institution in wrong Court for prompt realisation of debt—Good faith—Return of plaint for presentation to proper Court—Civil Procedure Code (Act V of 1908), s. 20.

Section 4 of the Limitation Act is a particular statutory provision, not for the purpose of computing the period of limitation prescribed as in section 14, but allowing in certain circumstances the filing of suits after the period has expired. [p. 625, col. 2.]

The section can be availed of only if the suit, appeal or application is filed in the *proper* Court when the time for doing so has expired on a holiday. [p. 625, col. 2.]

Mira Mohideen v. *Nallaperumal*, 12 Ind. Cas. 58; 36 M. 131; 21 M. L. J. 1000; 10 M. L. T. 254; (1911) 2 M. W. N. 221, followed.

Section 14 of the Limitation Act only prescribes a certain rule to be observed in computing the period of limitation prescribed for a suit, appeal or application, *i. e.*, in reckoning the number of days if time has expired, the period allowed by the section may be deducted from the period that has actually expired. [p. 625, col. 2.]

Where a plaintiff instituted a suit on the day after the last day of limitation, the last day being a holiday in a Court within whose jurisdiction one only of the defendants resided and the Court declining to give leave under section 20 (*b*), Civil Procedure Code,

returned the plaint for presentation to the proper Court, which was subsequently done:

Held, that the plaint not having been presented to a proper Court on the day after the last day of limitation, the suit was barred.

The institution of a proceeding in a Court with a view to prompt realisation of the claim from the defendant, who is an officer of that Court, is not a proceeding lacking in good faith within the meaning of section 14.

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 618 of 1915, preferred against the decree of the Court of the Additional District Munsif, Tinnevelly, in Original Suit No. 360 of 914.

FACTS.—The plaintiff presented his plaint in the Court of the District Munsif, Ambasamudram, as the first executant of the bond resided there. The other executants resided in different jurisdictions. The District Munsif acting under section 20, clause (*b*) of the Civil Procedure Code, declined to give leave for the institution of the suit in that Court, in consequence of which the suit was subsequently filed in the Court of the District Munsif of Tinnevelly.

The District Munsif of Ambasamudram gave the following reasons for returning the plaint in his order returning it:—"The plaintiff is living in Tinnevelly. The bond was executed in Tinnevelly".....[This latter statement is not quite correct as it was executed in a different place.] The defendants Nos. 2 to 4 are nearer Tinnevelly than Ambasamudram. The only reason alleged for filing the plaint in my Court is that the 1st defendant is here. I think that the balance of convenience is in favour of the plaint being presented to the District Munsif exercising jurisdiction in Tinnevelly town. I decline to give permission for suit being filed here." The suit was then filed in the Tinnevelly Munsif's Court. The 1st defendant was Head Clerk of the Ambasamudram Munsif's Court.

Mr. *K. R. Gurusawmi Aiyar*, for the Appellants.

Mr. *B. Sitaram Row*, for the Respondent.

JUDGMENT.

NAPIER, J. (after stating facts as above)—With regard to the question whether the suit was *bona fide* filed in the Court of the District Munsif of Ambasamudram, I do not think that the fact that he thought he would be more likely to get his money paid by the 1st defendant if he sued him in the Court of which he was an officer shows want of *bona fides*. A man has a perfect right to endeavour to get the payment of his money, and I see nothing improper in suing his debtor where he thought he would be more willing to discharge the debt. But the real difficulty in the way of the plaintiff seems to me to lie, in the language of the section, as follows:—"In computing the period of limitation prescribed for any suit," that is to say, in reckoning the number of days to see if time has expired, you may deduct from the period that has actually expired the period allowed by section 14, namely, "the time during which the plaintiff has been prosecuting with due diligence another Civil proceeding" in a Court which is unable to entertain the suit. But the right by which the plaintiff can file his suit the day after a holiday is given by section 4, which is "where the period of limitation prescribed for any suit, appeal or application *expires* on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens," that is to say, although the period of limitation has expired a suit may be filed after the expiration of the period of limitation. That is how I read the section. It is a particular statutory provision, not for the purpose of computing the period of limitation, but allowing, in certain circumstances, the filing of suits after the period has expired. If that is so, then section 14 will not help the plaintiff because, as I have pointed out, it begins with the phrase: "In computing the period of limitation prescribed for any suit," prescribed, of course, having reference to the Articles. If this plaint had been presented in a proper Court on the day after that on which the limitation expired, that day having been a holiday, then the plaintiff would have been able to take advantage of the specific provision in section 4; but as he has not done so, in my opinion, he is not entitled to take advantage of that provision. That seems to me to be the view taken by Mr. Justice Spencer in *Mira Mohideen* v. *Nallaperumal* (1) and I agree with him in that

(1) 12 Ind. Cas. 58; 36 M. 131; 21 M. L. J. 1000, 10 M. L. T. 254; (1911) 2 M. W. N. 221.

view. I would, therefore, allow the appeal and dismiss the suit against defendants Nos. 5 to 7 also. There will be no costs in any Court.

SADASIVA AIYAR, J.—I agree.

M.C.P.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

January 29, 1918.

Present:—Lord Buckmaster, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

HARDIT SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

GURMUKH SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Adverse possession—Joint holding—Co-sharer in exclusive possession, effect of.

Where one member of a joint family alone occupies the joint estate, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. [p. 626, col. 2.]

Where possession can be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. [p. 626, col. 2.]

Plaintiffs and defendants were joint owners of an estate and were recorded in the revenue papers as such. It appeared, however, that the defendants alone had been in possession of the joint estate. In 1890 the revenue records were the subject of challenge, but the defendants took no steps to get them rectified, with the result that the plaintiffs continued to be recorded as owners of their joint share:

Held, that the mere fact that the defendants had all along held possession of the joint estate did not amount to an adverse exclusion of the plaintiffs from their joint share. [p. 627, col. 2.]

Appeal from the decree of the Chief Court of the Punjab (Shah Din and Beadon, JJ.), dated the 20th December 1913.

Sir *William Garth*, for the Appellants.

JUDGMENT.

LORD BUCKMASTER.—The question in this appeal is whether the appellants have an interest jointly with the respondents in a village known as Bhagsar.

In the proceedings, out of which the appeal has arisen, the appellants were the plaintiffs and the respondents were the defendants, and in that suit the two material issues were, *first*, whether the property in question was part of a joint family estate, and *secondly*, if it were, whether the plaintiffs, who were members of the family, had lost their right by abandonment, acquiescence, or adverse possession. The finding of the two Courts that the property was originally joint is not challenged, and the only question is that raised by the second issue. Upon this the Subordinate Judge of Ferozepore found in favour of the appellants, and his judgment was reversed by the Chief Court of the Punjab. In considering the soundness of this latter judgment it is important to bear in mind certain facts with regard to the possession of joint property, which distinguish it from property separately held. In the former case the phrase "exclusive possession" has an equivocal meaning; in the latter it has not. If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members [*Maharajah Sir Luchmeswar Singh Bahadur* v. *Sheikh Manowar Hossein* (1) and *Corea* v. *Appuhamy* (2)]. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The fact, therefore, that this village of Bhagsar has been occupied for many years by the defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence. This evidence the respondents sought to find in certain proceedings that took place in 1890, and as the Chief Court has recorded their opinion that the respondents' view of these matters is correct, and this Board has not had the advantage of hearing Counsel for the respondents, it becomes

(1) 19 I. A. 48; 19 C. 253; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S.) 614.

(2) (1912) A. C. 230 at p. 236; 81 L. J. P. C. 151; 105 L. T. 836.

necessary to submit this evidence to close scrutiny.

The facts seem to be these : A disposition of part of the property appears to have been made by Wasawa Singh and Hazara Singh, the fathers of the defendants, in favour of two people, named Phala and Mala, who were respectively the brothers-in-law of Wasawa and Hazara. Mala appears to have taken proceedings in 1890 in assertion of his right for partition of this land. The records of the proceedings appear to have been lost, apart from an order, dated the 20th February 1891 and it is only from the material thus furnished that it is possible to ascertain what the proceedings were. This order states that on the 10th November 1890 an order of partition was proposed and partition had been all but prepared when the plaintiff, Mala, objected on the ground that it was prejudicial to him, and on an enquiry being directed he asserted that he was entitled to one-third of certain *khatas*, Nos. 39 to 41, the property of the sons of Wasawa and Hazara, referred to in the order as Basawa and Hazara. This the sons of Wasawa and Hazara disputed, and asserted that Mala should get a share in proportion to Rs. 5-14-3, being his share shown in the *jamabandi* papers. What this share was meant to be it is impossible to know. It may be that it represents the share to which Mala might be entitled upon the footing that the property was jointly held with the appellants' predecessors, and that the sons of Wasawa and Hazara were asserting that the estate was jointly held by them with others in order to defeat Mala's claim. Both Mala and the occupancy tenants disputed the entries in the revenue papers, and those entries clearly showed that the estate was then held jointly by Wasawa and Hazara and the predecessors of the plaintiffs. The Court consequently directed that it was expedient to postpone the partition until the objectors had obtained relief against the entries in the revenue papers in a Civil Court. Now these entries were adverse to the objectors, because they showed that the estate was jointly held with the plaintiffs' predecessors, and unless their claim was removed Mala's share would be to that extent reduced. Three months' time was allowed in order to have these entries rectified, and that was in substance the whole effect of the order. No suit was brought in pursuance of this permission, and the entries were continued on the same footing in the revenue papers, down to and including those for 1905 and 1906, and clearly showed the interest of the plaintiffs in the joint estate.

These facts led the Chief Court to the conclusion that the defendants set up in 1890 adverse possession, and that that possession had continued for more than twelve years before the institution of these proceedings. If their Lordships were so able to interpret the proceedings referred to, they would not be prepared to differ from the judgment of the Chief Court, but in truth they can only find that at that time the revenue records were the subject of challenge, though apparently not by the present respondents, and that the parties interested in their alteration took no steps whatever to secure rectification, with the result that the appellants have remained, as shown by these records, entitled to their joint share in the property.

The absence of all the preliminary proceedings leading up to the order, to which reference has been made, has caused much of the difficulty in this case. If these could be examined much that is now obscure might be made plain, but it is only possible to reconstruct them from the order now in existence.

Their Lordships are unable to think that the information thus obtained is sufficient to justify them in holding that an estate, which must be accepted as having originally been joint, which is recorded as joint throughout the whole of the revenue records, is an estate from which the defendants were adversely excluded, as the Chief Court think. Apart from the effect of these proceedings, the Chief Court, in agreement with the Court below, do not appear to regard the evidence of actual user as sufficient to establish the contention of abandonment or exclusion, and this conclusion is in agreement with their Lordships' view.

For this reason they will humbly advise His Majesty that the appeal be allowed with costs and the judgment of the Subordinate Judge restored.

Their Lordships' attention has been directed to the fact that the appellants only claimed a two-thirds share of the estate, but for some unexplained reason three fourths has been awarded to them by the decree of the Subordinate Judge. This must be due to some error in drawing up the order, for it is inconsistent both with the claim and the evidence. In these circumstances the decree of the Subordinate Judge must be altered by substituting therein the words "two-thirds share" in the place of the words "three-fourths share," and so altered, the decree should be restored.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 71 OF 1916.

October 10, 1917.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

MEDA CHINNASUBAMMA—PETITIONER—APPELLANT

versus

PAPIREDDI GARI CHINNAYYA MINOR, BY HIS GUARDIAN *ad litem* NAGAPEDDAYYA (LEGAL REPRESENTATIVE OF RESPONDENT)—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 144, 151, O. XXI, r. 90—Order refusing to set aside execution sale, reversal of, in appeal—Auction-purchaser not party to proceedings—Restitution, claim to, maintainability of.

An order refusing to set aside an execution sale under Order XXI, rule 90, Civil Procedure Code, was reversed on appeal. The auction-purchaser was not a party to the proceedings. The judgment-debtor applied for restitution of the property from the auction-purchaser:

Held, (1 that section 144 of the Civil Procedure Code did not apply, inasmuch as no decree had been varied or reversed on appeal but only an order under Order XXI, rule 90, refusing to set aside a sale in execution;

(2, that an order could not be made under section 151 of the Civil Procedure Code on the analogy of section 144, inasmuch as the auction-purchaser was not a party to the proceedings instituted for setting aside the sale.

Appeal against the order of the Temporary Subordinate Judge, Cuddapah, in Appeal Suit No. 71 of 1916, preferred against the order of the District Munsif, Nandalur, in Civil Miscellaneous Petition No. 183 of 1913, in Original Suit No. 168 of 1905.

Mr. *V. Ramesam*, for the Appellant.

Mr. *N. Chendrasakara Ayyar*, for the Respondent.

JUDGMENT.—Section 144 of the Code of Civil Procedure cannot in terms apply as no decree was varied or reversed, but only an *order* under Order XXI, rule 90, refusing to set aside a sale in execution, was reversed by the Appellate Court.

Assuming that section 151 of the Code of Civil Procedure allows an order for restitution in appropriate cases, even though it does not fall under section 144 of the Code of Civil Procedure, such an order cannot be made on the analogy of section 144, unless the auction-purchaser was a party before the Appellate Court which set aside the sale in the proceedings instituted for setting it aside.

The mere fact that the decree-holder was a party to those proceedings will not suffice as the Court auction-purchaser is not the representative of the decree-holder. *Manickka Odayan* v. *Rayagopala Pillai* (1), which held otherwise, has been disapproved of in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (2), to both of which decisions the present learned Chief Justice was a party.

The Munsif says, that the auction-purchaser need not at all be a party to any proceedings for confirmation of or setting aside the sale. The petition for restitution does not expressly state that the Courtauction purchaser was a party to the proceedings taken to have the auction sale set aside. No records have been produced before us to establish that fact. We, therefore, cannot hold that section 151 empowers the Court to pass an order for restitution against the person not shown to be a party to, and so bound by the order of the Appellate Court setting aside, the sale.

The appeal is dismissed with costs.

M.C.P.

Appeal dismissed.

(1) 30 M. 507; 2 M. L. T. 347; 17 M. L. J. 291.

(2) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 66; 9 M. L. T. 152; 21 M. L. J. 928.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 1185 OF 1916.
April 5, 1918.
Present :—Mr. Justice Shah and Mr. Justice Kemp.
VISHNU JAGANNATH JOSHI—
DEFENDANT—APFELLANT
versus
VASUDEO RAGHUNATH OKA—
PLAINTIFF—RESPONDENT.

Trespass—Injunction, suit for—Trees overhanging plaintiff's land—Damages, proof of, whether necessary—Custon allowing trees to overhang, whether reasonable—Easements Act (V of 1882), s. 18—Customary easement—Right to retain trees overhanging another's land.

Where trees belonging to one man overhang another man's land the latter has the right to cut off the overhanging portions of the trees, and he has the right also to maintain an action to enforce that right, if it is disputed, apart from any question of damages. [p. 629, col. 2.]

A custom that a person over whose land trees belonging to another overhang is not entitled to complain is neither definite nor reasonable. [p. 630, col. 1.]

Quære.—Whether the right to retain trees overhanging another's land is a customary easement within the meaning of section 18 of the Easements Act?

Second appeal from the decision of the Assistant Judge at Ratnagiri, in Appeal No. 1 of 1916, confirming the decree passed by the Subordinate Judge at Chiplun, in Civil Suit No. 262 of 1915.

Mr. *P. V. Nijsure*, for the Appellant.

Mr. *N. V. Gokhale*, for the Respondent.

JUDGMENT.

SHAH, J.—This second appeal arises out of a suit brought by the plaintiff for an injunction ordering the defendant to remove the trees overhanging his land and for damages. Both the lower Courts have allowed the plaintiff's claim as to the injunction, and directed that the defendant should remove and cut off the portions of the trees in suit which overhang the land of the plaintiff at his expense, failing which the plaintiff is to be at liberty to cut them down at defendant's costs. The damages were not proved and the claim as to damages was consequently disallowed.

In the appeal before us two points have been urged by Mr. Nijsure: *first*, that, as no damages are proved, no injunction could be granted; and, *secondly*, that the defendant should have been allowed to prove the alleged local custom as to his right to retain the trees overhanging the plaintiff's land.

As to the first point I have no hesitation in disallowing the appellant's contention. It is clear on the authorities, and for the purpose of this point it is not disputed before us, that the plaintiff has the right to cut off those portions of the trees which overhang his land. This right is recognized in *Lemmon* v. *Webb* (1), *Hari Krishna Joshi* v. *Shankar Vithal* (2) and *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (3). It is conceded that if the plaintiff had sued only for an injunction he could have maintained the action. The last two of the cases cited above are instances of such actions. But it is urged that as the plaintiff has in fact claimed damages and has failed to prove them, his claim as to injunction cannot be allowed. No authority is cited in support of this proposition, and on principle I am unable to make his claim for an injunction dependent upon his ability to prove actual damages. The plaintiff has the right to cut off the overhanging portions of the trees, and, in my opinion, he has the right also to maintain an action to enforce that right if it is disputed, apart from any question of damages. In the present case the matter does not rest there. It has been found by both the Courts that the overhanging trees are likely to cause damage to the plaintiff. Under these circumstances the first point fails.

As regards the alleged custom, the defendant described the custom in the written statement in these terms: "No owner of plantation can make a complaint against another owner even if these trees grow in any direction in the air. There is a Vahivat (custom) to this effect in our province continuing for over thousands of years." When the issues were framed, there was no specific issue raised as to this custom. After the hearing of the suit commenced, an application was made on the 29th of November 1915 in which the defendant requested the Court to raise the issue as to custom

(1) (1895) A. C. 1; 64 L. J. Ch. 205; 11 R. 116; 71 L. T. 647; 59 J. P. 564.
(2) 19 B. 420; 10 Ind. Dec. (N.S.) 284.
(3) 31 C. 944; 8 C. W. N. 719.

in these terms: "Does defendant prove that there is a custom in the village not to complain against overhanging of cocoanut trees over every neighbour's land?" The trial Court disallowed the application of the defendant for this issue and the evidence relating to it. It is urged before us that the trial Court should have allowed the defendant an opportunity of proving this custom. Having regard to the terms of the issue it seems to me that the trial Court was right in disallowing the defendant's application. As stated in the written statement and as indicated in the proposed issue, there is a custom in the village not to complain against the overhanging of cocoanut trees over neighbours' lands. It seems to me that such a custom would not be reasonable and cannot be pleaded. In effect it amounts to a plea that a person whose right to land is infringed cannot sue in respect of that infringement. Apart from the form in which the alleged custom is stated by the defendant, it seems to me that in substance it is indefinite and vague; and, in my opinion, it will serve no useful purpose to direct at this stage an enquiry as to a custom, which, as stated by the defendant, does not appear to be either reasonable or definite.

In this view of the case it is not necessary to consider Mr. Gokhale's argument on behalf of the respondent that there could be no customary easement in respect of the right to overhang the trees on a neighbour's land as such a right is not an easement within the meaning of the definition of 'easement' under the Indian Easements Act. I express no opinion on the general question as to whether the right to retain the trees overhanging the neighbour's land is a customary easement within the meaning of section 18 of the Indian Easements Act.

On these grounds I would dismiss this appeal and confirm the decree of the lower Appellate Court with costs.

KEMP, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1114 OF 1916.

January 22, 1918.

Present:—Mr Justice Spencer and Mr. Justice Bakewell.

KUTTIVENTI VENKATARAMANAMURTHI—DEFENDANT No. 3—APPELLANT

versus

MACHERLA SUNDARA RAMIAH AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1, 2, 4 AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 36, 47, O. XXI, rr. 53 (3), 93, O. XXXIV, r. 14—Maintenance, decree for, charged on immoveable property—Execution.—Sale of property charged- Sale, setting aside of—Order for re-payment of purchase-money, enforceability of.

There is nothing in Order XXXIV, rule 14, Civil Procedure Code, to prevent a maintenance decree-holder from proceeding in execution against the properties charged under the maintenance decree. [p. 631, col 2.]

Sowbagia Ammal v. *Manika Mudali*, 42 Ind. Cas. 975; 33 M. L. J. 601; 22 M. L. T. 386; (1917) M. W. N. 782; 6 L. W. 701, followed

Venkatasubhamma v. *Venkanna*, 17 M. L. J. 217, not followed

Where a property charged with maintenance is brought to sale, but the sale is subsequently set aside, the purchaser is entitled under Order XXI, rule 93, Civil Procedure Code, to an order for refund of the purchase-money with or without interest in the Court's discretion and to execute the order under section 36 as if it were a decree. [p. 631, col. 1.]

In such a case the purchaser can enforce payment of the amount ordered to be refunded to him by attaching the maintenance decree and executing it under Order XXI, rule 53 (3) of the Civil Procedure Code. [p. 632, col. 1.]

Second appeal against the decree of the District Court, Godaveri at Rajahmundry, in Appeal Suit No. 54 of 1915, preferred against the decree of the Court of the Principal District Munsif, Rajahmundry, in Original Suit No. 541 of 1911.

Mr. *B. Appa Rao*, for the Appellant

Mr. *P. Somasundaram* for Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT—The first defendant obtained a decree for maintenance against defendants Nos. 2 to 5. By the decree a charge was created over certain immoveable property concerned in the present suit. In executing the decree the property which was subject to the charge was attached and sold for Rs. 900. The plaintiff was the purchaser. He paid the purchase money into Court, and the first defendant drew out Rs. 365-7-0 of it. On 3rd defendant's petition the sale was subsequently set aside on the 14th September 1909. The plaintiff applied for a

refund of his purchase-money and obtained an order on 1st December 1908 that 1st defendant should within one month deposit in Court the money drawn out by her with interest at 6 per cent.

Subsequently in execution of that order he attached on 15th December 1908 1st defendant's maintenance decree. He applied to sell the property charged under the maintenance decree but his application was dismissed on 22nd April 1910, for what reason it is not clear, from the records before us. Finally he brought this suit in 1911 against defendants Nos. 1 to 5 to recover the purchase-money. In the plaint there is a prayer for sale of the debt of Rs. 607 due to 1st defendant from defendants Nos. 2 to 5. But the Courts below have treated this as a suit by the holder of a decree to enforce a charge and have passed decrees in the form prescribed by Order XXXIV, rule 4 (1), Civil Procedure Code.

The points argued in second appeal are (1) whether the plaintiff's suit is maintainable in its present form; (2) whether the plaintiff is entitled to recover from defendants Nos. 2 to 5 the amount due to 1st defendant up to the date of his attachment of the maintenance decree or the amount due to her on the date when this suit was instituted.

In considering the maintainability of the present suit it is necessary to keep distinct the plaintiff's cause of action to recover from 1st defendant the amount of purchase-money taken out of Court to which he alone became entitled upon the sale being set aside, and his cause of action as against defendants Nos. 2 to 5, who are the judgment debtors in the maintenance suit, to execute the decree attached by him as if he were the original decree-holder.

As against 1st defendant the plaintiff as purchaser was entitled by Order XXI, rule 93, to an order for repayment of his purchase-money with or without interest and to execute the order under section 36, Civil Procedure Code, as if it was a decree. He appears to have followed this procedure when he obtained the order of 1st December 1908 and to have executed the order when he attached the maintenance decree.

The interest the plaintiff is entitled to against 1st defendant is interest up to the date of repayment of the purchase-money taken by her. Under Order XXI, rule 93, it was discretionary with the Court to direct the payment of interest and the Court in its order of 1st December in fact fixed the interest at 6 per cent. up to the date of payment. Having got this order it was unnecessary for the plaintiff to get a personal decree against this defendant; but in order that she might be bound by the order or decree to be obtained against defendants Nos. 2 to 5, it might have been advisable to make her a party to any proceedings against the family property of defendants Nos. 2 to 5.

As between defendants Nos. 2 to 5 and the plaintiff there is no privity of contract for the return of his purchase-money. He can only recover it by virtue of his right to step into the shoes of the maintenance decree-holder and to execute her decree in any manner lawful to her [Order XXI, rule 53 (3)].

It was held in *Venkatasubhamma* v. *Venkanna* (1) that the maintenance decree-holder must institute a fresh suit and could not, in execution of his or her maintenance decree, bring to sale the properties made subject by that decree to a charge for maintenance. Section 99 of the Transfer of Property Act, which was held to preclude the decree-holder from proceeding in execution, has since been repealed, and it has recently been decided by this Court in *Sowbagia Ammal* v. *Manika Mudali* (2) that there is nothing in Order XXXIV, rule 14, which has taken the place of section 99, Transfer of Property Act, to prevent a maintenance decree-holder from proceeding in execution against the properties charged under the maintenance decree. The learned Judges who decided that case remarked that the position of a widow who, by virtue of her maintenance decree, for the first time acquires a charge on specified immoveable properties, is different from that of a holder of a charge under section 100 of the Transfer of Property Act (although section 100 speaks of charges arising by operation of law as well as those created by act of parties), and that it does not fall within the scope of Order

(1) 17 M. L. J. 217.

(2) 42 Ind. Cas. 975; 33 M. L. J. 601; 22 M. L. T. 386; (1917) M. W. N. 782; 6 L. W. 701.

XXXIV, rule 14 We are not prepared to dissent from their opinion.

Accordingly it was open to the plaintiff as representative of the maintenance decree-holder under Order XXI, rule 53, to proceed to attach and bring to sale the defendants' immoveable property. Instead of doing so he has launched this suit, alleging in his plaint that all the parties agreed that that was his only remedy. The question of estoppel has been argued before us but it is unnecessary to go into it, as there was no issue raised on the point at the trial and as the plaintiff's suit need not be dismissed simply on the ground that his proper remedy lay in execution, seeing that under section 47, Civil Procedure Code, it was always open to the Court in which the suit was instituted to treat the suit as a proceeding and deal with it accordingly.

The objection to the suit is a good objection. The plaintiff is not the holder of the charge nor the transferee of the maintenance decree-holder's interest. He has not as yet brought the maintenance decree to sale and purchased it himself. He has not done more than attach the decree, an act which gives him a right to execute the decree by virtue of Order XXI, rule 53 (3), but not a right to institute a suit as mortgagee for the sale of the mortgaged property, as that right remains vested in the holder of the charge or mortgage, namely, 1st defendant. As regards interest the plaintiff appears to be entitled to recover it up to the date of repayment of his purchase-money from the defendants Nos. 2 to 5 to an extent not exceeding the past and future maintenance due to 1st defendant on the date of plaintiff's instituting these proceedings. The Appellate Court has exonerated 1st defendant from interest and the plaintiff has not appealed.

We allow the 3rd defendant's appeal with costs here and in the Courts below, and we remand the plaintiff's suit to the Court of the District Munsif for being disposed of as a proceeding in execution under section 47 (2), Civil Procedure Code.

Appeal allowed;
Case remanded.

M. C. P.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 12, 1917.

Present:—Lord Parker of Waddington, Lord Wrenbury, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

Musammat SAKINA BAI AND OTHERS—APPELLANTS

versus

KANIZ FATIMA BEGUM—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (g)—Grant, construction of—Sanad granting 'taluka' *in lieu of pension*—'Taluka', *whether can be attached.*

The operative part of a *sanad* recited that Government had granted a *taluka* with all lands cultivated or uncultivated to one *K.* for his life as revenue-free *jagir* by way of maintenance and that after the death of *K* the *ilaka* would continue to stand in the name of his children as a permanent *zemindari* assessed to a light amount of *jama*:

Held, (1) that the subject-matter of the grant was land and not a money payment in the nature of a pension and was not, therefere, exempt from attachment under section 60 (*g*) of the Civil Procedure Code; [p. 633, col. 1.]

(2) that the grant was a maintenance grant in the case of *K.* but not in the case of his children. [p. 633, col. 2.]

Appeal from a judgment and decree of the Allahabad High Court (Mr. Justice Piggott and Mr. Justice Rafique), dated the 24th March 1914, reported as 25 Ind. Cas. 120.

Mr. *B. Dube*, for the Appellants.

Messrs. *A. M. Dunne*, *K. C.*, and *Ramsay*, for the Respondent.

JUDGMENT.

LORD PARKER OF WADDINGTON.—In this case the respondent, a widow, having obtained a decree for dower against the appellants, attached a number of villages inherited by the judgment-debtors from her deceased husband. Objection was taken to the attachment on the ground that the villages constituted a political pension within section (60) (*g*) of the Code of Civil Procedure. The Subordinate Judge upheld this objection, but his decision was reversed on appeal by the High Court of Allahabad. The appellants are now appealing to His Majesty in Council from the decision of the High Court.

Their Lordships are of opinion that the point at issue depends entirely upon the true construction of the Sanad under which the appellants derive their title. This Sanad, a translation of which will be found on pages 88 to 92 of the record, is dated the 13th August 1819 and it appears from the recitals (1) that one Karim Khan, the appellants' ancestor, was then entitled to

receive from the Government Rs. 16,000, whether by way of pension for his life or as a lump sum payment is not very material; (2) that the Government had recently purchased a Pargana, comprising the villages in question in the suit, from the Raja of Barhiapur; and (3) that the premises granted were intended to be in lieu of Rs. 10,000 out of the Rs. 16,000 which Karim Khan was entitled to receive

The operative part of the Sanad witnesses that the Government had granted the "Taluka" of the said Pargana together with all lands cultivated or uncultivated to Karim Khan for his life as "revenue-free Jagir by way of maintenance," and that "after the death of Karim Khan the said Ilaka will continue to stand in the names of his children and Ahfad as a permanent Zemindari assessed to a light amount of *jama*".

The appellants contend that the subject-matter of the grant witnessed by this Sanad is not the Pargana which the Government had purchased, but the revenue which prior to the purchase had been payable in respect of such Pargana. Karim Khan is, according to them, entitled to receive such revenue for his life without paying any *jama* in respect thereof. After his death his descendants are to receive it, paying a light *jama*, which will be subsequently assessed. In this way they contend that what is granted to Karim Khan for life and afterwards to his descendants, is merely the right to a money payment in the nature of a pension. The respondent, on the other hand, contends that the subject-matter of the grant is the Pargana itself with the lands, whether cultivated or waste, to be held by Karim Khan for life, revenue-free, and by his descendants after his death subject only to a light *jama*, in other words, that the subject-matter of the grant is land, and not a money payment in the nature of pension.

Their Lordships are of opinion that the contention of the respondent is correct. It may be true that the use of the words "Taluka", "Ilaka," "Jagir," and "Zemindari" is not entirely inconsistent with the appellants' construction of the Sanad, but these words point, in their Lordships' opinion, to the grant being a grant of land rather than of revenue charged on land. It will be observed that what the Khan is to enjoy for his life is the usufruct of the Ilaka, as well as the Zemindari rights. According to the appellants' contention, he is to have only Zemindari rights in the sense of a right to collect the revenue, whereas the word usufruct appears to point to an actual occupation and user of the soil, subject, of course, to the rights of third parties. The word "Jagir" primarily points to occupancy, though it may be occupancy of an office, such as that of collector of revenue. Where, however, a Jagir held for life only is, as in this Sanad, used in contradistinction to an Ilaka held as a permanent Zemindari, it is an almost necessary inference that the occupancy referred to is an occupancy of land.

Their Lordships find it impossible to distinguish this Sanad from the Sanad in question in the case of *Amna Bibi* v. *Najamunnissa Bibi* (1) and they agree with the decision in that case. They also agree with the Court below that the correspondence on which the unreported case relied on by the Subordinate Judge appears to have turned is quite irrelevant upon a question of construction.

The only other point to which reference need be made is the contention that the Sanad was in the case of the descendants of Karim Khan, as well as of Karim Khan himself, a maintenance grant, and that in consequence the premises granted, even if consisting of land, were inalienable and, therefore, not subject to attachment. The answer to this contention is a simple one. In the case of Karim Khan the grant is expressed to be for his maintenance. In the case of his descendants, it is not. The right inference, therefore, is that it was not a maintenance grant in the latter case, though it was in the former.

Their Lordships will humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Barrow, Rogers* and *Neville*.

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

(1) 2 Ind. Cas. 100; 31 A. 382; 6 A. L. J. 519; 5 M. L. T. 388.

BHARAT SINGH *v.* BINDA CHARAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 88 OF 1913.

September 9, 1915.

Present :—Mr. Stuart, A. J. C., and Syed Mohammad Ali, A. J. C.

Chaudri BHARAT SINGH—DEFENDANT—APPELLANT

versus

BINDA CHARAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6 (e)—Profits, transfer of right to receive, validity of.

A transfer of a share of the profits of a village which have at the time actually accrued due, is an assignment of a debt and not of a mere right to sue and is, therefore, not bad in law under the provisions of section 6 (*e*) of the Transfer of Property Act, although the tranfer of a right to sue is a necessary incident of the transaction [p. 634, col. 2.]

Shyam Chand Koondoo v. *Land Mortgage Bank of India, Ltd.*, 9 C 695; 12 C. L. R. 440; 4 Ind.Dec. (N. S.) 1112, *Durga Chunder Roy* v. *Koilas Chunder Roy*, 2 C. W. N. 43; *Pragi Lal* v. *Fateh Chand*, 5 A. 207; A. W. N. (1882) 219; 3 Ind. Dec. (N S.) 166 and *Abu Mahomed* v *S. C. Chunder*, 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384, distinguished from.

Appeal from the decree of the Subordinate Judge, Unao, dated the 22nd May 1913.

Mr. *J Jackson* and Babu *Aditya Prasad*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Lakshmi Narayan*, for the Respondents.

JUDGMENT.—The learned Counsel for the appellant has confined his arguments in appeal to two points only and contests the decision of the lower Court on no other point.

The first point is with regard to the legality of the assignment to plaintiffs Nos. 6—8. He contends that this assignment is bad in law under the provisions of section 6, clause (*e*), Act IV of 1882.

The second point is with regard to the amount of profits to be awarded. He contends that the terms of the *sulahnama* of 1865 are still in force and that they confine the profits to Rs. 1,200 a year, the enjoyment of certain land rent-free, and the financing of certain family ceremonies.

The respondents argued that the appellant cannot take up the first point, as he definitely abandoned it, according to their assertion, in the lower Court. We could not go so far as to say that he definitely abandoned it, and we allowed the Counsel for the appellant to argue it.

The facts are as follows:—Plaintiffs Nos. 1—5 applied to the Revenue Court for partition of a 4/5ths share in six villages. The appellant disputing their proprietary title, they filed a suit in the Civil Court on 29th June 1909, and satisfactorily established their title. The decree affirming their title and their right to partition was finally affirmed by the Court of the Judicial Commissioner on 17th February 1913. This decree impliedly gave title to plaintiffs Nos. 1—6 to recover the profits of a 4/5ths share of the six villages from the appellant from March 1904, the date of his father's death. The right of recovery was subject, of course, to the provisions of the law of limitation. On the 8th March 1912 plaintiffs Nos. 1—5 transferred to plaintiffs Nos. 6—8 (the present respondents) their rights in the profits of the three years preceding the date of the transfer, that is to say, for the three Fasli years 1317, 1318 and 1319, the Rabi profits of 1319 being in existence on 8th March 1912. The deed of transfer provided that the transferees might retain excesses in certain events, and should in other events be remunerated on a sliding scale.

There is nothing objectionable in the terms of the deed of transfer. It assigns profits actually in existence for valuable consideration. The learned Counsel for the appellant argues that it is bad in essence as a transfer of a right to sue. If it were a transfer of a mere right to sue it would be bad in law, but we consider that it is not a transfer of a mere right to sue, but an assignment of a debt. The transfer of the right to sue was a necessary incident of the transaction, but does not affect the essence of the transaction which was an assignment of a debt. That debt, though not an ascertained amount, or liquidated, was definitely ascertainable. It was not an amount awardable at the discretion or volition of a Court. It was not of the nature of damages. The appellant as Lambardar was under an obligation to disburse to the other co-sharers their legal profits, but he had to disburse them not as damages personal to himself, but as their share of the collections that he made on their behalf and his own. There is nothing in common between such profits and mesne profits to which reference is made

in *Shyam Chand Koondoo* v. *Land Mortgage Bank of India, Limited* (1) and *Durga Chunder Roy* v. *Koilas Chunder Roy* (2), which were damages due from a trespasser, or compensation for the wrongful attachment of moveable property in execution of a decree [*Pragi Lal* v. *Fateh Chand* (3)] or damages for breach of contract [*Abu Mahomed* v. *S. C. Chunder* (4)]. In all the latter cases the transfers were clearly transfers of the right to sue and nothing else, but here the situation is completely different. We, therefore, find against the contention of the learned Counsel for the appellant upon the first point.

Our decision upon the second point is that the limitation of profits under the terms of the Sulahnama of 1865 existed until the death of Lachhman Singh only. After the death of the latter the remaining sharers took the rights to profits of ordinary members of a co-parcenary body of revenue payers. This was not a case of members of a joint Hindu family.

This concludes all the points argued in the appeal. We dismiss the appeal. The appellant will pay his own costs and those of the respondents.

Appeal dismissed.

(1) 9 C. 695; 12 C. L. R. 440; 4 Ind. Dec. (N. S.) 1112.
(2) 2 C. W. N. 43.
(3) 5 A. 207; A. W. N. (1882) 219; 3 Ind. Dec. (N. S.) 166.
(4) 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 205 OF 1917.
March 14, 1918.
Present :—Mr. Justice Beaman and
Mr. Justice Heaton.
GOPAL JAYVANT SHIRGAONKAR
—PLAINTIFF—APPELLANT
versus
SHRINIWAS VITHAL PAI—DEFENDANT
—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 108 (j), 115—Lease, assignment of—Assignee, position of—Forfeiture of lease.

Section 115 of the Transfer of Property Act designedly confines forfeiture to the case of an under-lease, so that where a lessee has assigned his entire interest under the lease the assignee's interest cannot be forfeited by any act of the original lessee. [p. 635, col. 2; p. 637, col. 1.]

Appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 547 of 1915, confirming the decree passed by the Subordinate Judge, Vengurla, in Civil Suit No. 60 of 1915.

Mr. *V. D. Kamat*, for the Appellant
Mr. *Y. N. Nadkarni*, for Respondent No. 3.

JUDGMENT.

BEAMAN, J.—The plaintiff sued the defendants Nos. 1, 2 and 3 in ejectment as upon a forfeiture for the recovery of the demised land and arrears of rent primarily from defendants Nos. 1 and 2, the plaintiff's lessees, and thereafter generally, should they not be liable, from whomever the Court should find responsible. The 4th defendant is merely a tenant of defendant No. 3, and we are not concerned with her. The plaintiff's father originally let the land permanently to the grandfather of defendants Nos. 1 and 2, and defendants Nos. 1 and 2 in turn assigned this permanent lease to defendant No. 3. Now, along with the assignment of a lease go all covenants running with the land and there remain only in the assignor personal covenants or obligations which may be enforced against him by the lessor. By such assignments privity of estate is at once established between the original lessor and the assignee of the lease; and should the lessor accept rent from the assignee, then privity of contract is likewise established, and the resulting position is that the original lessee, the assignor, stands liable merely as a surety to the lessor for all the contractual covenants of the lease. I think it follows from this very clearly that mere repudiation by the original lessee of the lessor's title will not work a forfeiture against the assignee of the lease. That is the only ground upon which forfeiture was asked in the present suit. The case will be entirely different where it is a sub lease, or, as it is called in section 115 of the Transfer of Property Act, an under-lease. But having regard to the change in the legal rights and obligations of the first lessor and lessee upon the assignment of the whole lease, I think

it must follow (and this rule must be a rule without exception) that no mere act of the kind complained of by the first lessee can operate so seriously to the prejudice of the assignee of the lease. It is true that some attempt may be thought to have been made to provide against such abuses by the terms of section 115 of the Transfer of Property Act. But since that section, in my opinion, is confined, and intended to be confined, to cases of sub-leases, or under-leases or parting with part of the interest under the original lease, the principles which will come into play would be very different from those upon which the rights and obligations of a lessor and the assignee of a complete lease will have to be inquired into and determined. Therefore, I think that the Court below was quite right in rejecting the plaintiff's claim to recover possession of the land as upon a forfeiture. The assignee of the lease has never denied the plaintiff's title and has expressed himself ready and willing to pay all the rent due to the plaintiff under the assigned lease. It is true that he says that he has actually paid that rent to his assignor in the belief that he in turn was passing it on to the original lessor, the plaintiff. It is pretty clear, I think, that the plaintiff did not desire to recover the rent from the assignee, thus establishing privity of contract as well as privity of estate between them, and that is the reason, I should think, why matters have been allowed to drift on as they have done. It is also true that the rent is very small, only Rs. 3 a year, and that the plaintiff would doubtless have been very glad to forego it, if by doing so he could have regained possession of the demised land. The decree of the lower Court, however, only allows the plaintiff rent against the original lessees, defendants Nos. 1 and 2. That, in the circumstances, I think, is wrong and that the defendant No. 3 should be made under the decree jointly liable for the arrears of rent. Had he contested the point, it might have needed more consideration, but he does not contest it and his Pleader has expressed his readiness to accept joint liability for the arrears of rent decreed against defendants Nos. 1 and 2. That being so, and with that small amendment, I would confirm the decree of the lower Appellate Court, but the result would be slightly different since the suit could not be dismissed against defendants Nos. 3 and 4. And the proper order would be that the plaintiff's suit should be decreed to the extent of obtaining all arrears of rent against defendants Nos. 1, 2 and 3 jointly and that no relief need be awarded against defendant No. 4, and that the suit in so far as it was to recover possession of the land should be dismissed. But the plaintiff should have his costs throughout from defendants Nos. 1 and 2. Defendant No. 3 should pay his own costs, and the plaintiff should pay the costs of defendant No. 4 throughout.

HEATON, J.—This appeal raises an interesting and an important point. It appears that in 1867 a person, whom I will call the lessor, leased certain property to the lessee. In the year 1883 the lessee transferred absolutely the whole of his interest in the property to the father of defendant No. 3, whom I will call the assignee. Quite recently it happened that the rent was not paid by the lessee and as clause (*r*) of section 108 of the Transfer of Property Act tells us, the lessee was still liable to pay the rent, although he had parted with his interest to the assignee; though, of course, he on his part was entitled to recover whatever rent was agreed upon between him and the assignee. However, the rent payable to the lessor fell into arrears, and on a demand for it by the lessor, the lessee repudiated the lessor's title. I think that it is clear in this case that if the only persons concerned had been the lessor and the lessee the latter would have incurred a forfeiture, for a suit brought by a lessor has been held to show his intention to enforce the forfeiture and put an end to the lease. In this case, therefore, it seems to me that there is a clear case of forfeiture as between the lessor and the lessee, were they the only persons concerned. But the defendant No. 3, the assignee, very naturally asserts that at any rate there was no forfeiture of his interest in the property. He has never repudiated the lessor's title, nor has he failed to pay rent demanded from him. Both the lower Courts held that there is no forfeiture

of the interest of defendant No. 3 and the suit as regards possession has been dismissed, and I think rightly dismissed, for it is futile to grant a decree for possession against defendants Nos. 1 and 2, the representatives of the original lessees, and it would be wrong to make a decree for possession against defendant No. 3, the assignee. The reason why I think it would be wrong to make such a decree against the assignee is to be found primarily in section 115 of the Transfer of Property Act. I have already referred to clause (*j*) of section 108. That clause empowers the lessee to transfer his interest absolutely, or by way of mortgage, or by sub-lease, clearly recognising these different methods of transfer and the different interests which they cover. Then, we have the general law as to forfeiture which is contained in clause (*g*) of section 111. Then, we come to section 115, the second part of which says that the forfeiture of a lease annuls all under-leases except in particular cases which we need not consider. But it does not enact that forfeiture annuls any other kind of transfer by the lessee except the under-lease, and seeing that other kinds of transfers are, as I have pointed out, clearly recognised, I infer that the second part of section 115 designedly confines forfeiture to the case of an under-lease. That in itself would, I think, justify the inference that where the lessee has transferred his interest in other ways than by way of under-lease the transferee's interest is not forfeited by the act of the original lessee. I cannot find in the Transfer of Property Act anything which seems to me to suggest that this conclusion is erroneous. For instance, if we turn to clause (*e*) of section 111, we find forfeiture provided for where the lessee does certain things, and that word, reading this part of the Transfer of Property Act as a whole, does not seem to me to mean the lessee or his assignee. Then the provisions about the assignment, to which I have already referred, give the power of assignment and on an assignment the interest of the lessee is vested in the assignee. The general intention of the Act is made clearer still, I think, by the words of section 108, which enacts that the benefit of the lease shall be annexed to, and go with, the lessee's interest as such, and may be enforced by every person in whom that interest is from time to time vested. It seems to me, therefore, clear that the Transfer of Property Act does very emphatically recognise that his interest in the property may be transferred by a lessee to an assignee and this may be done without the consent of the lessor, and if that can be done, it seems to me to follow as a matter of reason that when the entire interest is transferred by the lessee to the assignee, then the assignee is not responsible for acts done by the lessee. His responsibilities are those arising out of his acquired interest in the property leased. That being the general conclusion at which I have arrived from a study of the provisions of the Transfer of Property Act, I think that the decrees of the lower Courts were quite correct in refusing to direct the dispossession of defendant No. 3. But as the assignee gets the interest in the property, so also he becomes liable to the obligations attaching to that interest, and one of those obligations is the payment of rent, not merely to the lessee or assignor, but to the original landlord, the lessor, and though the assignee is not under any direct obligation personally to pay the lessor, yet if the rent is not paid, the lessor can demand it not only from his original lessee but also from the person to whom the lessee's interests have been transferred. That seems to me to follow as a matter of reason just as clearly as the other conclusion follows, *i.e.*, that the assignee is not responsible for the acts of the lessee after the lessor has assigned his interest in the property.

Therefore, just as I think that the decrees of the lower Courts were right in refusing a decree of dispossession against defendant No. 3, I think they were wrong in refusing to make defendant No. 3 responsible equally with defendants Nos. 1 and 2 for the arrears of rent. And so I agree with the decree proposed by my learned brother.

Decree modified.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1849, 1852, 1853, 1855, 1856, 1858, 1859, 1861, 1863 TO 1868, 1870 TO 1873, 1876, 1878, 1883 AND 1895 of 1913.

July 8, 1918.

Present :—Mr. Justice Walmsley and Mr. Justice Panton.

AZIMUDDIN MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

TARA SANKAR GHOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Parties, necessary, not brought before Court, effect of—Bengal Tenancy Act (VIII B. C. of 1885), s. 105—Application for enhancement of rent by two landlords—Appeal dismissed as against one landlord, whether can proceed against other.

An appeal cannot proceed unless all the parties necessary for the determination of the case are brought before the Court. [p. 638, col. 2.]

In a case which arose out of an application made under section 105 of the Bengal Tenancy Act by two landlords for settlement of fair rent and for enhancement, after the decision of the lower Appellate Court one of the landlords died leaving two sons, of whom one was a major and the other a minor. The tenant defendants, who preferred an appeal to the High Court having failed to pay the costs of the Deputy Registrar who was appointed guardian of the minor son, the appeal as against him was dismissed at the risk of the appellants:

Held, that the appeal must fail in its entirety as all the parties necessary for the disposal of the case were not before the Court. [p. 639, col. 1.]

Appeals against the decision of the Special Subordinate Judge, Bogra, dated the 30th September 1912, modifying that of the Settlement Officer at Bogra, dated the 22nd November 1911.

Babus *Mahendra Nath Roy* and *Banku Behari Bhaduri*, for the Appellants.

Babus *Sarat Chunder Roy Chowdhury* and *Bhudeb Chandra Roy*, for the Respondents.

JUDGMENT.

WALMSLEY, J.—These appeals are by the tenants and they arise out of proceedings under section 105 of the Bengal Tenancy Act. The plaintiffs were the two landlords Tara Sankar and Kali Sankar. After the decision of the lower Appellate Court, Kali Sankar died leaving two sons, Asutosh a major and Sudhansu a minor. The appellants applied to have the heirs of Kali Sankar substituted and caused a notice to be issued to Asutosh calling upon him to show cause why he should not be appointed guardian of his minor brother. Asutosh did not appear. Orders were then passed by the Court that the Deputy Registrar should be appointed guardian of Sudhansu. Defendants failed to pay the costs of the Deputy Registrar, with the result that on 12th June 1918 a Bench of this Court ordered that the appeals should stand dismissed as against the minor at the risk of the appellants. The only respondents, therefore, now before the Court are Tara Sankar, one of the original plaintiffs, and Asutosh, one of the two sons of the second plaintiff.

A preliminary objection is taken on behalf of the respondents that in the absence of Sudhansu the appeals cannot proceed on the ground that all the parties necessary for the determination of the case are not before the Court. It is pointed out that the case arose out of an application made under section 105 of the Bengal Tenancy Act for settlement of fair rents and for enhancement and that such an application must under section 188 be made by all the landlords; but the result of what has happened in the course of the present appeals is that one of the landlords is now absent. Reference is made to the case of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1), where a somewhat similar situation arose. The Judges there held, "The decree was a joint decree in favour of all the plaintiffs, and if the defendant desired to question the correctness of that decree, he was bound to bring before the Court all the parties affected by that decree," and the appeal was dismissed as he had not done so. Another case is *Tarip Dafadar* v. *Khote annessa* (2). A third case is *Basir Sheikh* v. *Fazle Karim Biswas* (3). It is urged on behalf of the tenants that between the case of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1) and that of *Basir Sheikh* v. *Fazle Karim Biswas* (3) the new Civil Procedure Code came into force; and the difference between Order XXII, rule 4, of the new Code and section 368 of the old Code is emphasized. Under the law as it now stands the words "as against the deceased defendant" have been added after the words "the suit shall abate." It is also pointed out that in the case of *Basir Sheikh* v. *Fazle Karim Biswas* (3) the Judges proceeded very much on the

(1) 6 C. W. N. 192 at p. 196.
(2) 10 C. W. N. 981.
(3) 28 Ind. Cas. 703; 19 C. W. N. 290.

ground that two of the plaintiffs being omitted from the appeal they would be able to execute the decree in its entirety. That is one of the reasons given. But the learned Judges also referred to the cases of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1) and *Tarip Dofadar* v. *Khotejannessa* (2) which I have just mentioned, and it appears to me that those earlier cases proceeded not on the words of section 368 but on the general principle that all the parties necessary for the disposal of the case must be brought before the Court.

I think, therefore, that the preliminary objection must be sustained and the appeals referred by the tenants be dismissed with costs, one gold *mohur* in each case.

The learned Vakil on behalf of the landlords intimates that he withdraws the cross-objections filed in connection with these appeals. We make no order as to costs, in the cross-objections.

PANTON, J.—I agree.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 40 OF 1916.

November 28, 1916.

Present:—Mr. Daniels, A J.C

Pandit IQBAL NARAIN—DECREE-HOLDER—APPELLANT

versus

JASKARAN AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXI, r. 14, applicability of—Decree for sale on mortgage—Execution Attachment, whether necessary.

A preliminary attachment is not necessary in cases where an application is made for sale in execution of a decree passed for sale of mortgaged property, and therefore Order XXI, rule 14, Civil Procedure Code, does not apply to such an application.

Appeal against the order of the District Judge, Lucknow, dated the 8th September 1916, upholding that of the Munsif, North Lucknow, dated the 13th July 1916.

JUDGMENT—These are two connected appeals in an execution case coming under section 47, Civil Procedure Code. The execution applications were dismissed by the Munsif under Order XXI, rule 14, for failure to produce a certified extract from the *khewat* as ordered. The appeals have been dismissed by the District Judge and the decree-holder appeals. It appears to me that the appellant is right in his contentions that Order XXI, rule 14, does not apply. In neither case was the application one for the attachment of land. The decree passed was one for sale on a mortgage where a preliminary attachment is not necessary, and the execution applications, which I have perused, merely ask for sale of the property, not for its attachment. In Appeal No. 40 there is an additional reason why the rule does not apply as the application does not relate to land at all. The property the sale of which is asked for consists exclusively of trees. I accordingly allow both appeals and direct that the execution applications be restored to the file. The appellant will have costs of the appeals.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 80 OF 1917.

March 22, 1918.

Present :—Mr. Justice Beaman and Mr. Justice Heaton.

BHARMA SHIDAPPA BHORE—PLAINTIFF—APPELLANT

versus

BALARAM SAKHARAM GUJAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 119—Suit to establish adoption—Limitation.

Where an adoption is challenged and the rights of the adopted son are interfered with, the latter is bound to bring his suit to establish his adoption within six years of the interference under Article 119 of Schedule I of the Limitation Act. [p. 640, col. 2.]

Plaintiff's adoption was challenged in 1901 and a decree was passed against him. In 1913 he brought a suit for a declaration that he was not bound by the decree in the former suit:

Held, that the plaintiff having failed to establish his adoption within six years of the decree in the former suit, the present suit was barred by time. [p. 640, col. 2.]

VANAMATTI SATTERAJU *v.* BOLLAPRAGADA PALLAMRAJU.

Appeal against the decision of the District Judge, Belgaum, in Appeal No. 92 of 1914, confirming the decree passed by the Subordinate Judge at Chikodi, in Civil Suit No. 5 of 1915.

Mr. *V. D. Limaye*, for the Appellant.

Mr. *Nilkanth Atmaram*, for Respondent No. 1.

Mr. *P. V. Kane*, for Respondent No. 2.

JUDGMENT.

BEAMAN, J.—In my opinion the Courts below were right in holding this suit barred. The plaintiff's adoption was challenged in 1901 and his rights were clearly interfered with as a result of that litigation. That is plain from the frame of the present suit, in which he seeks to have it declared that he is not bound by the decrees in the former suit. It is, therefore, in my opinion, clearly a case within the principle of *Jagadamba's case* [*Jogadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (1)]. That case was made the foundation of a Full Bench decision of this Court in *Shrinivas* v. *Hanmant* (2) and although there have been two later decisions of the Privy Council in the cases of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (3) and *Muhammad Umar Khan* v. *Muhammad Niaz-ud-Din Khan* (4), which may appear to conflict with the principle of *Jagadamba's case* (1), it was pointed out by a Bench of this Court in the case of *Shrinivas Sarjerao* v. *Balvant Venkatesh* (5) that those decisions left the authority of *Shrinivas* v. *Hanmant* (2), as far as this Court is concerned, quite unshaken. I entirely concur with that view. Having carefully considered those decisions of the Privy Council, it is clear that neither of them professes to overrule *Jagadamba's case* (1), although without any reference to it there is one sentence in the later Privy Council case which appears to conflict with it. However that may be, we are bound by the authority of our own High Court. Under that authority the plaintiff was bound to bring his suit within six years to establish his adoption. He failed to do so; and, inasmuch as he admittedly cannot succeed in this litigation without establishing the validity of his adoption, it follows that his present suit is out of time and ought to have been dismissed, as it was dismissed by the lower Courts, with all costs upon the plaintiff. I think this appeal must likewise be dismissed with all costs upon the plaintiff.

HEATON, J.—I concur.

Appeal dismissed.

(1) 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. s.) 705 (P. C.).

(2) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N.s.) 709 (F. B.).

(3) 33 I. A 156; 8 Bom. L. R. 722; 10 C. W. N. 1065; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727 (P. C.).

(4) 13 Ind. Cas. 344; 39 I. A. 19; 14 Bom. L. R. 182; 39 C. 418; 126 P. R. 1912; 6 P. W. R. 1912; 12 P. L. R. 1912; 22 M. L. J. 240; 11 M. L. T. 76; (1912) M. W. N. 77; 9 A. L. J. 137; 16 C. W. N. 458; 15 C. L. J. 172 (P. C.).

(5) 20 Ind. Cas. 162; 37 B. 513; 15 Bom. L. R. 533.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 934 OF 1917.

March 26, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts Trotter.

VANAMATTI SATTERAJU—PLAINTIFF—APPELLANT

versus

BOLLAPRAGADA PALLAMRAJU AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 239—Partnership—Sailing vessel, co-owners of—Freight and earnings of ship—Accounts, claim for, on basis of partnership, maintainability of.

Co-owners of a vessel are not, as such, partners, but only tenants-in-common, but if the vessel is put to use to earn freight, the co-owners become partners in the employment. [p. 642, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit 92 of 1916, preferred against the decree of the Court of the District Munsif, Cocanada, in Original Suit No. 353 of 1915.

Mr. *A. Kirshnaswami Aiyar*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for a decree for the dissolution of his partnership with the defendants and the learned Sub-Judge dismissed the plaintiff's suit on

a point taken for the first time in his Court, namely, that the suit was not maintainable as, assuming the facts alleged in the plaint to be true, there was, in law, no partnership.

These facts were contained in the 3rd, 4th and 5th paragraphs. Paragraph 3 says that the plaintiff and the 1st defendant entered into an arrangement in or about December 1907 to construct at their joint expense a boat and another smaller boat attached to it, the plaintiff making certain advances towards it, among certain other stipulations which need not be gone into in detail, and agreeing that the licenses, when the boat was completed, should be taken in the name of the 1st defendant, that the boats should be plied for hire, that the 1st defendant should keep the accounts and that net profits and losses derived from the user of the boats should be shared equally between the plaintiff and the defendants. Paragraph 4 sets out the amount advanced by the plaintiff towards the capital and paragraph 5 states that the 1st defendant had been letting the boat for hire and managing the whole business and had earned large sums of money by way of profit from her use, for which he had not accounted to the plaintiff.

Now, the learned Subordinate Judge, having perused a section in Lord Lindley on Partnership on this extremely difficult subject, apparently has come to the conclusion that people who own a ship in common in no circumstances are partners. The law of England no doubt is that a mere part ownership of a ship does not constitute the relation of a partner. That is clearly stated in all the books and in all the cases. And there is no doubt that section 239 of the Indian Contract Act has tended to import into the law of this country some of the very fine distinctions derived from the law of England, where special reasons of public policy led to the making of these close distinctions between mere co ownership and co-partnership in regard to the vessels. Although it is quite true that the co-ownership in a vessel does not constitute the relation of partners but merely that of tenants in-common, yet when the ship begins to be put to use, to earn freight, a very different state of things exists. Abbott on Merchant Shipping, Part I, Chapter III, page 132 of the 14th Edition, says this: "*Firstly*, co-owners are, as such, tenants-in common of their ship : and, *secondly*, if they employ their ship in earning freight, or otherwise as a money making machine, they become joint adventurers or partners in the employment," and for that proposition *Green* v. *Briggs* (1) is cited. That is a very long judgment of Wigram, V. C., and he cites *Holderness* v. *Shackels* (2) and says this: "The Court distinguished between the ship itself and her earnings; and held in that case that although part owners were tenants-in-common of the ship, they were jointly interested in the use and employment of the ship, and that the law as to earnings must follow the law in partnership cases." And in *Hill, Ex parte* (3), the Vice-Chancellor said : "There is no lien on the ship because that was not joint property, but the earnings of the ship would have been joint property and liable to the joint creditors, not from any doctrine peculiar to the earnings of a ship, but on the general principles applicable to the joint property of every partnership. If, in this case, the *Thames* had been employed on a whaling voyage, and the money now at the Bank represented the cargo, no dispute could have arisen. Then is freight, *qua* earnings, distinguishable from other earnings of a ship, for the purpose under consideration? In the absence of authority establishing such distinction, or a clear principle requiring me to adopt it, I will not admit it."

In *Young, Ex parte* (4), one of the cases relied on by the respondents' Vakil, in which Lord Elden's mind was distinctly called to the distinction between the ship and her earnings, he said, "I have no doubt that freight is liable to the joint demand. As to the ship, it stands upon the nice distinction of a tenancy-in common".

And I notice that Lord Lindley points out there are two cases under the English Law

(1) (1848) 17 L. J. Ch. 323; 6 Hare 395; 67 E. R. 1219; 12 Jur. 326; 77 R. R. 156.

(2) (1828) 8 B. & C. 612; 3 Man. & Ry. 25; Dan. & Ll. 203; 7 L. J. K. B. (o. s.) 80; 108 E. R. 1170; 32 R. R. 496.

(3) (1815) 1 Madd. 61; 56 E. R. 24.

(4) (1813) 2 V. & B. 242; 35 E. R. 311; 13 R. R. 73.

of employment of a ship, one is where she is employed by some only of the total co-owners, which, in English Law, can be done against the will of the rest. For reasons of public policy it has been held that the majority of the co-owners of the ship who wish to employ her may force the hands of others. Therefore, one sees that, if a ship is employed under these conditions, it may very well be right that the law should guard the unwilling co-owners from being made co-adventurers in an employment which they did not approve of. With regard to the second case what Lord Lindley says at page 37 is this: "Where a ship is employed by all the part-owners, or by some of them, but not against the will of the others, they all share her gross earnings, and contribute to the expenses incurred in obtaining them and in such a case there is little, if any, difference between the account which is taken between the part owners and that which would be taken if they were actually partners." And similarly Abbott lays it down quite plainly at page 133 that "each part owner, who does not before the commencement of an adventure effectually withdraw authority from his co-owners to sail the ship on his behalf, is liable as a partner for the whole of the expenses of that adventure." We, therefore, hold that, so far as the earnings of the ship go as regards the freight that she earns, on the allegations in the plaint there exists a partnership between the plaintiff and the defendants, and the plaintiff, if he can prove these allegations, will be entitled to a dissolution of partnership and taking of accounts as regards freight. But he is not a partner but only a co-owner in respect of the actual hull of the ship and he will not be entitled, in any event, to have his prayer granted as regards the sale of the boat or boats used by the partnership.

The preliminary objection on which the learned Subordinate Judge dismissed the case was due to a misapprehension and it must be remanded to him for disposal upon the merits. The appellant will have the costs in this Court. The costs in the Courts below will be costs in the cause.

M. C. P.

Appeal allowed;
Case remanded.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1213 OF 1917.

April 11, 1918.

Present :—Mr. Justice Kajiji.

P. W. MONIE AND OTHERS—PLAINTIFFS

versus

THE REV. ROBERT SCOTT—DEFENDANT.

City of Bombay Municipal Act (III of 1888), *ss.* 140 (c), 143 (1) (a), (2) (d)—*Universities Act (VIII of* 1904), *ss.* 21 (1) (c), (f), 25 (1), (2) (m)—*College hostel, whether liable to be assessed to general tax—Hostel fee, whether rent—Charitable purpose, what is—Portions occupied by Superintendent and Professor—Civil Procedure Code (Act V of* 1908), *s.* 90, *O. XXXVI—Special case, whether can be re-opened.*

The extra sum paid by the resident students of a College in respect of hostel accomodation is not paid as rent within the meaning of sub-clause (*d*) of section 143 (2) of the City of Bombay Municipal Act, but is an additional fee paid by them for the advantages derived by them and more attention paid to them for looking after their social, moral and physical welfare than the non-resident students of the College. [p. 644, col. 1.]

The portions of a College hostel occupied by the resident students of the College are exempt from taxation under section 140 (*c*) of the City of Bombay Municipal Act, as they are exclusively occupied for charitable purposes within the meaning of section 143 (1) (*a*) of the Act. [p. 644, col. 2.]

The portions of a College hostel occupied by the Superintendent or a Professor and the peons are exempt from taxation under section 143 (1) (*a*) of the City of Bombay Municipal Act, if the presence of the occupants on the premises is absolutely necessary for the discharge of their duties of supervision and physical welfare of the students as required by section 21 (1) (*c*) of the Universities Act. [p. 645, col. 1.]

It is settled practice that where a special case is stated by consent, it can only be re-opened by mutual consent. [p. 645, col. 1.]

Mr. *Campbell* (with him Mr. *Inverarity*), for the Plaintiffs.

Mr. *Mirza* (with him Mr. *Setalvad*), for the Defendant.

JUDGMENT.—This is a case stated for the opinion of the Court under section 90 and Order XXXVI of the Code of Civil Procedure. The plaintiffs, who are the Municipal Commissioner and the Municipal Corporation for the City of Bombay, seek to recover from the defendant, who is the present acting Principal of the Wilson College, municipal property taxes in respect of the buildings known as hostels belonging to that College. The Wilson College is affiliated to the University of Bombay. Section 21 (1) of the Indian Universities Act, 1904, provides that a College apply-

ing for affiliation to an University must satisfy the Syndicate of the University, *inter alia*, "(*c*) that the buildings in which the College is to be located are suitable, and that provision will be made, in conformity with the regulations, for the residence, in the College or in lodgings approved by the College, of students not residing with their parents or guardians, and for the supervision and physical welfare of students;" "(*f*) that due provision will, so far as circumstances may permit, be made for the residence of the Head of the College and some members of the teaching staff in or near the College or the place provided for the residence of students."

Under section 25 (1) and (2) (*m*) the Senate of an University is empowered with the sanction of the Government to make regulations to provide, *inter alia*, for the residence and conduct of students, and the Senate of the Bombay University has accordingly made the following regulation, *viz.*, "that each College shall provide residential quarters for such a percentage of its students as the Syndicate may from time to time approve." In order to satisfy the requirements of the provisions of section 21 (1) (*c*) of the Indian Universities Act, 1904, and pursuant to the above quoted regulation, the Wilson College has erected three buildings known as hostels, two of which are in the College compound and the third in close proximity to the same, for the use of its students. The first is capable of accommodating thirty students, the second, forty-four students, and the third, one hundred and twenty-six students. It appears that in addition to the students an European Professor and an Indian Superintendent reside in the first and second hostels and an European Superintendent and an Assistant Superintendent reside in the third hostel, and that all these are on the staff of the College. In the second hostel a peon is accommodated in the outer compound. The fees payable by students of the Wilson College in respect of each of the two terms in a year are as follows:—

1 Non-resident students, Rs. 48, and a sum of Rs. 3 as subscription towards the Gymkhana.

2. Resident students the above sums of Rs. 48 and Rs. 3 and an additional fee—the average amount of which is about Rs. 23.

Pursuant to section 140 (*c*) of the City of Bombay Municipal Act, 1888, the Municipal Commissioner has caused the three hostels to be assessed for payment of the general tax as set out in paragraphs 8 and 9 of the case.

The defendant contends that the Wilson College is exempt under section 143 (1) (*a*) and (2) (*d*) of the City of Bombay Municipal Act, 1888, from payment of the general tax in respect of the three hostels. Section 143 (1) (*a*) and (2) (*d*) runs as follows:—

"(1) The general tax shall be levied in respect of all buildings and lands in the city, except

(*a*) Buildings and lands or portions thereof exclusively occupied for public worship or for charitable purposes;

(2) The following buildings and lands or portions thereof shall not be deemed to be buildings exclusively occupied for public worship or for charitable purposes within the meaning of clause (*a*), *viz.*,

(*d*) Those in respect of which rent is derived, whether such rent is or is not applied exclusively to religious or charitable purposes."

Mr. Campbell for the plaintiffs has very fairly conceded that he is not going to contend that the fees paid by the resident students are rent within the meaning of subsection (2) (*d*) of section 143 of the City of Bombay Municipal Act, 1888. The main contention of Mr. Campbell for the plaintiffs is that these three hostels are not exclusively occupied for charitable purposes.

It seems to me that it would be better and certainly more convenient to divide for the purposes of argument hostels into portions occupied by students, and portions occupied by the Professor, Superintendents and Assistant Superintendent. The plaintiffs contend that both these portions are rateable for payment of general tax, as they are not exclusively occupied for charitable purposes within the meaning of section 143 (1) (*c*) of the City of Bombay Municipal Act. The onus to prove that they are so occupied is on the defendant. Let us, then, first consider the question of the portion occupied by students. From the statement of the case it appears that the resident students on an average pay Rs. 23 more per term than the non-resident students. Then the

question arises: Are students tenants of the College? In my opinion they are clearly not; for none of the incidents relating to tenancy exists in a case like this. The students have to observe certain rules framed for regulating their conduct; they are liable to be turned out of their rooms at any time without notice and without refund of fees or part of fees. Certain restrictions are placed even on their user of the rooms in their occupation, and it is evident that there would be no discipline if these students were regarded as regular tenants of the College and had their legal rights of tenants. I, therefore, hold that the extra sum paid by resident students is not paid as rent within the meaning of sub clause (*d*) of section 143 (2) of the City of Bombay Municipal Act, but is an additional fee paid by them for the advantages derived by them and more attention paid to them for looking after their social, moral and physical welfare than the non-resident students of the College who pay a less fee.

Then the next question for consideration is that—is the portion of the hostels occupied by the students exclusively occupied for charitable purposes within the meaning of section 143 (1) (*a*)? It must be borne in mind that the words "charitable purposes" must not be taken in their popular sense and as it was held in the case of *University of Bombay* v. *Municipal Commissioner, Bombay* (1), the words "charitable purposes" have acquired a technical meaning in the Presidency of Bombay and in that sense they include all purposes within the meaning of Statute 43 Eliz., c. IV. It is not disputed that the College is a charitable institution. Then, is the hostel an integral part of the College as contended by Mr. Mirza for the defendant? In my opinion, the hostel cannot be considered a part of the College but must be regarded as a separate institution which every College must erect and maintain; for the Indian Universities Act, 1904, contemplates that the College authorities will provide accommodation in the College itself or in some convenient building near it for the residence of the students who are not living with their parents or guardians and for some members of the teaching staff in or near the College or the place provided for the residence of such students. Therefore, it is incumbent upon every College affiliated to the University to provide quarters for such students. Further, it is admitted that the Syndicate of the University requires the College authorities to submit periodically a statement of students for whom residence is provided in the hostel. I must, therefore, hold that hostels are erected and maintained by the College as part of the general educational scheme of the country and the object of the hostel is the advancement of learning and it, therefore, falls within the general objects which are charitable and which are mentioned by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (2) and, therefore, the portions occupied by the resident students are exempt from taxation, as they are exclusively occupied for charitable purposes within the meaning of section 143 (1) (*a*) of the City of Bombay Municipal Act.

Now as to the portion occupied by the Professor and Superintendents. On behalf of the plaintiffs it is contended that this occupation must be held to be a beneficial one and therefore rateable. Bearing in mind the fact that hostels are provided for residence of students who do not reside with their parents or guardians and that the Indian Universities Act, 1904, section 21 (1) (*c*), contemplates that the College authorities will perform the duty of supervising, looking after and taking care of students residing in the hostel, how can a College discharge the duty imposed upon them by the Legislature except some one, or so many of their teaching staff as are necessary, reside in the hostel? That is why a Superintendent is given quarters in the hostel for the proper discharge of the duties imposed upon them by the College authorities and as required by the Indian Universities Act. In my opinion, it is absolutely necessary for the scheme of education that provision must be made for the residence of necessary members of the teaching staff to reside in the quarters provided for students. Residence for such members is compulsory for the scheme of education for the proper discharge of their duties. Materials and details are

(1) 16 B. 217; 8 Ind. Dec. (N. S.) 623.

(2) (1891) A. C. 531 at p. 583; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J. P. 805.

necessary to come to a definite conclusion as to whether more than one Superintendent is necessary for the proper supervision and physical welfare of students or that the portions now occupied by a Professor and Superintendents are absolutely necessary for that purpose, or that any portion of such quarters is used for any other purpose. These are considerations necessary to determine the question before the Court: *Bent* v. *Roberts* (3) and the case of *The Oxford Rate* (4). Mr. Mirza for the defendant offered to adduce evidence by calling the defendant but the plaintiffs' Counsel would not agree to this course being adopted, and it is settled practice that where a special case is stated by consent it can only be re-opened by mutual consent: *Hamilton, Fraser & Co.* v. *Staley, Radford & Co.* (5).

On the materials before me it appears that in the first hostel there is accommodation for thirty students and in the second, for forty-four, and that although these are regarded as two buildings, it is really one as there is intercommunication between them, and the third hostel has accommodation for one hundred and twenty-six students I, therefore, hold, on the materials before me, that the premises occupied by one Superintendent for the first and second hostels and the premises occupied by one Superintendent in the third hostel and the portion occupied by the peon in the outer compound are necessary for the discharge of their duties of supervision and physical welfare of students as required by section 21 (1) (*c*) of the Indian Universities Act and are exempt from taxation under section 143 (1) (*a*). As to the portions occupied by the Professor and the other Superintendents or Assistant Superintendent, I have no evidence to show what the terms of their employment are or what their duties are such as to make their presence on the premises absolutely necessary for educational purposes and for due performance and proper discharge of the duties imposed upon them by the College; and, therefore, the portions occupied by them will, under the circumstances, be liable for taxation, but I will give liberty to the defendant to prove when occasion arises that the terms of their employment and their duties are such as to make their presence on the premises absolutely necessary and that the portions occupied by them are necessary and are exclusively occupied for that purpose.

Therefore, the answer to the question submitted is that the defendant as representing the Wilson College is liable to be rated for the general tax leviable under section 140 (*c*) of the City of Bombay Municipal Act in respect of the parts of the hostels occupied by persons other than the students and one Superintendent in the first and second hostel and one in the third hostel and the peon. Each party to bear its own costs.

Answer accordingly.

(3) (1878) 3 Ex. D. 66; 47 L. J. Ex. 112; 37 L. T. 673; 26 W. R. 128.

(4) (1857) 8 El. & Bl. 184; 27 L. J. M. C. 133; 3 Jur. (N. S.) 1249; 120 E. R. 68; 112 R. R. 506.

(5) (1884) Solicitors' Journal, p. 478.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 259 OF 1917.

January 3, 1918.

Present :—Mr. Lindsay, J. C.

GHIRRAO AND OTHERS—DEFENDANTS —APPELLANTS

versus

Sardar KARAM SINGH—PLAINTIFF —RESPONDENT.

Landlord and tenant—Tenant ejected from holding, whether can continue to occupy house in village abadi.

Where a tenant is ejected from his agricultural holding in a village, he has no right to occupy a house in the village *abadi* against the will of the *zemindar*. [p. 646, col. 1.]

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 31st May 1917, confirming that of the Munsif, Bahraich, dated the 5th September 1916.

Babu *Basudeo Lal*, for the Appellants.

Messrs. *Mohammad Naseem*, *Mumtaz Husain* and *Imtiyaz Ali*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit in ejectment. The plaintiff Sardar Karam Singh is the Talukdar of the village and the allegation in the plaint was that the three defendants, Ghirrao, his son Babu Ram and his brother Matadin, had been tenants in the village of Damodra belonging to the plaintiff. It was alleged that they had been

ejected by process of law from their holding and the plaintiff brought this suit for the purpose of having them ejected from the residential house which they occupy in the village. The plaintiff's case was that having ceased to be cultivators in the village the defendants had no longer any right to retain the house. The Talukdar stated that he was unwilling to allow them to remain in the village. He asked them to vacate the land upon which their house stands and they had refused to do so; and it was this refusal which constituted the cause of action for this suit.

It was admitted that Ghirrao, the 1st defendant, had been ejected from the holding in the village but the plea was taken that the members of the family to which the defendants belonged were not really cultivators but village Pandits. It was denied that the second and the third defendants had followed the calling of an agriculturist.

This question was determined against the defendants by both the Courts below. The learned Subordinate Judge in his judgment has come to the conclusion that the defendants are agriculturists and that the family originally settled in the village as such. There is documentary evidence to show that Bhawani Din, the father of the first and the third defendants, was a cultivator in this village as far back as the year 1868. I am bound by the finding of the lower Appellate Court and this matter is concluded. It follows, therefore, that if these people have been ejected from their agricultural holding in this village, they have no right to occupy a house in the village *abadi* against the will of the Zemindar. This is, as I understand it, the general law which applies in this part of the country to the relations between landlords and tenants. The law has been expounded in a judgment of Knox, J., which is to be found reported as *Shohrat Singh* v. *Jhagru* (1). There it was laid down that the general law of the land is that if a tenant is ejected from the tenancy or abandons it then, unless there be some special custom to the contrary, the site upon which he has built his house reverts to the Zemindar and the tenant must remove the materials therefrom. The same principle has been followed by another learned Judge of the Allahabad High Court in a judgment which is to be found reported as *Phul Bibi* v. *Zahur Ali* (2). So far as I am aware, this law laid down with respect to the relations between Zemindars and tenants in the Agra Province is equally good law for Oudh, and the learned Advocate for the appellants has not been able to refer me to any authority of this Court which lays down the law in the contrary sense. The judgment of the lower Appellate Court appears to me, therefore, to be quite correct and is not open to interference on any ground of law.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 30 Ind. Cas. 782; 13 A. L. J. 745.

(2) 28 Ind. Cas. 849.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1583 OF 1918.

July 26, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

AMBA *alias* PADMAVATI—PETITIONER

versus

SRINIVASA KAMATHI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110, O. XLIV, r. 1, O. XLV—Privy Council, appeal to—Leave to appeal in forma pauperis—*Jurisdiction of High Court.*

The High Court has no jurisdiction to grant leave to a party to appeal to the Privy Council *in forma pauperis*. [p. 647, col. 1.]

Ramkishen Lal v. *Manna Kumri*, 44 Ind. Cas. 731; 3 P. L. J. 179, followed.

Munni Ram Awasty v. *Sheo Churn Awasty*, 4 M. I. A. 114 at p. 136; 7 W. R. (P. C.) 29; 1 Suth. P. C. J. 166; 1 Sar. P. C. J. 323; 18 E. R. 642, not followed.

Petition presented under sections 109 and 110 and Order XLV, rules 2, 6 and 8 of Act V of 1908, praying that, in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to grant a certificate to enable the petitioner

to appeal to His Majesty in Council against the decree of the High Court, in Appeal Suit No. 24 of 1916, reported as 44 Ind. Cas. 483, preferred against the decree of the Court of the Subordinate Judge of South Kanara, in Original Suit No. 73 of 1914, and to grant leave to petitioner to prefer the said appeal *in forma pauperis*.

Mr. *C. V. Ananthakrishna Aiyar*, for the Petitioner.

Mr. *B. Sitaram Rao*, for the Respondent.

JUDGMENT.—The petition, in so far as it is for a certificate that the case is a fit one for appeal to his Majesty in Council, is not opposed. We certify accordingly under section 110 of the Code of Civil Procedure.

The petition is further for leave to appeal *in forma pauperis*. In *Munni Ram Awasty* v. *Sheo Churn Awasty* (1), Counsel (Mr. Moore) referred generally to a practice of the Courts in India granting such leave mentioning Bengal Regulation XXVIII of 1814. But no precedent for its grant has been proved in this Court and the authority of decisions in other High Courts is against it. *Jagadananda Asram* v. *Rajendra Roy* (2) and *Ramkishen Lal* v. *Manna Kumri* (3). We respectfully adopt the grounds of the latter decision and dismiss the petition as far as it relates to leave to appeal *in forma pauperis*. There will be no order as to costs.

M. C. P.

Petition partly granted.

(1) 4 M. I. A. 114 at p. 136; 7 W. R. (P. C.) 29; 1 Suth. P. C. J. 166; 1 Sar. P. C. J. 323; 18 E. R. 643.
(2) 18 Ind. Cas. 129; 17 C. L. J. 381.
(3) 44 Ind. Cas. 731; 3 P. L. J. 179.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 589 OF 1917.

July 1, 1918.

Present:—Sir Henry Drake-Brockman, KT., J.C.

APA PANDURANG AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DAMDIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, remarriage of, effect of—Succession to deceased son of first marriage.

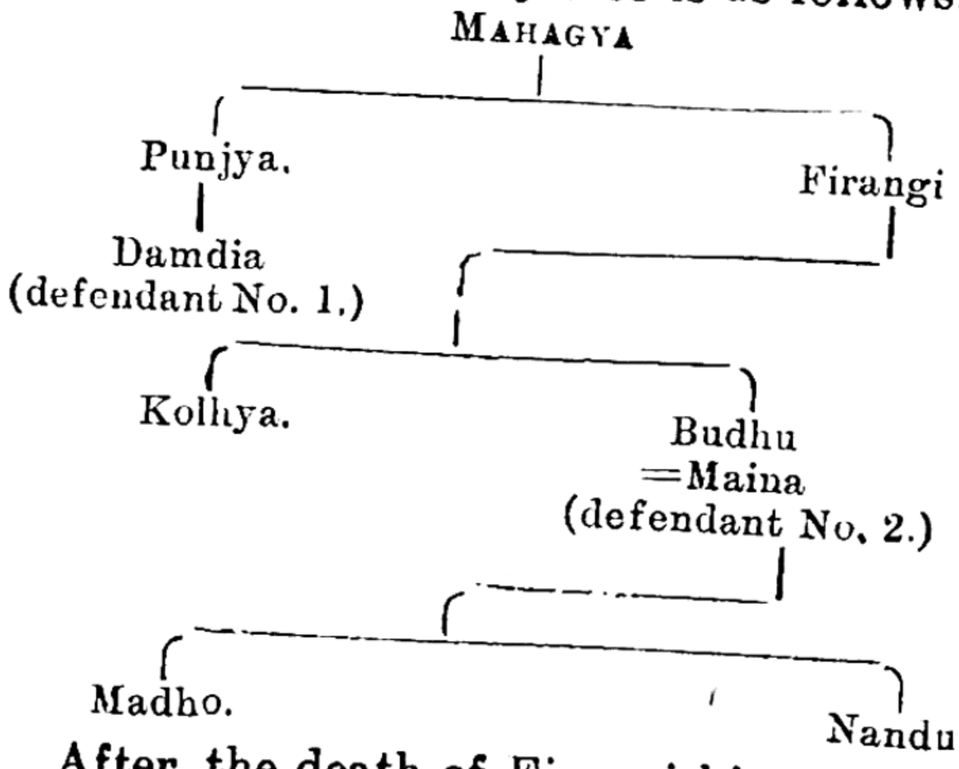
A remarried Hindu widow is entitled to succeed to the property left by a son of her first husband if the son dies after the re-marriage. [p. 648, col. 2.]

Appeal from the decree of the Additional District Judge, Betul, dated the 20th August 1917, in Appeal No. 61 of 1917.

Mr. *M. Bhawani Shanker*, for the Appellant.

Mr. *D. T. Mangalmoorty*, for Respondent No. 2.

JUDGMENT.—This litigation relates to a house which belonged originally to one Firangi, whose family tree is as follows.—



After the death of Firangi his son Kolhya died without issue so that Budhu became sole owner. Fifteen years before the suit was filed, *i.e.*, in 1902, Budhu was succeeded by his sons both of whom died in 1908. In the meantime Budhu's widow Maina had re-married in 1906. Madho and Nandu each left a widow, but both those women re-married almost immediately after their husbands' deaths and Maina, having succeeded as mother of Budhu's sons, was in possession when the suit was brought.

The plaintiffs are vendees from the defendant Damdia and having failed to obtain possession from Maina sued for possession, on the ground that she having re-married could not inherit her sons' property.

The trial Judge, following *Sammar* v. *Musammat Bhago* (1) and referring to *Sadhu* v. *Mussammat Patango* (2) and *Laxman* v. *Gundaji* (3), dismissed the claim on the ground that a re-married widow is entitled to succeed to the property left by the son of her first husband if the son died after the re-marriage.

The plaintiffs appealed on the strength of the decision of Stanyon, A. J. C., in *Basorey*

(1) 5 C. P. L. R. 85.
(2) 16 C. P. L. R. 99.
(3) 7 Ind. Cas. 543; 6 N. L. R. 103 at p. 105.

v. *Ballabhdass* (4), where it was held that a Hindu widow who remarries becomes thereafter incapable of inheriting any property which, but for her re-marriage, she would have inherited from a lineal successor of her former husband. The lower Appellate Court considered the learned Additional Judicial Commissioner to have taken a different view in *Kashirao* v. *Ukarda* (5) and concurring with the trial Judge dismissed the appeal.

In second appeal it is pointed out for the plaintiffs that in the case reported as *Kashirao* v. *Ukarda* (5) the *propositus* Pandharinath died in 1896 and his mother Manjai remarried in 1897 after inheriting the field in dispute. It is contended therefore that the remarks at page 118* of the report, regarding the position which would have obtained had Manjai claimed after remarriage, constitute a mere *obiter dictum* and should not be taken into account. It is further urged that just as a widow by remarriage ceases to be the *patni* of her husband so she must cease to be a Gotraja Sapinda of her son, to whom therefore she cannot inherit. The decision in *Basorey* v. *Ballabhdass* (4) above cited is said to be precisely in point and it is urged that if I am not prepared to follow it I should make a reference to a Bench.

On a careful perusal of the judgment in *Basorey* v. *Ballabhdass* (4), I have come to the conclusion that with all respect to the learned Additional Judicial Commissioner who decided it I should not regard it as binding upon me. It seems clear from the facts stated at page 174† that the plaintiffs failed to prove the date on which *Musammat* Chaturia remarried and that their claim was really barred by limitation, inasmuch as she had held the land in dispute as occupancy tenant in her own right, not as heir of her son Dhira by her first husband Latorey.

The ante-penultimate paragraph of the judgment does indeed support the appellants, but for the reason already stated this portion appears to have been unnecessary. That it was recorded without any basis in the arguments of the Counsel seems to be indicated by the fact that it contains no reference to the important decision in *Sammar* v. *Musammat Bhago* (1). Moreover, the reference to *Vrijbhukandas* v. *Bai Parvati* (6) is not intelligible, for in that case none of the women concerned had been remarried. The Bombay case really in point is *Basappa* v. *Ragava* (7), where a Full Bench of four Judges held, following the Calcutta decision relied on in *Sammar* v. *Musammat Bhago* (1), that a remarried Hindu widow is entitled to succeed to the property left by her son by her first husband, the son having died after the remarriage. An earlier Bombay case to the same effect is *Chamar Haru* v. *Kashi* (8). And in a recent Calcutta case of *Ganga Prasad* v. *Ramasrey Shahu* (9), Mookerjee and Casperz, JJ., referred to *Akora Suth* v. *Boreani* (10), *Chamar Haru* v. *Kashi* (8) and *Basappa* v. *Ragava* (7) as showing the Legislature to have recognized that remarriage not only does not operate as physical death of the widow, but that it does not operate even as a civil death for all purposes. Again in *Laxman* v. *Gundaji* (3), Bose, A. J. C., pointed out that a mother stands on an altogether different footing from a widow succeeding to her son, because he is part of her body, a connection which cannot be put an end to by the mother remarrying. Bose, A. J. C., further remarked that the Hindu Widows' Remarriage Act, 1856, could not apply to the case of a mother remarrying during her son's life, inasmuch as she had then no interest in her deceased husband's property by inheritance to him or his lineal successors. He considered that the Act could not apply prospectively and a remark to the same effect is to be found in *Kashirao* v. *Ukarda* (5).

In this state of the authorities I do not feel at all pressed by the decision in *Basorey* v. *Ballabhdass* (4) and following the earlier decision of this Court confirm the decrees of the Courts below.

This appeal is dismissed with costs. In the lower Courts costs will be paid as already ordered.

Appeal dismissed.

(4) 8 Ind. Cas. 1146; 6 N. L. R. 171.
(5) 31 Ind. Cas. 290; 11 N. L. R. 116.
(6) 32 B. 26; 9 Bom. L. R. 1187.
(7) 29 B. 91; 6 Bom. L. R. 779 (F. B.).
(8) 26 B. 388; 4 Bom. L. R. 73.
(9) 10 Ind. Cas. 69; 15 C. W. N. 579; 38 C. 862; 13 C. L. J. 558.
(10) 11 W. R. C. R. 82; 2 B. L. R. A. C. J. 199; 4 M. J. 286; 1 Ind. Dec. (N. S.) 781.

*Page of 11 N. L. R.—*Ed.*
†Page of 6 N. L. R.—*Ed.*

RAM SEWAK *v.* BALDEO BAKHSH SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 101 OF 1915.

December 21, 1917.

Present :—Mr. Stuart, A. J. C, and Pandit Kanhaiya Lal, A. J. C.

RAM SEWAK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur BALDEO BAKHSH SINGH—DEFENDANT—RESPONDENT.

Mortgage in favour of manager of joint Hindu family—Suit by sons of mortgagee - Disclaimer of interest by other members of family—Registered conveyance, whether necessary—Succession certificate, whether required—Interest, high rate of—Compound interest, whether penalty.

A mortgage-deed stood in the name of a person who together with his sons and nephew formed a joint Hindu family. After his death the sons claimed the entire money due on the mortgage, and the nephew stated that he had received from the sons his share of the mortgage money and had no objection to the sons realizing the entire mortgage money:

Held, (1) that a registered deed of assignment by the nephew was in the circumstances not necessary to give the sons a right to sue; [p. 650, col 1.]

(2) that the plaintiffs being the survivors of a joint Hindu family, a succession certificate was not required to enable them to bring a suit on the mortgage. [p. 650, col. 1.]

A covenant to pay compound interest in case of default at the rate originally fixed is not necessarily penal. [p. 650, col. 1.]

Where a mortgage-deed provided for payment of interest at Rs 1-8-0 per cent. per mensem and for payment of compound interest with six-monthly rests if the mortgage money was not paid within the fixed period:

Held, that the rate of interest secured by the mortgagee-deed was neither penal nor hard and unconscionable. [p. 650, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 18th September 1915.

The Hon'ble Pandit *Gokaran Nath Misra* and Mr. *K. P. Trivedi*, for the Appellants.

Babus *Ishwari Prasad* and *Basudeo Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs appellants for the recovery of money due on a mortgage effected by the defendant-respondent in favour of Gayadin, the father of plaintiff No. 1 and the grandfather of plaintiffs Nos. 2 and 3. The defence was that the covenant as to the payment of interest at Rs. 1-8-0 per cent. per mensem was hard and unconscionable and was obtained by undue influence exercised by Gayadin at a time when the defendant was in embarassed circumstances and that the further covenant to pay compound interest with six-monthly rests, if the mortgage money was not paid within a year, was penal and unenforceable. The learned Subordinate Judge found on all these points against the defendant. There was a further plea that the plaintiffs were not the only heirs of Gayadin or the sole owners of the mortgage-deed in suit, or, in other words, that the suit was bad for non-joinder of Ram Dayal, his nephew. The learned Subordinate Judge accepted this plea and dismissed the suit.

In so dismissing it, the learned Subordinate Judge overlooked the provision of Order 1, rule 9, of the Code of Civil Procedure, which lays down that no suit shall be defeated by reason of the misjoinder or non-joinder of the parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court below was asked by the plaintiffs to implead Ram Dayal as a co-defendant, if his impleading was necessary but the defendant objected that Ram Dayal should be a co-plaintiff, because he had an interest in the mortgage-deed in suit. Ram Dayal, however, stated in his evidence that he had no share in the mortgage-deed in suit, inasmuch as the plaintiffs had paid him Rs. 1,100 on account of his share of the principal and Rs. 1,000 on account of interest thereon 10 or 15 days after the grant of a certificate of guardianship to *Musammat* Rupni on account of her minor sons, who are now plaintiffs Nos. 2 and 3. It appears that Gayadin, Loke and Gokaran were three brothers; the last named died childless. Loke left a son named Ram Dayal. Ram Dayal claimed a share in the family property, including the mortgage-deed in suit and other deeds of mortgage. On the 30th April 1909 Ram Dayal agreed to accept Rs. 2,400 from the present plaintiffs in satisfaction of all his claims to the family property and secured the payment of that amount by taking Rs. 100 in cash before the Sub-Registrar and stipulating for the payment to him of Rs. 1,100 out of the mortgage-deed in suit and Rs. 1,200 out of another mortgage-deed with interest thereon after that date. This agreement was registered. Whether it was open to

him to receive his share of the money directly from the mortgagor or not, his admission in this case that he had received the money payable to him on account of the mortgage deed in suit from the plaintiffs is sufficient to protect the interest of the defendant.

The learned Counsel for the defendant-respondent contends that a registered deed of assignment was needed to enable the plaintiffs to claim the share belonging to Ram Dayal; but the statement of Ram Dayal being that he had no interest left in the mortgage deed, the plaintiffs as the sole heirs of Gayadin are entitled to sue. Section 45 of the Indian Contract Act has no application, because no promise was made by the debtor to Ram Dayal, who is not one of the heirs of Gayadin. As a matter of further precaution, Ram Dayal has now been added as a respondent to this appeal and as a defendant to the suit on his own application. The statement made by him in this Court, similar to what he said in the Court below, is that he had received his share of the money in the mortgage deed in suit from the plaintiffs and that he had no objection to the plaintiffs' realizing the entire money due on the mortgage. On the face of it, the deed stands in favour of Gayadin, whose heirs have brought the suit, and an assignment by Ram Dayal in favour of Gayadin was in the circumstances not necessary to give the plaintiffs a right to sue.

The rate of interest, secured by the deed of mortgage, is not penal nor hard and unconscionable. In the case of default of payment of the principal money within a year, the interest was to be compoundable at the original rate every half year. As pointed out by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (1), a covenant to pay compound interest at the rate originally fixed in case of default is not necessarily penal. The plaintiffs are the surviving members of a joint family, of which Gayadin was the manager, and no succession certificate under Act VII of 1889 was needed.

(1) 34 C. 150 at p. 158; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.).

The appeal is, therefore, allowed, and the claim of the plaintiffs decreed with costs here and below and future interest at 6 per cent. per annum from the date of the suit till realisation. Six months' time will be allowed for payment. A decree will be framed in terms of Order XXXIV, rule 4, of the Code of Civil Procedure. The defendant-respondent will bear his own costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 173 OF 1917.

June 18, 1918.

Present :—Mr. Justice Fletcher and Mr. Justice Panton.

Chowdhury JADAVENDRA NANDAN DAS MAHAPATRA—DEFENDANT No. 3—APPELLANT

versus

GAJENDRA NARAIN DAS MAHAPATRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Appellate Court refusing to accept report of Commissioner, whether bound to order fresh local enquiry—Commissioner, examination of—Discretion of Court—Remand, order of—Party accepting remand, whether can object subsequently.

Where an Appellate Court refuses to accept the report of the Commissioner for local inquiry, it is not bound to order a fresh local inquiry. The matter is within the discretion of the Court. [p. 651, col. 2.]

On an application by a party for the examination of the Commissioner for local inquiry the Court is bound to see that there is some real ground for examining the Commissioner and that the application has not been made for the purpose of annoying him or for some frivolous purpose. The Court has a discretion as to whether it should permit or refuse a party to examine the Commissioner. [p. 651, col. 2.]

The appellant obtained from the District Judge a remand on the ground among others that the decision in a former boundary suit was not to be treated as *res judicata* between the parties:

Held, that if the appellant was not satisfied with the order as to *res judicata*, he should have appealed against the order but that having taken the remand, he must be taken to have accepted the condition laid down by the Judge as to *res judicata*. [p. 651, col. 2.]

Appeal against the decree of the Additional District Judge of Mymensingh

dated the 7th June 1916, affirming that of the Subordinate Judge, 3rd Court of Mymensingh, dated the 25th January 1915.

Babu *Gunada Charan Sen*, for the Appellant.

Babus *Mahendra Nath Ray* and *Saroda Charan Maity*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 3 against the decision of the learned Additional District Judge of Midnapore, dated the 7th June 1916, affirming the decision of the Officiating Subordinate Judge of the same place. The suit was brought for possession of a portion of a Khal on declaration of title. Three points have been raised in this appeal against the judgment of the learned Additional District Judge. The first point raised is as regards limitation. It is said that the learned Judge for the finding he arrived at on the question of limitation relied on evidence which was inadmissible under the terms of the Indian Evidence Act. There are two answers to that. The first answer is that the learned Judge was invited by the parties to give his decision on the evidence on the record and, in the grounds of appeal, no question was raised with reference to the two documents objected to. The learned Judge might not unreasonably suppose that no grounds of appeal having been taken against the admissibility of those two documents he was entitled to refer to them. The second answer is this: certainly, the first document, namely, the judgment in the criminal case, was admissible and the second document, namely, the plaint, was not used by the learned Judge for the purpose of acting on the so-called admission contained therein but was used for the purpose of the learned Judge discovering what the suit dismissed was about. In those circumstances, the learned Judge was obviously entitled to satisfy himself as to what the suit the judgment in which was given in evidence was about, for, the suit having been dismissed for default, the learned Judge, unless he read the pleadings, was absolutely in the dark as to what the case was about.

The next point is that the learned Judge refused to permit a case of *res judicata* to be gone into. The grounds on which he refused that are these. This case was on appeal before the learned District Judge on a former occasion. The present appellant obtained from the District Judge a remand and that remand was granted on the grounds stated in the learned District Judge's judgment. And, amongst those grounds, the learned Judge held that the decision in the former boundary suit was not to be treated as *res judicata* between the parties. If the present apellant was not satisfied with that order, he could have appealed against that. He having taken the remand on the conditions mentioned by the learned Judge in his judgment, must be taken to have accepted the condition laid down by the learned Judge that the decision in the former boundary suit was not to be treated as *res judicata* between the parties.

The third point is one that has no substance in it. It is said that there ought to be a fresh local enquiry, the learned Judge having refused to accept the report of the Commissioner. That was a matter clearly within the discretion of the learned Judge and it is not shown that he wrongly exercised that discretion. Then the appellant states that he wished to examine the Commissioner but he was not allowed to do so. In a matter like this, the Court is bound to see that there is some real ground for examining the gentleman who had undertaken the duty of the Commissioner and that it is not for the purpose of annoying him or for some frivolous purpose. The learned Judge obviously has a discretion in a matter of this nature as to whether he should permit or refuse a party to examine the Commissioner. It has not been shown to us that the learned Judge improperly exercised the discretion that the law vested in him in declining to allow the appellant at the stage he applied to examine the Commissioner.

The present appeal fails and must be dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 193 OF 1917.

May 27, 1918.

Present :—M. Lindsay, J. C.

NADIR SINGH AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Babu INDAR SEN SINGH—DEFENDANT —RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 107G—Jurisdiction of Civil Court—Declaration that plaintiff is under-proprietor and not tenant, suit for, maintainability of—Oudh Laws Act (XVIII of 1876), s. 25—"Transferred", meaning of.

A Civil Court has jurisdiction to try a suit filed, by a person who has been held by the Revenue Court to be a tenant under section 107G of the Oudh Rent Act, for the purpose of obtaining a declaration that he is an under-proprietor and not a tenant [p. 652, col. 2.]

The word "transferred", as used in section 25 of the Oudh Laws Act, is of general import and its meaning cannot be restricted to cases in which the transfer has been made under orders of the Court [p. 653, col. 1.]

Suraj Bakhsh v. *Bhagwan Din*, Selected Decision No. 7 of 1903, dissented from.

Appeal from the decree of the District Judge, Fyzabad, dated the 27th February 1917, upholding that of the Subordinate Judge, Fyzabad, dated the 14th September 1916.

Mr *A. P. Sen*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Pandit *Harkaran Nath Misra*, for the Respondent.

JUDGMENT.—The plaintiffs-appellants brought a suit out of which this appeal has arisen for the purpose of obtaining a declaration that they were under-proprietors (*pukhtadars*) of certain plots in a village called Benipore described in the plaint.

It appears that recently the defendant *taluqdar* took proceedings under Chapter VIIA of the Oudh Rent Act against the plaintiffs and obtained an order of the Revenue Court under section 107G. The Revenue Court held that the lands now in suit were in possession of the plaintiffs as rent-free lands and were liable to be assessed to rent. The rent was assessed and the Court declared that the plaintiffs were tenants of the defendant.

The plaintiffs now come to the Civil Court for the purpose of claiming a decree for declaration that they are not tenants but under-proprietors of the lands in question. The suit was contested on a variety of grounds. Amongst other pleas one was taken to the effect that the Civil Court had no jurisdiction to entertain the suit. The Court of first instance accepted this plea and dismissed the plaintiffs' claim, though it is proper to observe that the case was also decided on the merits. I only mention the question of jurisdiction here because it was not debated in the lower Appellate Court; and the learned Counsel for the respondent in this Court has informed me that he is not in a position to support the opinion of the Court of first instance. It is clear that the Civil Court had jurisdiction to entertain this suit. The Judge of the first Court relied upon a ruling reported as *Rup Narain* v. *Badri Prasad* (1). This ruling was afterwards doubted in another case to be found reported as *Matai Singh* v. *Ajudhya Singh* (2) and it was finally overruled by a Bench decision to be found reported as *Shankar Sahai* v. *Gojadhar Prasad* (3). There is no doubt therefore that the suit was cognizable by a Civil Court.

To come to the merits of the case, it is admitted that in the year 1893 the property in suit was mortgaged to one Bhaiya Kamta Prasad by a deed of conditional sale. The mortgagee brought a suit for foreclosure and obtained a decree on the 22nd of December 1893. Eventually the decree was made final and possession was delivered to the mortgagee. After this the defendant *taluqdar* brought a suit for pre-emption on the basis of this foreclosure and obtained a decree on the 15th of August 1896. It is said that in execution of the pre-emption decree the *taluqdar* obtained formal possession but never succeeded in obtaining actual possession of the property now in question. No rent appears to have been paid by these plaintiffs until the *taluqdar* succeeded in obtaining from the Revenue Court the order under section 107G of the Oudh Rent Act to which I have referred above. The lower Appellate Court has dismissed the claim of the plaintiffs. It applied the provisions of section 25 of the Oudh Law

(1) 3 Ind. Cas. 667; 12 O. C. 225.
(2) 24 Ind. Cas. 223; 17 O. C. 86.
(3) 40 Ind. Cas. 20?; 20 O. [illegible]. 171; 4 O. L. J. 409.

Act (Act XVIII of 1876) and held that the result of the foreclosure was to deprive the plaintiffs of all proprietary or under-proprietary interest in the lands which were comprised in the mortgage and to leave them only with a right of occupancy as ex-proprietary tenants in such lands as they held as *sir* at the time foreclosure took place. It was of opinion that on the evidence it was shown that the lands now in question were the lands which the plaintiffs held as *sir* at that time, and consequently it was of opinion that they could not set up any rights as under-proprietors. All they could claim to be was that they were occupancy tenants.

It has been argued here in the first place that the learned Judge was wrong in applying section 25 of the Oudh Laws Act to the case. That section has been repealed, but it was in operation at the time the foreclosure proceedings took place. I agree with the learned Judge that section 25 did apply to the facts of this case. The argument here is that the word "transferred", as used in section 25, is not applicable to cases in which the transfer has been made by way of foreclosure; and in support of this argument a decision of the Board of Revenue, *Suraj Bakhsh* v. *Bhagwan Din* (4), has been relied upon. I am unable to accept the opinion of the learned members of the Board. It seems to me that the word "transferred", as used in section 25, is of general import and that its meaning cannot be restricted, as has been argued, to cases to which the transfer has been made under orders of the Court. Even if that argument were to be accepted, it seems to me sufficiently obvious that in the present case the transfer of the mortgagor's rights to the mortgagee was certainly effected by an order of the Court, for it is common ground that the property was transferred in the first instance under a foreclosure decree and was subsequently transferred by a decree of Court in favour of the defendant *taluqdar*.

It is true that after this transfer took place no proceedings were taken by the Deputy Commissioner, as provided by the section, for the purpose of determining the extent of the lands which the ex-proprietors were to hold as occupancy tenants, nor was anything done to determine the rent of the lands which were to be so held. All the same I cannot accept the contention for the appellants that because these proceedings were not taken by the Deputy Commissioner, it necessarily follows that the ex mortgagors remained in adverse possession of the plots which were then in their occupation If the plots now in dispute were in the actual cultivating occupancy of the plaintiffs at the time foreclosure took place, it follows that the highest right they can set up in respect of these lands is that of occupancy tenants. The Deputy Commissioner, if he had taken proceedings under the section, might have allowed them occupancy rights in all these plots. He certainly could not have allowed them any higher rights and he might have allowed them less by confining their rights to a portion only of the lands which they then held. On the other hand, I am not satisfied that it is shown on the evidence that the lands now in dispute were in the actual cultivating occupancy of the plaintiffs at the time when foreclosure was made; and before I can come to a proper decision in the case it appears to me to be necessary that this matter should be investigated. The fact that the plaintiffs describe these lands as their *sir* lands does not necessarily lead to the conclusion that at the time of foreclosure they must have been in their "actual cultivating occupancy", to use the words of section 25.

I remit the following issue to the lower Appellate Court for determination:—

Were the lands now in suit, or any of them, in the cultivating occupancy of the plaintiffs at the time of the foreclosure of the mortgage?

The learned Judge will take such evidence on this issue as the parties may desire to produce and he will return his finding to this Court within two months from the date of this order of remand. Fifteen days to run from the date of the lower Court's finding will be allowed to the parties to file objections, if they are so minded.

Issue remitted.

(4) Selected Decision No. 7 of 1903.

BALOBRAO APPARO *v.* ANAD RAO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 331-B OF 1917.

July 26, 1918.

Present :—Mr. Mittra, A. J. C.

BALOBRAO APPARAO—DEFENDANT No. 2—APPELLANT

versus

ANAD RAO AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Pre-emption—Trees standing on land and right of easement, whether go with land.

In a suit for possession of a piece of land by pre-emption, the trees standing on the land and all rights of easement appertaining to the land pass with the land.

Appeal from the decree of the Court of the 1st Additional District Judge, Akola, dated the 10th May 1917, in Appeal No. 254 of 1916.

Mr. *M. Chackerbutty*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondents.

JUDGMENT.—This appeal was filed before the judgment in *Surya Bhan* v. *Renai* (1) was published. The learned Counsel for the appellant admits that the ruling in question governs this case. This disposes of the first ground of appeal. As to the second ground of appeal the trees would undoubtedly go with the land on pre-emption. So would a right of easement. It is urged that these rights were separately valued. But this is not so, as far as the sale-deed is concerned. Some statement was made to this effect in the first Court. The price of pre-emption decreed includes the value of all rights. There is no error of law pointed out by the appellant's Counsel. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 42 Ind. Cas. 447; 14 N. L. R. 51.

PATNA HIGH COURT.

CIVIL APPEAL FROM APPELLATE ORDER No. 107 OF 1918.

July 31, 1918.

Present :—Justice Sir Ali Imam, KT., and Mr. Justice Thornhill.

MAKRU RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARJUG PERSHAD MISSER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 174—Amount to be deposited—Decretal amount with costs—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.

The amount of money required to be deposited

MAKRU RAI *v.* SARJUG PERSHAD MISSER.

by the judgment-debtor under section 174 of the Bengal Tenancy Act is the amount recoverable under the decree with costs, and not the amount specified in the proclamation, as is the case under rule 89 of Order XXI of the Civil Procedure Code. [p. 655, col. 1.]

Appeal from a decision of the District Judge of Darbhanga.

Mr. *Murari Prasad*, for the Appellant.

Mr. *Har Nandan Pershad*, for the Respondents.

JUDGMENT.

IMAM, J.—The only point of law on which the learned Vakil on behalf of the petitioner has addressed us arises on the question of the construction of section 174, Bengal Tenancy Act, and rule 89, Order XXI, Civil Procedure Code. The appellants were the judgment-debtors in a rent-decree. In execution of that decree a proclamation of sale was issued for satisfying the decretal amount. Thereafter the sale took place and under section 174 of the Bengal Tenancy Act the appellants deposited the amount mentioned in the sale proclamation with five per cent. on the purchase-money. The learned Munsif, before whom the amount in question with the five per cent. was deposited, accepted the sum and set aside the sale. The respondents then preferred an appeal to the learned District Judge of Darbhanga, who reversed the order passed by the Munsif and directed the sale to be restored.

The ground on which the learned District Judge has held that the deposit made by the judgment-debtors was insufficient is based upon a comparison of the language of section 174 of the Bengal Tenancy Act and rule 89, Order XXI of the Civil Procedure Code. Section 174 with reference to the amount contains these words: "the amount recoverable under the decree with costs", whereas the rule contains the words, "the amount specified in the proclamation."

It is not for a moment claimed by the appellants that they deposited the amount recoverable under the decree with costs. Their learned Vakil frankly admits that the amount specified in the proclamation was deposited, but he has contended that in fact, although the language of the two sections is different, the deposit made of the amount specified in the proclamation would work out to be the amount recover-

able under the decree with costs. With this contention we are not in sympathy, nor are we satisfied that the amount in question is the same. The difference of language has a purpose, as the two Acts have different legislative schemes. The learned Judge in dealing with this aspect of the question has very rightly drawn attention to sub-section 3 of rule 89, Order XXI, which clearly shows the position of the decree-holder under the Code with respect to any further charges that he may claim under the decree and in respect of which he may receive satisfaction. No such provision has been made in section 174. We are, therefore, of opinion that the learned Judge below was right in the construction he has placed upon the sections and that, therefore, his order restoring the sale was a just and proper one. In the circumstances the application is rejected with costs.

THORNHILL, J.—I agree.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 217 OF 1917.

November 26, 1917.

Present :—Mr. Lindsay, J. C.

LACHHMI NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DAYA SHANKAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 132 —"Debtor" in s. 20, meaning of—Hindu joint family —Son, whether debtor or agent of father—Mortgage-deed—Money payable by instalments—Default in payment of instalments—Suit instituted more than 12 years after default—Limitation—Waiver.

Where a mortgage-deed provided for payment of the mortgage money by certain definite instalments and further stipulated that if the instalments were not paid at the appointed time and if any default were to take place, then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to bring their suit at once and claim interest at a certain rate:

Held, (1) that a suit brought by the mortgagees on the basis of the above mortgage-deed more than 12 years after the date when the first default in payment was made was time-barred under Article 132 of Schedule I of the Limitation Act; [p. 656, col. 1.]

(2) that no question of waiver on the part of the mortgagees could arise for consideration in connection with a mortgage bond, the enforcement of which was being sought by a sale of the property. [p. 656, col. 1.]

The word "debtor", as used in section 20 of the Limitation Act, means the person who is liable under the contract of debt. Hence, where a father and his son form together a joint Hindu family and a debt is contracted by the father, the son is in the lifetime of the father neither a debtor nor, in the absence of any evidence, an agent of the father for the purposes of the said section. [p. 656, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 10th March 1917, upholding that of the Munsif, Purwa (Unao), dated the 23rd August 1916.

Babu *Hargobind Das*, for the Appellants.

Pandit *Harkaran Nath Misra* and Babu *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—The only question for discussion in this second appeal is a question of limitation. The suit was a suit for sale on a mortgage and the Courts below have decided that it was time-barred. In my opinion the decision is correct. The document upon which the suit was brought was executed on the 27th of October 1894 and the suit was instituted on the 3rd of April 1916.

Turning to the mortgage-deed, we find that the mortgagor was one Sheo Mangal who, it is said, is now deceased and is represented by his sons Daya Shankar and Har Shankar, defendants. The mortgage was made in favour of two persons Sukh Nandan Lal and Lal Behari, who are the predecessors-in-title of the present plaintiffs. The question of limitation must be determined with particular reference to the terms of the mortgage-bond. The deed provides that the principal sum in respect of which the mortgage is being executed is a sum of Rs. 800 and the agreement was that this money was to be paid up in certain definite instalments of Rs. 40 and 50 each. It was agreed between the parties that if the instalments were not paid at the appointed time and if any default were to take place, then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to bring their suit at once and claim interest at the rate of 12 per cent.

The evidence shows that the first default in payment was made on the 11th of April 1895, and consequently on the terms of the bond a suit for sale ought to have been brought within 12 years of that date. The learned Counsel for the appellants has re-

ferred to the fact that payments were made on account of principal after the date of this default, and he relies on these payments as proof of waiver on the part of the creditors. The answer to this is that no question of waiver can arise for consideration in connection with a mortgage-bond the enforcement of which is being sought by a suit for sale of property. In such a case the Article of limitation to be applied is Article 132 of the Schedule to the Limitation Act. The provision about waiver in connection with the question of limitation is to be found in Article 75 of the Schedule, but that Article refers in terms to suits based upon promissory notes or bonds. Nothing to be found in Article 75 can be applied to a suit to which Article 132 applies in order to make out some other rule of limitation than that which is laid down in the latter Article itself. This plea, therefore, must fail.

The learned Counsel then has relied upon the general exception which is declared by section 20 of the Limitation Act. I have been referred to the document of mortgage on the back of which, it is true, there are recorded certain payments. These are set down in a somewhat peculiar way. First, we have one or two notes of payments followed by a signature, then five and six memoranda of payments followed by another signature; and similarly a third set of payments followed by another signature. It has been stated here that the signature in each case is that of Daya Shankar, the son of the mortgagor Sheo Mangal, who is impleaded here as the first defendant. Now before any reliance can be placed on these endorsements for the purpose of extending the period of limitation under section 20 it must be shown, in the case where the payment was payment of a part of the principal, that it was made by the debtor or by his agent duly authorised in this behalf. We have also to take notice of the proviso to the section which says that, in the case of part payment of the principal of a debt, the fact of the payment must appear in the handwriting of the person making the same. It may be stated at once that no question of payment of interest can arise in this case for, as I have already stated, the principal sum was Rs. 800 and that was to be payable in certain instalments. No interest was to be charged and consequently any payments made must have been on account of principal. Then the question arises, if these payments were made, were they made by the debtor or by his agent duly authorised on this behalf? That they were not made by the debtor seems to be admitted. The debtor in the case was the executant of the mortgage-deed, Sheo Mangal. It has been argued, however, that Sheo Mangal with his sons constituted a joint family and that Daya Shankar was a debtor within the meaning of sub section (1) of section 20. I very much doubt whether that argument can be maintained, because it appears to me that this part of the section must be strictly construed and the natural meaning be attributed to the word "debtor" is the person who is liable under the contract of debt, and that person in this case was Sheo Mangal. I have to observe that it is admitted that all the payments endorsed on the back of the document were made while Sheo Mangal was still alive. I do not think, therefore, that with reference to the terms of this section Daya Shankar can be treated as a debtor, nor again it is, I think, possible to contend that he was the duly authorised agent of the debtor. No agency can be inferred from the fact that Daya Shankar and his father Sheo Mangal were members of a joint Hindu family. Sheo Mangal, while alive, was presumably the managing member of the family and certainly there is no authority that I know of for the proposition that the son, in the absence of any evidence, could be deemed to be a duly authorised agent of his father for the purpose of paying a debt. It seems to me, therefore, that the whole argument with regard to section 20 of the Limitation Act fails and that the plaintiffs are not entitled to the benefit of that section.

No other question remains for decision. The suit was, in my opinion, time-barred and was rightly dismissed. The consequence is that the appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 635 OF 1917.
CRIMINAL REVISION PETITION No. 561 OF 1917.
January 18, 1918.

Present:—Mr. Justice Bakewell.

In re SRINIVASA THATHACHARIAR—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 144—Trustee of temple required to abstain from interfering with conduct of adyapakam *service—Order, whether definite.*

Where a trustee of a Vaishnavite temple was directed under section 144 to abstain from "in any way interfering with the conduct of the *adyapakam* service:"

Held, that the order was definite and sufficiently defined the acts from which the trustee was required to abstain, and that it rendered the acts 'certain' within the meaning of the section.

Ramanadhan Chetti v. *Murugappa Chetti*, 24 M. 45; 2 Weir 92, applied.

Abayeswari Debi v. *Sidheswari Debi*, 16 C. 80; 13 Ind. Jur. 179; 8 Ind. Dec. (N. S) 53, doubted.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Chingleput, in Criminal Appeal No. 16 of 1917, confirming the sentence and conviction passed by the Court of the Taluq 2nd Class Magistrate, Conjeevaram, in Calendar Case No. 1 of 1917.

Messrs. *T. R. Ramachandra Ayyar* and *T. M. Vedantam*, for the Accused.

The Public Prosecutor, for the Crown.

ORDER.—The first point taken is that the act for which the petitioner was convicted does not fall within the order passed under Criminal Procedure Code section 144.

It is true that the order mentions a specific act, but it also includes all acts of the same kind by the general words, "in any way interfering with the conduct of the Adyapakam service." I think that these words sufficiently define the acts from which the petitioner was required to abstain and thus renders them "certain" within the meaning of section 144. I may also point out that the petitioner as trustee had powers of management over the temple and its property and the act done was within those powers, and the order as regards him may be read as directing him "to take certain order" in the management of the temple.

I think that the case falls within *Ramanadhan Chetti* v. *Murugappa Chetti*

(1) and I have some doubt as to the decision in *Abayeswari Debi* v. *Sidheswari Debi* (2).

The learned Magistrate seems to have made a slip as to the liability of defence 4th witness in his discussion of the credibility of that witness, but there was sufficient evidence on which he could act, and I do not think that this vitiates his decision.

The conviction of the petitioner for the act complained of is also questioned, but I see no reason to differ from the Magistrate in his conclusion. The fine is not excessive. The petition is dismissed.

Petition dismissed.

M. C. P.

(1) 24 M. 45; 2 Weir 92.
(2) 16 C. 80; 13 Ind. Jur. 179; 8 Ind. Dec. (N. S.) 53.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 456 OF 1918.
June 18, 1918.

Present:—Mr. Justice Newbould and Justice Sir Syed Shamsul Huda, KT.

SUKHU KALWAR—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Calcutta Police Act (IV of 1866), s. 54 (a), offence under—Findings necessary for conviction.

The preliminary condition which must be fulfilled before effect can be given to section 54 (*a*) of the Calcutta Police Act is that there must be reason to believe that the property found in the accused's possession is stolen property. [p. 658, col. 1.]

The Court has first to find on sufficient materials that there is reason for such belief, and it is not until it has come to such a finding that it can consider whether the accused has been able to account for possession of the property. [p. 658, col. 2.]

Rule granted against an order of the 4th Presidency Magistrate, Calcutta, Northern Division, dated the 8th May 1918.

FACTS appear from the judgment.

Mr. *J. N. Banerjee* (with him Babus *Jyotish Chandra Hajrah* and *Santosh Kumar Pal*), for the Petitioner, submitted that upon the findings of fact arrived at in this case the conviction under section 54A of the Calcutta Police Act was not tenable. The

petitioner was first of all tried under section 411, Indian Penal Code, with respect to some articles alleged to have been stolen and was acquitted. The present prosecution was in respect of another article found in the same search and alleged to have been stolen. There is no evidence in this case that the silver bar is stolen property except that of the Police Officer, who says he simply suspects it to be stolen property, but gives no reason for so saying. This is not enough. The defence has satisfactorily explained why the accused could not produce the key of the box. Even if he did not wilfully produce the key that would not be a sufficient reason for believing that this article found in the box was stolen property; the box might contain various other things which the accused did not like that the Police should search. Then as regards the accused's failure to account for his possession of this article, he ought not to have been asked to do so before the Magistrate had sufficient reasons for believing that the article was stolen property. The section itself is clear on this point.

Referred o *Queen Empress* v. *Dhanjibhai Eduljı* (1), *Queen* v *Behary Sing* (2), *Sheo Surun Sahai* v. *Mohomed Fazil Khan* (3).

JUDGMENT.—The petitioner has been convicted under section 54 (*a*) of the Calcutta Police Act, which provides that a person in possessin of anything which there is reason to believe to have been stolen or fraudulently obtained shall be liable to punishment, if he fails to account for such possession. The preliminary condition which must be fulfilled before effect can be given to this section is that there must be reason to believe that the property found in the accused's possession was stolen property. The reasons given by the Magistrate for coming to this belief in the present case are stated in his judgment as follows :—"*First*, that this silver bar was found along with other articles alleged to have been stolen and claimed by a certain person, about which there was already a case under section 411, Indian Penal Code, against the accused; *secondly*, that the accused was asked to produce the key of the box in which these articles were but he did not, and the box had to be broken open by the Police Officer; and *thirdly*, that the accused failed to account for the bar."

As regards the first of these reasons, the accused was acquitted of the charge referred to and in the absence of anything to show that the other articles were stolen, no inference against the accused can be drawn from the fact that this silver bar was found with those other articles. As regards the second of those reasons, the failure of the accused to produce the key is not shown to have been wilful. His story is that it was not then in his possession, and this has not been rebutted. The third ground is not one on which the Magistrate is justified in finding reason for believing that the property was stolen. He had, first, to find on sufficient materials that there was reason for such belief and it was not until he had come to such a finding that he could consider whether the accused had been able to account for its possession.

Taking this view, we make the Rule absolute and set aside the conviction and sentence passed on the petitioner. The petitioner is acquitted of the offence charged and his bail bond will be discharged.

Rule made absolute.

(1) 20 B. 348; 10 Ind. Dec. (N. S.) 793.
(2) 7 W. R. Cr. 3
(3) 10 W. R. Cr. 20.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 655 OF 1917.

November 21, 1917.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Phillips.

SUNDARAM AYYAR—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562—Penal Code (Act XLV of 1860), s. 420—'Cheating,' whether covers offence under s. 420, Penal Code.

SURENDRA NATH MUKERJI *v.* EMPEROR.

The word "cheating" in section 562, Criminal Procedure Code, cannot be given an extended meaning so as to cover an offence under section 420, Indian Penal Code.

Emperor v. *Ramjan*, 31 Ind. Cas. 381; 16 Cr. L. J. 781: 17 Bom. L. R. 921, followed.

Har Narayan v. *Ramji Das*, 23 Ind. Cas. 743; 12 A. L. J. 465; 15 Cr. L. J. 375, dissented from.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the District Magistrate, Madura, in his Letter R. O. C. No. 1370 of 1917 Magl.

Mr. *K. S. Jayarama Ayyar*, for the Accused.

Mr. *C. Narasimha Chariar*, for the Public Prosecutor.

ORDER.—The question for decision in this case is, whether we can give an extended meaning to the word "cheating" in section 562 of the Criminal Procedure Code so as to cover an offence under section 420 of the Indian Penal Code (cheating and dishonestly inducing delivery of property, etc.).

We should be glad to do so, as we recognise that equally strong reasons on public and humanitarian grounds may exist for lenient treatment of an offence under either section. On the other hand, a careful consideration of the wording of section 562 of the Criminal Procedure Code seems to preclude the possibility of such a construction. If the term "cheating" is to be held to cover offences under sections 418, 419 and 420 of the Indian Penal Code, which are included with section 417 in the same group in Schedule II to the Criminal Procedure Code, a similar extension must be allowed to the terms "theft" and "dishonest misappropriation." The former must be held to cover offences under sections 380, 381 and 382 of the Indian Penal Code and the latter offences under section 404 of the Indian Penal Code. But such a construction is impossible in face of the fact that the Legislature has specifically mentioned "theft in a building" (section 380, Indian Penal Code) in section 562 of the Criminal Procedure Code in addition to simple theft (section 379). The inference is irresistable that "theft in a building" was not intended to be included in the term "theft" and we cannot give a narrow interpretation in the case of "theft" and a wide one in the case of "cheating".

The view we have taken is in accord with that expressed by a Bench of the Bombay High Court in *Emperor* v. *Ramjan* (1). The only authority to the contrary is that of a single Judge in *Har Narayan* v. *Ramji Das* (2), from which we must respectfully dissent.

We set aside the order of the Sub-Divisional Magistrate and direct him to dispose of the case according to law.

M.C.P.

Order set aside.

(1) 31 Ind. Cas. 381; 16 Cr. L. J. 781; 17 Bom. L. R. 921.

(2) 23 Ind. Cas. 743; 12 A. L. J. 465; 15 Cr. L. J. 375.

ALLAHABAD HIGH COURT.

CRIMINAL APPLICATION No. 215 OF 1918.

April 15, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SURENDRA NATH MUKERJI—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 25, 27, 28—Statement made to Police leading to discovery of fact deposed, admissibility of—Defence, right of, to insist upon production and proof of record—Confession, admissibility of—Part of confession disbelieved, effect of—Criminal trial—Defence, whether bound to give explanation.

Accused went to a Police Station and made the report, "I have killed my wife and her corpse is lying in my house", in consequence of which the Police, proceeding to his house, discovered the corpse of his wife in an inner room of the house:

Held, that under section 27 of the Evidence Act the officer who had taken down the statement of the accused was entitled to depose that the accused came to him at the time and place stated and said: "I have killed my wife and her corpse is lying in my house", and that in consequence of that statement the woman's corpse was discovered as indicated by the accused; but that when this had been deposed by the prosecution, the defence were entitled to require the production of the record made at the Police Station and to insist upon proof of the whole of that record. [p. 661, col. 1.]

Per *Walsh, J.*—Where there is no evidence of offence except a confession, the confession must be taken as a whole. The Court cannot select, from the only evidence which it is proceeding to act upon, in order to find the crime established as a fact at all, portions which it rejects as untrue and treat the balance which remains as truthful evidence. [p. 664, col. 2; p. 665, col. 1.]

SURENDRA NATH MUKERJI *v.* EMPEROR.

In a criminal trial it is not desirable to call upon the defence to frame a theory either at the beginning or at any other stage of the hearing, particularly in a case of difficulty in which the theory of the prosecution itself is not clear. [p. 665, col 2.]

Appeal from an order of the Sessions Judge, Allahabad, dated the 21st March 1918.

Mr. *C. R. Alston*, for the Appellant.

Mr. *A. E. Ryves*, Government Advocate, for the Crown.

JUDGMENT.

PIGGOTT, J.—On the 3rd of December last, somewhere about 2 o'clock in the day, a young Bengali, Surendra Nath Mukherji, whose age is given in the record as 22 years but who according to his father's evidence was not yet quite 20 years of age, presented himself at the Kotwali Police Station at Allahabad and made a certain report, a record of which was entered in the Police register provided for the purpose. In consquence of this report the City Inspector, Muhammad Said, proceeded at once to the house in the city in which the said Surendra Nath Mukherji was living. He found the door leading into the inner apartments locked and it was opened with a key produced from his person by the above mentioned accused. The latter then led the way to a certain room on the north-east side of the courtyard which was fastened on the outside by a chain. He unchained this door and led the Police Officer and certain witnesses, one of whom, Bande Husain Khan has been called at the trial, into the room. On the floor was lying the corpse of a young girl named Sunilabala Debi, wife of Surendra Nath Mukherji aforesaid. As to the age of this girl there is some little conflict of evidence, but we shall not be far wrong if we take it to have been about 15 years. She was quite dead and was wearing only a bodice and a loin cloth. Some part of this loin-cloth was in some way drawn together or heaped up under the back of the neck. There was a slight cut or incision on the great toe of each of the feet, and with reference to these the accused made a statement and produced from a recess in the same room an implement with which he said those incisions had been made. The corpse was subsequently examined by Mr. Kashi Nath, Assistant to the Civil Surgeon of Allahabad. With regard to the incisions above spoken of Mr. Kashi Nath was quite satisfied that they had been inflicted after death, and this is in accordance with the statement to which the accused himself has adhered throughout. The only other external mark of injury was a slight redness of the skin on the left side of the neck. This was evidently a mere patch, described in the Assistant Surgeon's evidence as $1\frac{1}{2}$ inch long *into* $\frac{3}{4}$ inch broad. A further examination of the corpse disclosed that death was almost certainly due to asphyxiation, but beyond this the Assistant Surgeon was not prepared to go. He was asked a number of questions as to the possibility of death by strangulation or death by suffocation and as to the presence or absence of indications tending to prove that this suffocation, or strangulation, or whatever it was, had been in its nature either homicidal or suicidal. The general effect of his evidence seems to me to be to leave these questions absolutely open. In one portion of his evidence the Assistant Surgeon seemed to incline towards the belief that death had been caused by suffocation rather than by strangulation, though he admitted himself to be puzzled by the absence of any marks of external injury about the mouth or nose. At the very end of his examination after he had protested that he was unable to give any decisive answer on the question of strangulation or suffocation, he told the Court that on the whole strangulation by means of a soft cloth seemed to him more in conformity with the *post mortem* appearances than any other theory. This is in itself an opinion expressed with much doubt and reserve: it is not altogether consistent with other portions of the evidence given by the same witness. It is difficult to understand how, on the theory of strangulation effected in this manner, the only mark left upon the neck should have been the small red patch already referred to. On the evidence, moreover, it would seem that what is ordinarily the most characteristic symptom of death by strangulation, namely, the protruded tongue, was entirely absent. Surendra Nath Mukherji was eventually put on his trial on the charge that he had murdered his wife. Of the Assessors who heard the evidence one finds him guilty and the other not guilty. The learned Sessions Judge finds him guilty

and has passed sentence of death. The record is before us for confirmation of that sentence and we have had the advantage of hearing the petition of appeal presented on behalf of the convict argued by Mr. Ross Alston. The evidence on the record is admittedly most scanty. At the very outset of the trial a question arose as to the admissibility in evidence of the statement recorded at the Kotwali Police Station at 2-30 P. M. on December the 3rd. The learned Sessions Judge was at first disposed to reject that statement as inadmissible by reason of the provisions of section 25 of the Indian Evidence Act. Later on, upon further consideration of the provisions of section 27 of the same Act, he has allowed it to be put in evidence. I have no doubt that the provisions of both these sections apply to the circumstances stated and require to be considered. A mere statement in evidence by the City Kotwal that the accused came to the Police Station and made a report, in consequence of which the corpse of his wife was discovered in an inner room of his residential house, would be calculated to work unfairly from the point of view of the prosecution and from that of the defence; section 27 of the Indian Evidence Act was no doubt introduced on purpose to obviate the possibility of such unfairness. Under that section the City Kotwal was unquestionably entitled to depose that Surendra Nath Mukherji came to him at the time and place stated and said: "I have killed my wife, her corpse is lying in my house," and that in consequence of this statement the woman's corpse was discovered as indicated by the accused. Now when once this much had been deposed to on behalf of the prosecution, the defence were clearly entitled to require the production of the record made at the time at the Kotwali Police Station and to insist upon the proof of the whole of that record if they thought it advisable to do so. I think that the statement should have been put in evidence in this manner at the request of the defence; but as the case stands, I see no reason to object to its appearance on the record and I find it necessary to consider it in some detail. According to this statement the accused reported that his wife had been seriously misconducting herself for some-time past and that she had been carrying on an illicit correspondence with another man. For this reason, the statement says, the accused made up his mind to kill her. He arranged that he should be alone with her in the house at about noon on the day in question. He had spent the night in remonstrating with her, and continued to do so; but her only reply was, "leave me alone: I want to go away." Thereupon the accused tied her loin cloth round her neck and killed her, after which he inflicted the two incisions on the great toes already spoken of. With regard to these the explanation given in the statement is that the accused had heard that persons strangled by means of a piece of cloth would come to life again.

On the following day, the 4th of December 1917, the accused, having spent the night in Police custody, was placed before a Magistrate of the First Class, to whom he made a confession. We have before us the record of that confession and also the evidence of Mr. S. E. Anthony, the Magistrate who took it.

According to Mr. Anthony, as soon as he began to question the accused and before he had even completed the preliminary questions which a Magistrate always puts in these cases, the accused interrupted him by saying: "I have killed my wife." The confession itself adds very little to this bald statement. It repeats the allegation of unchastity against the girl in general terms, and adds that the accused had obtained possession of letters written by her to some other man. For this reason, he says, he murdered her by strangling her with the *dhoti* she was wearing. After the enquiry preliminary to commitment the accused was again examined by the same Magistrate on the 21st of December 1917. He then declined to answer most of the questions put to him and claimed his right to reserve his defence for the Sessions trial. To the Sessions Judge the accused said that he had gone out on the morning of December the 3rd and returned about 11 o'clock, to find the house door shut and no answer returned to his knocks. He then climbed over one of the walls and, in the closed room already spoken of, found his wife lying dead with her own loin cloth tied round the

neck. He unfastened the cloth and, in the attempt to discover whether life was quite extinct, inflicted the cuts on the toes which have already been referred to. He came out of the house, locking the door behind him and told one Tarak Nath Mukherji, a telegraph signaller, what had happened. On the advice of the latter he first sent a telegram summoning his own father, who was in Calcutta at the time, and then went to the Police Station intending to report that his wife had committed suicide. He alleged that, somewhere inside the Police Station, before he went upstairs to the room where the City Inspector Mohammad Said was sitting, he entered into conversation with some subordinate Police clerk, who strongly advised him not to report that his wife had committed suicide but to say that he had killed her out of jealousy on account of her misconduct. He says this Munshi gave him further reasons for adopting this course and that, after he had gone upstairs, the City Kotwal also urged him not to be afraid, but to say that he killed the woman and that he would get off all right. He ascribed his subsequent confession to the Magistrate to Police influence. He now denied having killed the girl, asserting that he was very much in love with her. He said, further, that she had attempted to commit suicide on other occasions. The defence evidence was mostly directed to this point; but the telegraph signaller Tarak Nath Mukherji confirmed the accused's statement so far as it concerned him. Two physicians, Dr. Nogendra Nath Datt and Nanak Prasad Varma, a homœopathic practitioner, gave evidence that they had attended the girl on two different occasions after what appeared to be attempts on her part to commit suicide by poisoning. Evidence was also given of an occasion on which it was said the accused's wife had left her house declaring her intention of drowning herself in the Jumna river. The evidence of the accused's father, Benod Behari Mukherji, and of a neighbour, Nimai Charan Mukherji, suggests further that the girl was of a wilful and hysterical temperament, that she would resort to hunger-striking and to beating her head on the ground if her will was crossed in any way.

I have set out the evidence for the defence in the first instance because there is really no further evidence for the prosecution beyond that already indicated. A younger brother of the accused's was called, but he gave no evidence particularly relevant to the case, except that in cross-examination he supported the allegation for the defence as to previous attempts to commit suicide. The record before us suggests that the prosecution intended in the first instance to produce certain further evidence, and more particularly that witnesses who were present at the discovery of the corpse were to be examined as to statements made by the accused at that time and as to a certain pantomime gone through by him, in illustration of the manner in which he had compassed his wife's death. It is not clear whether this part of the prosecution case was dropped because those responsible for the conduct of the case were satisfied that there was no substance in it, or because it was supposed that evidence of this nature could not be given without contravening the provisions of section 26 of the Indian Evidence Act. The evidence is certainly not before us and I only allude to it because of this latter possibility. I think that the witnesses were entitled to depose to any actions performed by the accused in their presence and, after they had done so, the defence would have been entitled under other provisions of the Indian Evidence Act to put questions (if they deemed it advisable) as to any words used by the accused which accompanied or explained those actions. If any evidence of this sort was available I can only say that, in so difficult a case, I feel some regret that it is not before me.

The learned Sessions Judge in finding the accused guilty has proceeded upon a line of reasoning which sounds convincing enough, if all the premises assumed by the learned Sessions Judge are granted. He takes it that the case must necessarily have been either one of suicide or one of wilful murder. He comes to the conclusion that the evidence as a whole and more particularly the statement of the Assistant to the Civil Surgeon, considered along with appropriate passages in certain medical treatises to which the Court was entitled to refer under the proviso to

section 60 of the Indian Evidence Act, practically excluded the possibility of suicide. Holding, therefore, that the fact of murder is established beyond question, the learned Sessions Judge finds that, even apart from the accused's retracted confession, the circumstances as a whole point to the accused as the only possible murderer. The confession itself, as made before the Magistrate on December the 4th, the learned Sessions Judge evidently regards as clinching the matter.

In considering the soundness of the conclusion thus arrived at, I wish to take up first two questions of detail. The whole of the evidence for the defence has been swept aside by the learned Sessions Judge on what appear to me quite inadequate grounds. It is true that most of the persons concerned are relatives, caste-fellows or friends of the accused, although it is not clear that these remarks apply to the physician Nanak Prasad Varma. The matters to which these witnesses were required to depose were matters which could only have been within the knowledge of relatives or close friends of the family. It is not logical to put aside evidence of this sort, merely on the ground that the persons giving it have a motive for desiring to befriend the accused person. No doubt, as the learned Sessions Judge remarks, the fact that this unhappy girl had attempted to commit suicide on previous occasions would have but little bearing on this case, if it be indeed proved beyond possibility of doubt that the present case was not one of suicide. Nevertheless the defence evidence as a whole does suggest to my mind certain conclusions which I regard as established with reasonable certainty. I accept it as proving that this child wife was of a self-willed disposition and hysterical temperament. I think it highly probable that she had on previous occasions, either actually made, or professed to make, some attempt to take her own life. Further than this I do not desire to press the defence evidence, nor do I think it necessary to do so. Now as regards the medical evidence, I feel bound, although with some reluctance, to comment on the absence of certain details which I should have desired to find there. In a case of this sort, where a human life is at stake, no motives of delicacy, however natural or in themselves commendable, can be allowed to interfere for a moment with any attempt to sift out the truth. Speaking on the basis of an experience which goes back for a considerable number of years, and which calls to my mind more than one case analogous to the present in some of its most important features, I take it upon myself to say that in all cases in which the supposed victim of a murder is a young girl, the Medical Officer conducting the *post mortem* examination should invariably make a thorough and careful examintation of the organs of sex. In the present case we have it that the parties had been married for about a year and, according to the evidence, they had been separated for almost six months of that time. It appears not very probable that the medical examination, if directed expressly to this point, would have proved that this unhappy girl was at the time of her death a *virgo intacta*; but if this had happened to be the case, it would have thrown a most important light upon the consideration of the entire evidence. Even apart from this possibility, it might have disclosed some evidence bearing upon one conceivable view of the case which has been entirely kept out of sight at the trial, but which I think it impossible altogether to overlook.

Subject to these preliminary remarks, I now come to close quarters with the main grounds upon which the judgment of the Court below has proceeded. Is it fairly established on the evidence that the present case is either one of suicide or of wilful murder, and moreover is the hypothesis of suicide absolutely excluded by the evidence? It is not a matter about which it is possible to enter into any course of detailed reasoning. The question is as to the inferences to be drawn from the evidence of the Assistant to the Civil Surgeon considered in the light of any standard authorities on medical jurisprudence Speaking for myself I can only say that, on the evidence as it stands, I think that the theory of suicide, although shown to be somewhat improbable, cannot be said to be definitely excluded. I would go further and say that, in the case of a young girl of this age and of such antecedents and temperament as I believe to be proved

by the defence evidence, the possibility of death by accident, or by some undiscovered natural cause, is not altogether excluded. There remains yet another possibility at which I have taken it upon myself to hint in an earlier portion of this judgment. To put the matter bluntly, assuming that this girl met with her death at a moment when she was alone in a certain room with her husband, I should not even then be satisfied that the accused had caused her death by inflicting any injury upon her with such guilty intention or such guilty knowledge as would be necessary to support a charge of culpable homicide. The possibility would remain that he had been resisted in an attempt to exercise his marital rights, resisted perhaps with cries and screams, and in an attempt to stifle those cries he had used more force that he realized and driven a nervous and hysterical child into death by suffocation, without any intention of producing such a result or knowledge that he was likely to do so. The most curious and exceptional feature of this particular case is to be found in the two cuts inflicted upon the feet after death. I am quite unable to believe that a man who had deliberately murdered his wife would inflict these curious *post mortem* injuries for any such motive as that suggested in the statement taken down at the Allahabad Kotwali. If he merely wished to make sure that his victim was dead, he could have used a cutting implement to better purpose in a great variety of other ways. I feel confident that the explanation subsequently offered by the accused of these injuries is the true one, namely, that he was trying desperately to see whether there was not some life left in the apparently inanimate body. It is at least possible that he suspected the girl was shamming death and intended to put that to the test.

This brings me, therefore, to the final question. We are asked to convict this young man of murder, substantially upon a retracted confession and to do this in a case in which, putting that confession on one side, there is not, in my opinion, definite proof that murder has been committed at all. I should feel in any case most reluctant to act upon a retracted confession under such circumstances. In this particular case I feel no hesitation in going a good deal further. Parts of the confession in question I definitely disbelieve. I do not believe the reason given in the statement recorded at the Kotwali for the cuts inflicted after death on the feet. I do not believe the imputations on the chastity of the unfortunate girl thrown out either in this statement or in the confession subsequently recorded before the Magistrate. Practically I come back to this. Disbelieving so much of the confession, am I prepared to feel satisfied beyond the possibility of doubt that the accused was speaking the truth when, at the outset of his statement before the Magistrate on December the 4th, he began by saying: "I have killed my wife?" To this my answer is, *firstly*, that I am not satisfied beyond all doubt that the accused was speaking the truth when he said this. If he had been induced by injudicious advice, no matter from what quarter that advice may have proceeded, to tamper with the truth in other portions of his statement, he may not have been speaking the truth when he uttered these words. *Secondly*, as I have already pointed out, I might be prepared to believe that the accused truly said that he had killed his wife, and yet hold that in doing so he had not committed the offence of murder, or even that of culpable homicide. I am satisfied as the case stands that the conviction and the sentence recorded in the Court below cannot be affirmed and that, on the materials on this record, the appellant cannot be convicted of any lesser offence.

WALSH, J.—I agree that this appeal must be allowed. I have formed no theories about the case, but if I had to direct a Jury I should feel myself compelled to tell them, not as a matter of law but as a matter of common sense, that upon the mysterious condition of the evidence in this case it was their duty to give the defendant the benefit of the doubt.

As I have said before, and I repeat it because I think it is sound and indeed I think what my brother has said is in accord with it, that when a confession is the only evidence, that is to say, when there is no evidence of the crime except the confession relied upon, you must take the confession as a whole, that is to say, you cannot select, from the only evidence which you are proceeding to

act upon in order to find the crime established as a fact at all, portions of it which you reject as untrue, and treat the balance which remains as truthful evidence. This does not seem to me a principle of law so much as a statement of sound reason and logic, and few cases could afford a better illustration of it than the present case. There are two statements in the confession, namely, the adultery by the deceased girl with other men, and the existence of love letters written by her, the first of which is in the highest degree improbable and the second of which is demonstrably untrue; but they are so completely involved in the confession itself as, to my mind, to constitute the confession a piece of testimony which no reasonable man would act upon in the ordinary affairs of life in a business of his own. The Judge has, I think, unfortunately treated this retracted confession, and the explanation given for its original utterance, as being necessarily an attack upon the Police. He says, "it is no doubt a retracted one but for all that, it is singularly free from suspicion." He further says, "it was made in the presence of a Police Officer who is above suspicion in the matter of bringing any pressure to bear upon the accused." In the sense in which the Judge used the words "free from suspicion," I agree with him. Where I differ from him, and I think it was a fatal misdirection, is in drawing the inference from that conclusion that the confession itself is necessarily true. It is quite consistent with all the facts of the case, and with the confession itself, that the accused was persuaded to make it voluntarily in his own interest, and was honestly supposed to be doing it in his own interest by the person who prompted him. I am inclined to think that the confession in that sense was quite voluntary and I accept the evidence of Mr. S. E. Anthony about it. But it is perfectly consistent with that hypothesis that nonetheless the confession was false, as indeed it has been shown to be to a large extent. There is one unsatisfactory feature about the trial and the way in which the conclusion was arrived at. There is great doubt, even mystery, upon the medical testimony and the appearance of the body, as to how the death was caused at all. In the calendar two witnesses were vouched, and sent up to the trial, for the purpose of proving that the accused had illustrated the manner in which death had been caused. It may be, I do not stop for the moment to enquire that it is not open to us now to look at that evidence, but it is part of the history of the prosecution and it is impossible for me to shut my eyes, in a case of this importance, to the fact that either because a doubt existed as to its legitimacy as evidence, or as to its trustworthiness, the point was deliberately abandoned by the prosecution. It is an elementary principle of criminal law, and certainly should be applied in a case of this gravity and difficulty, that the accused is entitled to the benefit of any point, such as this which was essential to the questions which lay at the root of the enquiry, which had been put forward and subsequently abandoned by the prosecution. A further difficulty in the case to which my brother has already referred, and which has been entirely overlooked in the decision of the case, is the bearing upon what really happened of the cuts inflicted on the deceased woman's toes after death.

The judgment reads in some particulars like a category of grievances against the accused and his friends. It cannot be too often repeated, because it ought always to be remembered and I think in this case it was forgotten, that there is all the difference between a trial of a criminal case where a man's life is at stake and a civil suit. It is not desirable to call upon the defence to frame a theory either at the beginning or at any other stage of the hearing, particularly in a case of difficulty in which the theory of the prosecution itself is by no means clear and whether there was any misunderstanding or not, Mr. Ross Alston, if he did refuse, was perfectly within his rights in declining to accept the invitation. I feel bound also to say that it is due to the father of the accused, to whom this case must in any view have been a source of great anxiety and who obviously was in a position of considerable difficulty in the witness-box, to say that, in my opinion, without having heard anything suggested against his demeanour at the trial, and after reading his evidence over and over again, he gave it with candour and freedom from any trace of dis-

honesty. He dealt in detail with the conversations which he had with his son, and with the Vakils who were advising at that critical moment in the defence, but as far as I can see, the evidence which he gave was, as I have said, candid and straightforward and I do think that some better reason should have been given for throwing over the whole of his testimony than the mere fact that his name was Mukherji.

The telegram, the absence of which is commented upon, is now in our hands. It has been produced by Mr. Ross Alston. There is one very curious feature about it, which only shows the importance in a case of difficulty of probing every clue, and this is the duty of the Police, as far as possible. Certainly before 2 o'clock, if not considerably before, the accused was at the Kotwali and from that moment remained in the custody of the Police. His witness says that the conversation about sending the telegram took place about 1-30. The telegram itself states officially that it was handed in at the Allahabad Telegraph Office at 12 minutes past 3. We are now informed that that hour relates to some transaction inside the office. The statement on the form is that the time was noted at the moment when it was handed in at the telegraph office. Therefore, the inference to be drawn from the telegram itself is, either that it was handed in at a time when the accused was in the custody of the Police or that there is great remissness in the telegraph office with regard to the entries of these matters. It is impossible to say that cases may not, and do not often occur, when the time and day of an act done, recorded accurately and officially, becomes of vital importance in an enquiry, and if the practice is in the post office to enter as the hour for handing in a telegram something which is two hours wide of the mark, the sooner that practice is abandoned the better. The entry ought to be accurate, and made in ordinary language, either in English or the language which is used for the telegram, so as to be readily understood by any person of ordinary intelligence without consulting a Code. This is a side issue, but it does so happen that the point has not actually been cleared up in the evidence. I agree that the conviction must be quashed.

BY THE COURT.—We accept this appeal, set aside the conviction and sentence in this case, acquit the appellant Surendra Nath Mukherji of the offence charged and direct that he be forthwith released.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 327 OF 1917.

October 8, 1917.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

EMPEROR—APPELLANT

versus

LAL BAGE—ACCUSED—RESPONDENT.

Madras Police Act (XXIV Mad. of 1859), *s.* 46—'Mamul', *payment of, to Police Officer—Offence.*

The mere demand by a Police Officer of 'mamul' or a customary payment with a view to extend his favour to the person making the payment is in itself a threat and consequently, the obtaining of money by such a demand comes within section 46 of the Police Act. [p. 667, col. 1.]

Appeal under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the accused by the Sub-Divisional Magistrate, Guntur, in Criminal Appeal No. 20 of 1917, preferred against the conviction and sentence by the Stationary Sub-Magistrate, Guntur, in Calendar Case No. 51 of 1917.

Mr. *E. R. Osborne*, for the Crown.

Mr. *K. P. Padmanabha Pillai*, for the Accused.

JUDGMENT.—The prosecution case is that prosecution 1st witness paid three annas to accused as a "mamul." The demand of the "mamul" is spoken to not only by prosecution 1st witness but also by prosecution 2nd witness, and the payment of the money was witnessed by prosecution 4th witness, the Circle Inspector. The Sub-Magistrate who tried the case believed these witnesses, and there is certainly no reason, in our opinion, for disbelieving prosecution 1st witness, who made his statement to the Inspector at the earliest opportunity. Accused's story is that he paid three annas to prosecution first witness as earnest money for purchase of a goat, and that prosecu-

tion 1st witness returned the money as he withdrew from the bargain. Defence witnesses Nos. 1 to 3 are examined in support of this story, but the prosecution witnesses were not cross-examined as to their presence at the scene of offence and the Sub-Magistrate has given good reasons for rejecting their evidence. On the facts we think the Deputy Magistrate has paid too little regard to the opinion of the Magistrate who heard the evidence, an opinion in which we entirely agree.

As regards the point of law the Deputy Magistrate considers that all the elements necessary to constitute an offence under section 46 of the Police Act are not established. The mere demand of a "mamul" or customary payment made in order to obtain the favour of the official demanding it is itself a threat and consequently the obtaining of money by such a demand comes within section 46 of the Police Act. In this case we have also the evidence of prosecution 1st witness that he paid as the Police were troubling him, and in Exhibit A he says the Police threatened to take him to the Police Station; we, therefore, restore the conviction by the Sub-Magistrate under section 46 of the Police Act and confirm the sentence of imprisonment but reduce the fine to Rs. 15.

M. C. P.

Appeal allowed.

PATNA HIGH COURT.

CRIMNIAL REVISION No. 268 OF 1918.

July 23, 1918.

Present:—Mr. Justice Jwala Prasad.

RAM BYAS RAI *alias* BYAS RAI—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 403—Misappropriation—Dishonest motive—Overt act of dishonesty, evidence of.

The chief element for a conviction under section 403 of the Penal Code is the dishonest misappropriation of the property or conversion to one's own use. [p. 669, col. 2.]

In the absence of any overt act on the part of the accused no inference of dishonest motives can be imputed to him simply because he has retained certain documents in his custody. [p. 669, col. 2.]

Criminal revision from a decision of the Magistrate, Shahabad.

Mr. *Sushil Madhab Mullick*, for the Petitioner.

JUDGMENT.—This is an application against the conviction of the petitioner under section 403 of the Indian Penal Code. The petitioner has been sentenced to an imprisonment of 25 days with a fine of Rs. 20.

The facts and circumstances relating to this case are shortly as follows:—

A sale-deed was executed in favour of one Gulzar Rai on July the 26th, 19.7, whereby some land of the vendor was conveyed to the petitioner. That land was in the possession of the opposite party Inder Rai by virtue of a mortgage deed executed for Rs. 165. Under the terms of the sale-deed the petitioner was entitled to redeem the said mortgage in favour of the opposite party. Gulzar Rai, the executant of the sale-deed, did not register it, and, therefore, the petitioner had to apply to the Sub-Registrar of Koilwar for having a compulsory registration of the deed. The Sub Registrar refused to register the sale-deed. The petitioner, therefore, appealed to the District Sub-Registrar of Arrah. In support of his case the petitioner filed before the District Sub Registrar certain documents amongst which were the said *rehan*-deed in favour of Inder Rai and a *bahi* belonging to him. We are concerned only with these documents in this case. The petitions whereby the documents were filed before the District Sub-Registrar are Exhibits 5 and 6, dated the 5th September and 13th October 1917 respectively. Among other witnesses Inder Rai, the opposite party, was alo examined as a witness on behalf of the petitioner in the registration appeal. He is witness No. 7, and was examined on the 5th September. The District Sub-Registrar allowed the appeal of the petitioner and compulsorily registered the sale-deed. Shortly after on the 24th November a petition was filed before the Sub Registrar for the return of the documents. This petition purports to be on behalf of both the petitioner and Inder

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Rai, the opposite party, through a Mukhtear named Bhagwat Prasad. On the 27th November 1917 the papers were returned to the petitioner in the presence of the said Mukhtear. Four months after, on the 1st March, the opposite party, Inder Rai, made an application for the return of the documents. He was then told by the clerk in the registration department that the documents were already returned to the petitioner. A slip was also written by the clerk to the petitioner requiring him to see him at once. This slip is Exhibit 12. On the 6th March, Inder Rai, the opposite party, made another application before the Sub-Registrar asking for the return of the documents. In this application he has referred to the previous application made by him: this is Exhibit 9. The Sub-Registrar then called both the parties. The parties then took time to settle their differences out of Court. This was not done. The opposite party again appeared before the Sub-Registrar complaining to him that the papers which were taken away by the petitioner were not returned to him. The Sub-Registrar then passed an order that the opposite party might take any step he liked in the criminal Court and that the Registrar could not help him. Inder Rai, therefore, instituted proceedings out of which this matter has arisen. The Courts below have convicted the petitioner holding that he did not return the documents to the complainant, Inder Rai, but retained them with a view to misappropriate the money due on the mortgage bond by setting up a redemption of the mortgage and that he thereby committed a criminal misappropriation under section 403 of the Indian Penal Code.

The Courts below have held that the petitioner took back the documents from the registration department but did not return them to the opposite party. There can, of course, be no doubt that the parties were both on friendly terms prior to the filing of the documents before the Sub-Registrar and also that Inder Rai gave evidence before the Registrar not long before the documents were returned to the petitioner. Gulzar Rai, the vendor of the petitioner, after the execution of the sale-deed resiled from it and would not register the deed and hence the proceedings in the registration department arose. The money due under the mortgage bond to Inder Rai, the opposite party, was not paid and could not be paid because the time for the payment, namely, the end of Jeth stipulated for in the mortgage bond had not arrived. This was admitted by the petitioner. Inder Rai was ready to give every assistance that lay in his power in order to support the case of the petitioner, so much so that although the money was not paid to him he handed over the documents without any demur and the documents were accordingly filed on behalf of the petitioner. He further supported the petitioner's case by giving his evidence on the 5th September 1917. The registration case being over, one would naturally expect that the parties would apply for the return of the documents soon after the order of the Registrar was passed. The petition, therefore, of the 24th November, which purports to have been filed on behalf of both the parties, is only natural. It is also clear that both the parties joined in the petition for the return of the documents. Some of the documents filed belonged only to the petitioner and others belonged to Inder Rai, the opposite party. This is supported by the evidence of Bhagwat Prasad Mukhtear, who says that both of them appeared before him and joined in the application filed by him for the return of the documents. This is a very important fact which bears upon the motive in this case, but unfortunately the Courts below have not considered it and perhaps their attention was not drawn to it. As the documents were filed only on behalf of the petitioner, the registration department returned the documents to him in the presence of Bhagwat Prasad. The Courts below have made much of the fact that the registration department clerk ought not to have returned the documents to Ram Byas Rai, the petitioner, but ought to have returned them to both the parties, as the application for the return of the documents was made by both of them. I do not appreciate this, I would rather think that the documents could not be returned to Inder Rai as they were not filed on his behalf. No Court or office can take the responsibility of returning documents to a person on whose

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behalf they are not filed simply because the documents might belong to that person. For the purpose of returning a document the Court recognises only the person on whose behalf the document is filed. The fact remains that the petition of the 24th November was filed on behalf of both the parties, and Inder Rai, therefore, knew that the documents were going to be returned. The petitioner, when he appeared before the Sub-Registrar, stoutly denied having retained the documents with him at that time and boldly asserted that the documents were made over, soon after they were taken back from the registration department, to the opposite party. It appears to me that there is a good deal of substance in the plea of the accused, inasmuch as if the documents were not returned to the opposite party for four months he would surely have come to Court and repeated his grievance long before the 1st of March, the date on which he made his first appearance before the registration department and complained in respect of the documents. This throws a great suspicion on the complainant's case. The present course adopted by the complainant, opposite party, four months after the documents were returned to the petitioner, is probably due to some unfortunate dispute which has since cropped up between the parties. There is an indication of this in the report of the Sub-Registrar to the Sub-Divisional Officer, in which he says that there was something else in the hearts of both the parties and that he, therefore, advised them to have their grievances settled by arbitration. They took time to do it but could not make up their differences. The evidence in the case is too meagre for a sure and certain finding that the petitioner did not make over the documents to the opposite party. Even if it be admitted that the documents were not returned, there is nothing to show that there was a criminal motive on the part of the petitioner. The Courts below have said that the object of the petitioner was to misappropriate the mortgage money and to set up the redemption of the mortgage. The opposite party is in possession of the land mortgaged to him. The petitioner's case has all along been that no money was paid to the opposite party and that the mortgage has not been redeemed. This was his case when he applied for the compulsory registration of the sale-deed and has been so throughout the proceedings in the registration department. Even when he appeared before the District Sub-Registrar four months after the documents were returned to him, he said that the mortgage of Inder Rai was not redeemed. This was his case in the trying Court and as well as in this Court (*vide* the sworn petition of motion). There is nothing to show that there has been any attempt thereto on his part to deprive Inder Rai of his money or to use the documents for his own purposes. In the absence of any overt act on his part, no inference of dishonest motive can be imputed to him simply by the retention of the documents, *Queen* v. *Abdool* (1). The chief element for a conviction under section 403 is the dishonest misappropriation of the property or conversion to one's own use, *Crown* v. *Muhammada* (2), *Bhuban Mohan Banerjee* v. *Tansuk Roy Seraogi* (3). The petitioner's avowedly honest statement all through that the mortgage has not been redeemed has not been at all considered by the Courts below in imputing a dishonest motive to him.

I, therefore, set aside the conviction and sentence of the petitioner and direct that he be discharged from his bail bond. The fine, if paid, should be refunded.

Conviction set aside.

(1) 10 W. R. Cr. 23A.
(2) 28 P. L. R. 1906; 3 Cr. L. J. 299.
(3) 6 C. W. N. 34.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 141 OF 1918.

July 8, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

In re MARAPPA GOUNDAN.

THE SESSIONS JUDGE OF COIMBATORE—REFERRING OFFICER—PETITIONER.

Criminal Procedure Code (*Act V of* 1898), *s.* 436—

GANPAT *v.* EMPEROR.

Offence, minor, cognizance of, by Court—Graver offence disclosed, charge for, not pressed by prosecution—Commitment to Sessions on graver charge, legality of.

Where a Magistrate takes cognizance of a minor offence against an accused, and a graver offence triable by the Sessions Court is disclosed in evidence but the prosecution does not press for the framing of a charge in respect of such offence, a commitment to the Sessions Court in respect of the graver offence is illegal.

Krishna Reddi v. *Subbamma*, 24 M. 136; 2 Weir 544, explained.

Petition praying that in the circumstances stated in his Letter D. No. 3230, dated the 3rd April 1918, the High Court will be pleased to quash the commitment of Marappa Goundan, accused, in Sessions Case No. 21 of 1918, on the file of the Sessions Court, Coimbatore (P. R. No. 2 of 1918 on the file of the Court of the Sub-Magistrate of Mettupalayam).

The Hon'ble Mr. *T. Richmond*, for the Accused.

Mr. *E. R. Osborne*, the Public Prosecutor, for the Crown.

ORDER.—The decision in *Krishna Reddi* v. *Subbamma* (1) goes only to this extent, that, where the prosecution had pressed for the framing of a charge of a higher offence triable by the Sessions Court, even if the Subordinate Magistrate had originally taken cognisance only of a charge relating to a lesser offence, the refusal of the Magistrate to frame the charge for the higher offence might be treated as an order of discharge in respect of that offence and that section 436 of the Criminal Procedure Code would, in those circumstances, give the District Magistrate jurisdiction to direct the Subordinate Magistrate to commit the accused to the Sessions on the graver charge.

In the present case the offence of attempt at rape was not mentioned in the Police charge sheet on which the Subordinate Magistrate took cognizance of the case and the prosecution did not press for the framing by that Magistrate of a charge against the accused in respect of that offence.

The Sessions Judge was, therefore, justified in holding that the decision in *Krishna Reddi* v. *Subbamma* (1) could not be extended so as to cover this case, and we accordingly accept the reference. Quashing the commitment we direct the Subordinate Magistrate of Mettupalayam to proceed with the trial of the charges for the minor offences framed by him against the accused.

M. C. P.

Commintment quashed.

(1) 24 M. 136; 2 Weir 544.

PUNJAB CHIEF COURT.

REVISION PETITION No. 447 OF 1918.

May 17, 1918.

Present:—Mr. Justice Martineau.

GANPAT—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 377—Unnatural offence—Proof—Evidence, uncorroborated, of person on whom offence committed, whether sufficient.

In cases under section 377 of the Penal Code it is, as a rule, unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reasons that testimony is entitled to special weight [p. 670, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Multan, dated the 28th January 1918, affirming that of an Honorary Magistrate of the 1st Class, Multan, dated the 20th December 1917, convicting the petitioner.

Mr. *Mukand Lal Puri*, for the Petitioner.

JUDGMENT.—The conviction rests solely on the evidence of the boy Muhamda, whose statement is not supported by Sulla and Yaru, the alleged witnesses of the offence.

No semen was found on the clothes either of Muhamda or of Ganpat, and no injuries were found on their persons.

Muhamda admits that he had hurt his thigh while ploughing 2 or 3 days before and that it bled, so this would account for the blood colouring matter found on his loin cloth, and the presence of such matter on Ganpat's loin cloth might be equally well explained.

It appears to me that in a case of this kind it is, as a rule, unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reasons that testimony is entitled to special weight. Muhamda is a boy of 14, and it cannot

be said to be improbable the he may have been tutored. The offence is said to have been committed on the 10th October, and it is noteworthy that the boy admits that he did not tell his father Ramzan about it till the next day and it was not till the 12th that a report was made at the Thana. I also note that Ramzan speaks of only of Sulla having been mentioned to him by Muhamda as witness of the occurrence, whereas Yaru is said to have witnessed it as well.

Further, there is an important discrepancy as to where the boy went after the commission of the offence. He says in Court that he was first taken by the witnesses to the well and that in the evening (not the morning, as stated by the learned Sessions Judge in his judgment) he was taken by the accused and Mehra to Shamkot and stayed the night with the accused. But in the report at the Thana what he said was that after the accused had run away he returned to his well, and Ganpat's brother Babu kept him there for the night.

From this discrepancy alone it would appear that Muhamda is not an entirely straightforward witness. He has not satisfactorily explained why after Sulla and Yaru had come up and the accused had run away, he did not go straight to his father and complain to him.

In my opinion, therefore, implicit reliance cannot be placed on Muhamda's evidence, and Ganpat should not be convicted thereon.

I accept the application, set aside the conviction and sentence, and acquit Ganpat and direct that he be set at liberty and the fine, if paid, be refunded.

Revision accep ed.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 859 OF 1916.
August 28, 1916.
Present:—Mr. Justice Fletcher
and Mr. Justice Teunon.
FAKIR MULLICK AND ANOTHER —
PETITIONERS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 139 (1), 141—Inquiry in proceedings under s 133—Bona fide claim of right set up—Procedure.

On a complaint being made to a Magistrate that public rights in a channel had been interfered with, the Magistrate took proceedings under section 133, Criminal Procedure Code, and coming to the conclusion that the channel in question was in fact a public channel passed orders under sections 139 (1) and 140 (1), Criminal Procedure Code:

Held, that it was not incumbent upon the Magistrate to inquire whether the party complained against had a *bona fide* claim of right to the channel and to refer the parties to the Civil Court if he found that the claim of right set up was *bona fide*, although in normal cases that course would be a wise and proper course to adopt. [p. 671, col. 2.]

Criminal revision against the order of the Sub-Divisional Officer, Uluberia, dated the 14th August 1916.

Babus *Manmathanath Mukherjee* and *Asiranjan Chatterjee*, for the Petitioners.

Babu *Atu'ya Charan Bose*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the District Magistrate of Howrah to show cause why the orders under sections 139 (1) and 140 (1), Code of Criminal Procedure, complained of in the petition should not be set aside or why such other order should not be passed in the matter as to this Court might seem fit and proper on grounds Nos. 1 and 2 mentioned in the petition. The proceedings with which we are concerned in this case are proceedings taken under section 133, Code of Criminal Procedure. The learned Sub Divisional Magistrate of Uluberia proceeded to enquire on a complaint that public rights had been interfered with and he came to the conclusion that the channel was, in fact, a public channel. Mr. Mukherjee, who appears for the petitioners in this case, says that, having regard to the rulings of this Court, the Magistrate ought to have first enquired whether his clients had a *bona fide* claim of right to the channel; and, if he found that they had, then he should have referred the parties to the Civil Court. No doubt, in certain decisions of this Court the rule is stated to that effect: but those words do not appear in the section and I think that every case must largely turn on the particular circumstances affecting it. No doubt, in normal cases that course is a wise and proper course to adopt. It is not con-

venient that a Court of this nature should adjudicate and settle matters which can properly be referred to the Civil Court. But there are other cases—cases of urgency—where that rule, notwithstanding the fact that it may place one of the parties in a less favourable position, cannot be followed and it seems to me that the present case is one of those cases where the Magistrate has got to choose whether he would proceed with the case and determine it or whether serious injury would be caused to the other party. I think in this case we ought not to interfere with the orders complained of, the Magistrate having determined that the public have a right to the water of the channel, as it would, if the petitioners' argument be assented to, seriously affect a very large portion of land of the persons who appeared before the learned Magistrate.

The other point that has been made is that the learned Sub-Divisional Magistrate was guilty of a serious contempt of Court in ordering the *bund* to be cut after an order had been made by this Court on the 16th August last staying all further proceedings. It is said that the order was communicated to the learned Magistrate by a Mukhtar. Whether the learned Magistrate believed the statements made by the Mukhtar as credible or not we do not know. There is no answer to the affidavit filed by the petitioners and I do not know whether the Magistrate ever knows of it or not. There seems to be no reason, if the petitioners intended to communicate an order of an urgent nature to the Magistrate, why an order in some form or other should not have been taken from this Court to communicate to the Magistrate. Whether any actual rule exists or not as to that I do not know; but I take it that, where the order is of a very urgent nature, there cannot be any difficulty in procuring an order from the Court and sending it down by the party who obtains the order to communicate it to the Magistrate. I do not think we can assume in this case that the learned Magistrate was deliberately acting in defiance of the order of this Court. I think this is a case where we ought not to interfere, having regard to the nature of the public right which the learned Magistrate has found to exist. That being so, the Rule fails and must be discharged.

TEUNON, J.—I agree.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 285 OF 1918.

July 18, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

EMPEROR—APPELLANT

versus

S. VARADACHARIAR—ACCUSED—RESPONDENT.

Madras City Municipal Act (III of 1904), ss. 282 420—Construction of inflammable pandal—*Offence—Owner and occupier, liability of.*

The words "whoever contravenes" in section 420 of the Madras City Municipal Act, 1904, cover owners as well as occupiers of the premises.

The construction of an inflammable *pandal* or the continuance of an existing one is an offence under section 282 read with section 420 of the Act.

Appeal, under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the 4th Presidency Magistrate, Egmore, Madras, in Calendar Case No. 17776 of 1917.

The Crown Prosecutor, for the Appellant.

Mr. *K. S. Krishnaswamy Ayyangar*, for the accused.

JUDGMENT.—We are quite clear that this section 282 (of the Madras City Municipal Act, 1904) read with section 420 (of the Act) was intended to reproduce section 264 of the old Act (The City of Madras Municipal Act, 1884), which made the new construction of an inflammable *pandal* or the continuance of an existing *pandal*, etc., of that character an offence. The *pandal* in question is clearly unlawful and there is no written permission of the President to legalise it. We think that the language of section 420 (the Madras City Municipal Act, 1904), "Whoever contravenes", is wide enough to cover an owner and occupier of premises which offend against the section.

We set aside the acquittal and impose a fine on the defendant of Rs. 5.

Acquittal set aside.

M. C. P.

ABBAS BANDI BIBI *v.* ABDUL GHANI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 208 OF 1917.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Musammat ABBAS BANDI BIBI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ABDUL GHANI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), Ch. II, s. 9—Pre-emption—Sale of house by riaya*—Suit for pre-emption, maintainability of.*

A sale by an occupier of a house in a village who has merely the ordinary rights of a *riaya* in it, does not give rise to a right of pre-emption exercisable under Chapter II of the Oudh Laws Act, inasmuch as under section 9 of that Act, unless the transferor is a proprietor of a proprietary or under-proprietary tenure or a share in such a tenure, no right of pre-emption comes into being. [p. 674, col. 1.]

Mangal v. *Raja Partab Bahadur Singh*, 4 O. C. 26, followed.

Appeal from the decree of the District Judge, Fyzabad, dated the 23rd February 1917, confirming that of the Munsif, Akbarpore, dated the 23rd October 1916.

Syed *Wazir Hasan*, for the Appellants.

Mr. *Mohammad Wasim*, for the Respondents.

JUDGMENT.—The facts of this case are very simple. A widow called Asuda was the occupier of a house in Kasba Jalalpur, Fyzabad district. She had in this house the ordinary rights of a *riaya*, that is to say, she owned the materials but had no title in the site. She sold this house to one Abdul Ghani. The proprietors of the village have sued to exercise a right of pre-emption under the provisions of Chapter II, Act XVIII of 1876. The lower Courts dismissed the suit, relying on the decision in *Mangal* v. *Raja Partab Bahadur Singh* (1). The learned Counsel for the appellants at the first hearing of this appeal admitted that, if that decision were followed, this appeal must fail. He stated, however, that he proposed to question the view of the law taken in that decision. The appeal was accordingly referred to a Bench for decision. In *Mangal* v. *Raja Partab Bahadur Singh* (1), Mr. Spankie laid down that, unless the sale was one by a proprietor or under-proprietor of the land in a village, no right of pre-emption was created. The learned Counsel for the appellants has argued on the following lines. Under the provisions of section 6, Act XVIII of 1876, what is referred to as "the right of pre-emption" is stated to be "a right of the persons hereinafter mentioned or referred to to acquire, in the case hereinafter specified, immoveable property in preference to all other persons." He points out that that section does not specify who are the persons who acquire the right but that those persons are specified in section 9 in the order in which they are entitled thereto, that is to say—

(1) co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendor or mortgagor,

(2) co-sharers of the whole *mahal* in the same order,

(3) any member of the village-community,

(4) if the property be an under-proprietary tenure, the proprietor.

He thus finds the persons entitled to the right. He then proceeded to consider what was the property to which the right applied. That is found in section 7. It is the property in all village communities, whether proprietary or under-proprietary, and in the cases referred to in section 40 of the Oudh Land Revenue Act, and extends to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights affecting such lands. He urged that, as this was a house built upon the village site, it was property to which the right applied, and, as he finds the appellants amongst the persons entitled to the right and the property in suit as property subject to the right, he argues that there must be a right of pre-emption in their favour. This argument, however, ignores the existence of two other necessary conditions. To establish such a right of pre emption as created by Chapter II of the Act, we must discover as constituent elements—

firstly, the person entitled to the right,

secondly, the property over which the right can be exercised,

thirdly, the nature of the transfer,

fourthly, the status of the transferor.

(1) 4 O. C. 26.

MAUNG MYO *v.* MAUNG KWET E.

His argument does not cover the two latter points. The nature of the transfer is given in section 10. It must be a private sale or a foreclosure of a mortgage. Here there was a private sale, so that question is settled. But where his argument fails is with regard to the fourth point. Under section 9, unless the transferor is the proprietor of a proprietary or under-proprietary tenure or a share of such a tenure, no right of pre-emption comes into being. This point is not made very clear in *Mangal* v. *Raja Partab Bahadur Singh* (1). But it is undoubtedly the point upon which Mr. Spankie based his decision. The words of the Chapter must be strictly construed. It could not be suggested for a moment that, where the transfer has been by a gift, any right of pre emption could exist and it is equally the case that, where the transferor is not a proprietor of a proprietary or under-proprietary tenure or a share in such a tenure, no right of pre-emption comes into being.

We, therefcre, accept the principle laid down in *Mangal* v. *Raja Partab Bahadur Singh* (1) and dismiss this appeal accordingly. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 390 OF 1917.

May 6, 1918.

Present:—Mr. Saunders, J. C.

MAUNG MYO—PLAINTIFF—APPELLANT

versus

MAUNG KYWET E—DEFENDANT—RESPONDENT.

Defamation—Damages, suit for, maintainability of, in respect of charge which has formed subject of complaint.

Where one man charges another with an offence and without unreasonable delay makes that charge the subject of a complaint to the Police or to the Court, he is protected from an action for defamation of character in respect of allegations contained in the charge. If the complaint is dismissed, the accused has two remedies, one by obtaining sanction for the prosecution of the complainant for bringing a false charge, and the other, if he has suffered loss or injury, by a suit for damages for false and malicious prosecution. [p. 675, col. 2.]

Mr. *G. S. Pillay*, for the Appellant.

Mr. *Tha Gywe*, for the Respondent.

JUDGMENT.—Plaintiff sued for Rs. 100, damages for defamation of character, on the ground that the defendant had falsely charged him with setting fire to his, defendant's house. The defence was that the charge was true. The first Court gave plaintiff a decree for Rs. 60. On appeal the lower Appellate Court stated that the suit was for damages for malicious prosecution according to the plaintiff-respondent's Advocate, and on the authority of certain Indian cases dismissed the plaintiff's suit. The plaintiff now comes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation.

The plaintiff-appellant urges that his suit was not or was not merely for damages for false and malicious prosecution, and no statement of his Advocate in the lower Appellate Court could alter the nature of the suit which was to be ascertained from the record. This is undoubtedly the case. The plaint as filed alleged in paragraph 2 that the defendant had come to the plaintiff's house, while the plaintiff was asleep, with the headman and village elders, and had charged the plaintiff with having set fire to his house. The plaint went on to state that the defendant was on bad terms with the plaintiff, that the charge was false, that the plaintiff had been defamed thereby and had suffered loss and injury. The case was at first dealt with *ex parte*, but the defendant appeared later and was allowed to defend the suit. The Judge of the lower Appellate Court says in his judgment that "the plaintiff was too premature. He had not even waited to see what the result of the information given to the Police would be." But there is nothing on the record to show when the information was laid with the Police; and though the defendant appeared and was examined before issues on the 21st July 1916, the suit having been filed on the 1st July 1916, and then stated that he had lodged a complaint with the Police, in his cross-examination when examined as a witness, he

admitted that this suit had been filed before he had made his complaint to the Police. It would seem, therefore, that the suit could not have been a suit for damages for a false and malicious prosecution since, at the time it was filed, no step had been taken towards prosecuting the plaintiff; the cause of action cannot, therefore, have been a prosecution which had not even reached the stage of a report to the Police at the time the plaint was filed.

The judgments relied upon by the lower Appellate Court appear to lay down that unless and until cognizance is taken of a complaint by a Court and some action is taken to require the plaintiff to appear and answer a charge, it cannot be said that there is any prosecution and there can, therefore, be no right of action for damages on the ground that there is a prosecution which is false and malicious. This view appears to have been dissented from in the Bombay case of *Ahmedbhai* v. *Framji Edulji* (1), and in the case of *Bishun Pergash* v. *Fulman Singh* (2) a Bench of the Calcutta High Court in 1914 examined the case-law on the subject and expressly dissented from the view taken in the Calcutta and Madras cases relied upon by the lower Appellate Court. I am bound to say that there appears to me to be much force in the arguments by which the learned Judges in this later case arrived at their conclusions. It is not necessary to refer to them in detail because, as has been pointed out above, this suit was not a suit for damages for malicious and false prosecution. But I have referred to these cases because there appears to be another question arising in this suit which is referred to in two at least of the cases cited which appears to be of importance, and that is whether an action for defamation would lie against a defendant in respect of a charge which has formed the subject of a complaint to the Police or to Court. In the case of *Bishun Pergash* v. *Fulman Singh* (2) cited above, the plaintiff also claimed damages for defamation, but the Judges refused to consider this claim on the ground that it was not put in issue and for other reasons. In the case of *Golap Jan* v. *Bhola Nath* (3), however, it was held that even if the complaint to the Magistrate was defamatory, still the complainant was entitled to protection from suit and this protection was the absolute privilege awarded in the public interest to those who make statements to the Courts in the course of and in relation to judicial proceedings. This view of the law appears to be correct. Defamation of character is not a ground for claiming damages for false and malicious prosecution which may be granted upon proof of actual loss or damage. The law provides sufficient protection for an accused person in the prosecution of a complainant who has deliberately brought a false charge. But if this is the case, it appears to me to be more than doubtful whether a plaintiff is entitled to sue for damages for defamation on the ground that the allegations which formed the subject of the complaint to the Police or Magistrate had been previously made outside the Court, and whether if he were so entitled the effect would not be to deprive the complainant of his privilege and would not be opposed to public policy. A person who had reason to believe that an offence had been committed, would be very seriously and unfairly handicapped if he were bound to keep his reasons to himself and to go to Court without making any enquiry into the truth of his suspicions, under penalty of having to meet an action for damages if he did not follow this course. I am of opinion therefore that the defendant-respondent having taken his complaint to the Police and to Court, so far as the record shows, without unreasonable delay was protected from an action for defamation of character in respect of allegations contained in his subsequent complaint. This being so, the plaintiff-appellant's suit was bound to fail. He had, when the complaint was filed and was dismissed, two remedies, one by obtaining sanction for the prosecution of the defendant for bringing a false charge, and the other, if he suffered loss or injury, upon the authority of the Calcutta case of 1914 cited above, by a suit for damages for false and malicious prosecution. In this view of the case the appeal is dismissed with costs throughout.

Appeal dismissed.

(1) 28 B. 226; 5 Bom. L. R. 940.

(2) 27 Ind. Cas. 449; 20 C. L. J. 518; 19 C. W. N. 935.

(3) 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N. 917.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 81 OF 1917.

June 11, 1917.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

BRIJ INDRA BAHADUR SINGH—PLAINTIFF—APPLICANT

versus

DEPUTY COMMISSIONER OF KHERI FOR MAHEWA ESTATE AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Interlocutory order, whether open to revision.

Section 115, Civil Procedure Code, authorises the Court to call for the record of any case which has been decided, but where there has been no decision and the case is still pending, interlocutory orders passed during the course of the hearing cannot be made the subject of revision, unless those orders have the effect of determining the case, so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal. [p. 676, col. 2; p. 677, col. 1.]

Revision against the order of the Second Additional District Judge, Lucknow, dated the 15th May 1917.

Messrs. *Moti Lal Nehru*, *H. C. Dutt* and *H. K. Ghose*, for the Applicant.

Messrs. *John Jackson*, *Ram Bharose Lal* and *Sita Ram*, for Respondent No. 1.

Babu *Salig Ram*, for Respondent No. 2.

JUDGMENT.—This is an application for revision of an order passed in a suit, pending in the Court of the Second Additional Judge of Lucknow, refusing to permit an amendment of the plaint in certain particulars.

The plaintiff is a minor and has instituted a suit, claiming possession of the Mahewa Estate, as the heir-at-law of the late Taluqdar, Rajendra Bahadur Singh. The defendant, Jai Indra Bahadur Singh, claims the estate as the legatee of Rajendra Bahadur Singh. The plaintiff is represented in the suit by his mother, who is his next friend. The allegation of the plaintiff in regard to the Will set up by Jai Indra Bahadur Singh is that Rajendra Bahadur Singh was a man of weak intellect and mind, and was for various reasons in fear of Sheo Indra Bahadur Singh, with whom he lived and who was the manager of his estate, and that the latter took advantage of his position and of Rajendra Bahadur Singh's weakness, and got him to execute a Will in favour of his own son, Jai Indra Bahadur Singh by the exercise of coercion and undue influence.

These allegations were denied by the defendants. In his replication the plaintiff reiterated what he had stated in the plaint and affirmed that Sheo Indra Bahadur Singh had got his brother Rajendra Bahadur Singh to execute the Will by fear and undue influence.

The plaint was verified by the next friend of the plaintiff, and the replication was verified by her general agent.

It is now sought to amend the plaint so as to add that the execution of the said Will by Rajendra Bahadur Singh was also denied. The ground on which the amendment was pressed in the Court below, was that the mother and next friend of the plaintiff had on previous occasions contested the genuineness of the Will in other cases to which the plaintiff was a party and that her agent and Counsel had wrongly represented her as admitting the execution of the said Will by Rajendra Bahadur Singh without her knowledge or permission. The Court below disallowed the application.

The learned Counsel who now appears for the plaintiff urges in revision that the next friend of the minor was in any event entitled to apply for the amendment of the plaint in the interest of the minor, if on a reconsideration she thought that she had wrongly made admissions prejudicial to his interest. We cannot, however, allow that question to be considered in revision because, as pointed out in *Heranchal Kunwar* v. *Kanhai Lal* (1) and in *Nand Ram* v. *Bhopal Singh* (2), no application for revision lies from an interlocutory order which does not determine the case. An appeal would lie from the final decree which might be passed in the suit. Section 115 of the Code of Civil Procedure authorizes the Court to call for the record of any case, which has been decided, but where there has been no decision, and the case is still pending, interlocutory orders, passed during the course of the hearing, cannot be made the subject of revision, unless those orders have the effect of determining

(1) 4 Ind. Cas. 878; 12 O. C. 405.
(2) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

the case, so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal. In *Riasat Ali* v. *Rae Rajeshar Bali* (3) and in *Allahabad Bank* v. *Muhammad Raza Khan* (4) an application in revision was entertained from an order adding or refusing to add a person as a party to a suit, because so far as the right to add that person as a party was concerned, the order had the effect of concluding it. In *Musammat Farid-un-nisa* v. *Mukhtar Ahmad* (5), an application for revision was similarly entertained from an order directing the plaintiff to elect and remove one of the two inconsistent allegations, because the effect of the forced removal would have been to determine that part of the case.

In the present case, it is open to the plaintiff to contest the propriety of the order refusing him leave to amend the plaint under section 105 of the Code of Civil Procedure, when an appeal is filed from the final decree. The consequences of the application for amendment being allowed in appeal may sometimes be embarrassing, as evidenced by the decision in *Sevugan Chetty* v. *Krishna Aiyangar* (6), but the ground on which the application for amendment is pressed in this Court is different from that urged in the Court below, and it may be still open to the plaintiff to move the Court below for a reconsideration of its order. We do not desire at this stage to express any opinion on the merits of the application for amendment.

We disallow the application for revision accordingly. The opposite party will get one set of costs from the applicant.

Revision rejected.

(3) 6 Ind. Cas. 977; 13 O. C. 109.
(4) 16 Ind. Cas. 592; 15 O. C. 304.
(5) 40 Ind. Cas. 488; 4 O. L. J. 230.
(6) 13 Ind. Cas. 268; 36 M. 378; 22 M. L. J. 139; 10 M. L. T. 557.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 65 OF 1916.

March 13, 1917.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PROSUNNO KUMAR BAIDYA—DEFENDANT No. 1—APPELLANT

versus

RAM CHANDRA DE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Letters Patent (Cal.), cl 15—"Judgment," meaning of—Order dismissing appeal without investigation, whether "judgment" - Limitation Act (IX of 1908), s. 5—Appeal, delay in presenting—Review, time spent in obtaining, exclusion of—Sufficient cause.

The term "judgment" in clause 15 of the Letters Patent means "decree" or "order", consequently an order of dismissal of an appeal without investigation of the merits may be a "judgment." [p. 679, col. 1.]

Quære.—Whether an order dismissing an appeal on the ground that it had been preferred after the period of limitation prescribed therefor and that sufficient ground had not been made out for extension of the period under section 5 of the Limitation Act is a "judgment" within the meaning of clause 15 of the Letters Patent.

An appellant is not entitled, as a matter of right, to a deduction of the period during which his application for review remains pending in the Court below. He has to seek extension of time under section 5 of the Limitation Act, in other words, to satisfy the Appellate Court that he had sufficient cause for not preferring the appeal within the prescribed period. [p. 679, col. 1.]

Letters Patent Appeal against the decision of Mr. Justice Newbould, dated the 21st March 1916, in Appeal from Appellate Decree No. 2545 of 1913, against the decision of the Subordinate Judge, 1st Court of Chittagong, dated the 7th October 1912, affirming that of the Munsif, 2nd Court at Patiya, dated the 8th July 1911.

FACTS appear from the following judgment of

NEWBOULD, J.—This appeal admittedly was filed after the period of limitation had expired. The appellant filed a petition supported by an affidavit asking that the appeal might be registered and it was ordered that it should be registered, subject to objection at the hearing.

The facts of the case, so far as they are necessary for dealing with the point now raised, are as follows:—The appeal against which this second appeal was preferred was disposed of on the 7th October 1912. On the next day, 8th October 1912, an application was made for review of that judgment. That application was dismissed on

the 12th April 1913. The present appeal was filed in this Court on the 9th July 1913; but the application for registering the appeal after time was not made till the 4th August 1913. The learned Pleader for the respondent has conceded for the sake of argument that the appellant is not to blame for the delay that took place between the 8th October 1912 and the 12th April 1913 in disposing of the application for review. His contention is that the appellant ought not to be allowed to proceed with this appeal because he has given no explanation for the delay of the period between the disposal of the review application and the filing of this appeal. In my opinion, this contention must be allowed. The facts of this case are similar to those of the case of *Gobinda Lal Das* v. *Shiba Das Chatterjee* (1). In that case, the question was whether an appeal filed after time on account of the delay in the hearing of an application for review should be admitted. The two learned Judges who heard the Rule (Rampini and Mookerjee, JJ.) differed, the former holding that the filing of an application for review was no sufficient ground for extending the time for filing an appeal and Mookerjee, J., on the other hand, holding that the Rule should be made absolute and time for filing the appeal extended "as the grounds upon which the review was asked were *prima facie* proper and reasonable and the appeal to this Court was presented with due promptitude, as speedily as might be, after the disposal of the application for review of judgment." In that case, the application for review was rejected on the 24th November, the petition for leave to file the appeal was drawn up on the 27th November and presented to this Court on the 30th November, which was the next day for hearing applications. On behalf of the appellant, it is contended that the time occupied by the application for review should be ignored and the appellant should be allowed the ordinary ninety days from the date when that matter was decided. This contention finds considerable support from a decision of the Punjab Chief Court in *Karm Bakhsh* v. *Daulat Ram* (2). That decision was considered in the judgment of Mookerjee, J., to which I have already referred, at page 1330*. In discussing this and other decisions, he remarked :—"Upon a review of these authorities, it is clear, that there has been some difference of judicial opinion as to the manner in which the discretion of the Court, in extending the period prescribed for an appeal, should be exercised. The earlier Full Bench cases in this Court lay down that as an ordinary rule, allowance should be made for the period during which an application for review is pending, and the later cases lay stress on the condition that such application for review must be a *bona fide* and a proper one presented and carried on with due diligence and that the appeal itself is presented without unreasonable delay after the rejection of the application for review." In the present case, in the absence of any explanation of the delay between the 12th April and the 9th July 1913, I cannot say that this appeal was presented without unreasonable delay after the rejection of the application for review. I must, therefore, refuse to exercise in the appellant's favour the discretionary power given to me by section 5 of the Limitation Act. The petition of appeal is, therefore, rejected with costs, one gold *mohur*.

Babu *Mohini Mohan Chuckerburty*, for the Appellant.

Babu *Chunder Sekhar Sen*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould. The appeal was dismissed by him under section 3 of the Indian Limitation Act, on the ground that it had been preferred after the period of limitation prescribed therefor and that sufficient ground had not been made out for extension of time under section 5.

A preliminary objection has been taken that the appeal is incompetent as the decree made by Mr. Justice Newbould is not a "judgment" within the meaning of clause 15 of the Letters Patent. In support of this view reliance has been placed upon the decision in *Gobinda Lal Das* v. *Shiba Das Chatterjee* (1). On behalf of the appellant that case has been distinguished, on the ground that there the Court had to deal with an application for registration of the appeal after expiry of the period of limitation and that the

(1) 33 C. 1323; 10 C. W. N. 986; 3 C. L. J. 545.
(2) 183 P. R. 1888 (p. 478.).

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effect of the order was that the appeal was never registered, while in this case the appeal was registered and was dismissed subsequently under section 3 of the Indian Limitation Act. We need not decide whether the distinction is or is not substantial; but we observe that the decision in *Gobinda Lal Das* v. *Shiba Das Chatterjee* (1) has been criticised and distinguished in the case of *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (3). It may also be pointed out that as repeatedly ruled by this Court [*Doucett* v. *Wise* (4), *Upendra Nath Bose* v. *Bindeshri Prosad* (5) and *Krishen Doyal Gir* v. *Irshad Ali Khan* (6)], the term "judgment" in clause 15 of the Letters Patent means "decree or order," and that consequently an order of dismissal of an appeal without investigation of the merits may be a "judgment." In the present case, however, it is not necessary for us to enter upon a discussion of this question, because, the appeal, if competent, must fail on the merits. The application for review was, no doubt, presented to the lower Court with due diligence on the 8th October 1912, that is on the day following the disposal of the appeal in that Court. The application for review was dismissed on the 12th April 1913, but the appeal to this Court was not presented till the 9th July 1913, and no application was made under section 5 of the Indian Limitation Act till the 5th August 1913. No explanation has been offered for this delay. The decision in *Gobinda Lal Das v. Shiba Das Chatterjee* (1) shows that the appellant is not entitled, as a matter of right, to a deduction of the period during which the application for review remained pending in the Court below. He has to seek extension of time under section 5 of the Indian Limitation Act, in other words, to satisfy this Court that he had sufficient cause for not preferring the appeal within the prescribed period. He is consequently under an obligation to explain satisfactorily why he did not come to this Court till the 9th July 1913, and further why he did not apply for extension of time till the 4th August 1913. This he has completely failed to do. The appeal was obviously barred by limitation and there was thus no ground whatever established for extention of time.

The result is that the decree made by Mr. Justice Newbould is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(3) 34 Ind. Cas. 634; 43 C. 857; 23 C. L. J. 443; 20 C. W. N. 594.

(4) 2 Ind. Jur. (N. S.) 280 at p. 296.

(5) 32 Ind. Cas. 468; 22 C. L. J. 452; 20 C. W. N. 210.

(6) 31 Ind. Cas. 965; 22 C. L. J. 525.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 195 OF 1917.

August 20, 1917.

Present:—Mr. Lindsay, J. C.

MANNA LAL AND OTHERS—PLAINTIFFS —APPELLANTS

versus

BHAGWANDIN AND ANOTHER—DEFENDANTS —RESPONDENTS.

Hindu Law—Debt incurred by father—Sons, pious obligation of, nature of—Sons, position of, during father's lifetime—Decree against co-parcener for separate debt—Co-parcener's interest in joint property, whether liable to attachment and sale—Creditor of co-parcener, position of.

So long as the father in a Hindu family is alive; the pious obligation to discharge his debts which is imposed by the Hindu Law upon his sons cannot be enforced. [p. 680, cols. 1 & 2.]

Under a decree against any individual co-parcener for his separate debt, a creditor may during the life of the debtor seize and sell his undivided interest in the family property. [p. 680, col. 2.]

Appeal from the decree of the District Judge, Lucknow, dated the 17th April 1917, confirming that of the Subordinate Judge, Unao, dated the 13th November 1916.

Mr. *St. C. Thompson*, for the Appellants.

Babu *Basudeo Lal*, for Respondent No. 2.

JUDGMENT.—The decision of both the lower Courts in this case is erroneous and must be set aside. The facts of the case may be very briefly stated. One Bhagwandin, who is the first defendant in the suit out of which this appeal has arisen, made a mortgage in favour of the second defendant Naraindin of a 4 pies share in certain Zemindari property. This mortgage was made in the year 1907. Later on the mortgagee brought a suit for foreclosure, the defendant impleaded being the mortgagor Bhagwandin. When that suit was instituted, the sons

of Bhagwandin, who are the plaintiffs in the present case, applied to be made parties on the ground that they were interested in the subject-matter of the dispute. The defence which they put forward was that the property was joint ancestral family property, that their father had no right to mortgage the ancestral property and that there was no reason which in law would justify the passing of a decree which would bind the family property on the ground that the debt had been borrowed for legal necessity or in the interests of the joint family. The Court which was dealing with that case gave effect to this defence. It dismissed the suit for foreclosure but gave a personal decree for the mortgage debt against the father Bhagwandin. Thereafter the decree-holder proceeded to take out execution of this personal decree and in execution it seems that he attached the 4-pies share which had been mortgaged in the year 1907. The sons objected to this attachment. Their objection was dismissed and in consequence of the order of dismissal they filed the present declaratory suit. The relief which was claimed in the suit was that it should be declared that the entire family property was exempt from attachment and sale in execution of the personal decree obtained against Bhagwandin the father. In the alternative it was prayed that if the whole of this relief be not granted, it should nevertheless be declared that the interest of these sons of Bhagwandin was not liable to be taken in execution of the decree. Both the Courts below have dismissed the suit in its entirety.

They have proceeded on the principle that the sons are liable to pay the father's debt and that, therefore, it was not possible in the present proceedings to hold that this property which belonged to them was not liable to be taken in execution in order to satisfy the father's debt. However, we have it on the authority of a very recent decision of their Lordships of the Privy Council, which is reported as *Sahu Ram Chandra* v. *Bhup Singh* (1), that so long as the father in a Hindu family is alive, the pious obligation to discharge his debts which is allowed by the Hindu Law upon his sons cannot be enforced. To quote the words of Lord Shaw, which are to be found at page 443* of the report, "While the father, however, remains in life, the attempt to affect the sons' and grandsons' share in the property in respect merely of their pious obligation to pay off the father's debts, and not in respect of the debt having been duly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged." Consequently I must hold that the reason which has led the Courts below to their decision is not a good reason in law, and obviously the proper decree to be passed in the case was a decree declaring that the interest of these five plaintiffs in this share, which is joint family property, was not liable to be attached and sold in execution of the decree. The learned Counsel for the appellants has argued very strenuously that the plaintiffs are entitled to have a declaration made in respect of the entire joint family property including the interest of the father Bhagwandin, but that proposition does not appear to me to be maintainable. It has, I think, been settled definitely that under a decree against any individual co-parcener for his separate debt a creditor may during the life of the debtor seize and sell his undivided interest in the family property. Consequently it appears to me that it was competent to the decree-holder in this case to apply for attachment and sale of the joint undivided interest of Bhagwandin in this ancestral family property and to have the share brought to sale. The purchaser of such an interest is after his purchase entitled to enforce his rights by partition.

I am given to understand that while these proceedings have been going on in Court, the property has already been brought to sale and has been purchased by the decree-holder himself. In that case I may observe here that he has bought the property subject to the result of this litigation and the result will be that he will be deemed

(1) 39 Ind. Cas. 280; 15 A. L. J. 437; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.).

*Page of 15 A. L. J.—*Ed.*

to have acquired only the interest of Bhagwandin in this joint family property. I allow the appeal to this extent, therefore, that I give the plaintiffs a decree declaring that their interest in this joint undivided family property, consistingof 4-pies Zemindari share, was not liable to attachment and sale in execution of the decree obtained by the second respondent against their father Bhagwandin. The plaintiffs are entitled to costs in all three Courts.

Appeal allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 370 OF 1916.

April 22, 1918.

Present:—Mr. Heald, J. C.

MAUNG PWE AND OTHERS—APPELLANTS

versus

U INGUYA AND ANOTHER—RESPONDENTS.

Buddhist Law, Burmese—Succession—Pongyi, *whether can inherit from lay relatives after ordination*

A *pongyi* or *rahan* divests himself of all worldly possessions at the time of his ordination and thereafter is incapable of inheriting property from his lay relatives [p. 682, col. 2.]

Mr. *Pershad* for Mr. *C. G. S. Pillay*, for the Appellants.

Mr. *Tha Gywe*, for the Respondents.

JUDGMENT.—The plaintiffs, U Inguya and U Nyannawun, are Burmese Buddhist priests. They sue their cousin Maung Pwe for partition and possession of their two-thirds share of the undivided estate of the common grandfather Tha Byo. Tha Byo had three children, one son Maung Gyi and two daughters Ma Cheik and Ma Nge. U Inguya is a son of Ma Cheik, U Nyannawun of Ma Nge, and Maung Pwe of Maung Gyi. The plaintiffs' case is that the lands in suit, which belonged to Tha Byo, remained undivided in the hands of his descendants and are now in the possession of Maung Pwe, and that they, as representing Tha Byo's two daughters, are entitled to recover two-thirds of the estate from Maung Pwe who represents the son. The second plaintiff U Nyannawun also alleged that Maung Pwe had been paying him one-third of the produce of the land annually as his share of the income, and because Maung Pwe had refused to pay in the year 1275, he claimed to recover twenty baskets of paddy from Maung Pwe as arrears.

Maung Pwe replied that Burmese Buddhist priests cannot inherit from their lay relations, that he had been in adverse possession of the lands for over twenty years, that the plaintiffs relinquished their rights in his favour some sixteen years ago and that, even if the plaintiffs could inherit, they would not be entitled to the shares which they claimed.

The trial Court framed issues as to—

(1) Whether the plaintiffs, being *pongyis*, could inherit from their lay relatives,

(2) whether their claim was barred by limitation,

(3) whether they had relinquished their rights in favour of Maung Pwe,

(4) what share they would be entitled to, supposing that they could inherit, and

(5) whether the second plaintiff was entitled to recover arrears of his share of the produce.

After recording evidence, the Court found on the authority of the ruling of this Court in *Ma Fwe* v. *Maung Myat Tha* (1) that the plaintiffs being *pongyis* could not inherit from their lay relatives, and on this finding dismissed their suit.

The plaintiffs appealed to the District Court which, holding on the authority of *Mi Taik* v. *U Wiseinda* (2) that it was settled law that *pongyis* could inherit, set aside the judgment and decree of the trial Court and directed that the suit should be re-admitted and decided on the merits.

The trial Court then found that, in view of the fact that the last of Tha Byo's children died some thirty years ago and Maung Pwe had been in undisputed possession ever since, the plaintiffs' claim was barred by limitation.

The plaintiffs again appealed, and the District Court held that the claim was

(1) U. B. R. (1897-01) II, p. 54.

(2) 2 Chan Toon's Leading Cases 235.

not barred by limitation and again remanded the case for trial on the merits.

The trial Court then found that Maung Pwe failed to prove that the plaintiffs had relinquished their rights in his favour, and holding on the evidence that the plaintiffs succeeded in proving that they were each entitled to one-third of the estate and that the second plaintiff was entitled to recover from Maung Pwe one-third of the produce of the lands from 1275 B. E. onwards, gave judgment for plaintiffs with costs.

Maung Pwe appealed but his appeal was dismissed with costs.

He now comes to this Court in second appeal under the provisions of section 100 of the Code of Civil Procedure and he still alleges that under Burmese Buddhist Law a priest cannot inherit from his lay relatives.

The rulings of this Court on this point have undoubtedly been conflicting.

In *Ma Fwe's case* (1), cited above, the learned Judicial Commissioner, Mr. Burgess, held that a Burman on entering the monastic order retained no interest in the property which he possessed before his ordination.

In *Ma Taik* v. *U Wiseinda* (2) another Judicial Commissioner, Sir George Shaw, expressed the opinion that there was nothing in Burmese Buddhist Law to prevent a monk from acquiring by inheritance property which he proceeds to devote to religious purposes.

In *U Tilawka* v. *Nga Shwe Kan* (3) my learned predecessor Mr. McColl said: "I think it is clear that a monk is debarred by the rules of his order from mortgaging property descended from his ancestors, and indeed from owning such property."

All doubt in the matter seems now to have been set at rest by the decision of the Chief Court of Lower Burma in the case of *Shwe Ton* v. *Tun Lin* (4). In that case the question before the Full Bench for decision was whether the next-of-kin of a *pongyi* are entitled on his death to inherit from him lands which he received after his ordination (*a*) as inheritance, or (*b*) as a gift. In order to decide the first part of this question the learned Judges found it necessary to decide whether a *pongyi* can inherit lands from his lay relatives after his ordination, which is the very question which arises in the present case. On this point the judgment of the Chief Court is as follows: "We are not prepared to hold that a *pongyi* can inherit from his lay relatives. When a *pongyi* or *rahan* is ordained, his severance from his family is so complete that, if he was a married man before, he is regarded as having divorced his wife. He is certainly cut off as completely from his original family as if he had been adopted into another family. We consider it inconsistent with a *pongyi's* personal status that he should inherit from his natural family with whom all ties of relationship have been annulled."

This ruling supports the opinion of my learned predecessor and I have no hesitation in following it.

The first plaintiff in the present case was admittedly ordained before his mother died, so there can be no doubt that he could not inherit from her and it is as her heir that he claims a share in the land in suit. His claim must clearly fail.

The second plaintiff says that his parents both died when he was a child. If this is true he had already acquired the status of heir before he was ordained, and the question arises whether or not, after his ordination, he can still claim to be heir to his parents. There can be no doubt that Burmese Buddhist priests divest themselves of all worldly possessions at the time of ordination. That being so, the second plaintiff must have divested himself of his rights as heir to his parents and grand-parents when he entered the priesthood, and he cannot now claim to be heir to Tha Byo. His claim to a share of Tha Byo's estate must, therefore, fail.

But if he had no right to the lands, he clearly had no right to any share of the produce, and the contribution of twenty baskets of paddy which he alleges Maung Pwe paid to him as his share of the produce must be regarded as a charitable gift, which is what Maung Pwe says it was. As a matter of fact it was

(3) 29 Ind. Cas. 613; 2 U. B. R. (1914-16), 61.
(4) Civil Reference No. 1 of 1916.

not Maung Pwe who gave the paddy, but Maung Pwe's tenants, and the evidence goes to show that they gave it not by direction of Maung Pwe but as a result of the influence of the *pongyi*. However that may be, it seems clear that the second plaintiff had no right to demand the payment and his claim under this head also must be dismissed.

I find, therefore, that the plaintiffs were not entitled to claim any share of the estate in suit or of the income thereof and I set aside the judgments and decrees of the lower Courts and dismiss the plaintiffs' suit with all costs.

Appeal decreed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 200 OF 1914.

February 24, 1916.

Present:—Mr. Lindsay, J. C.

RAM DAYAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALTA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 83, applicability of—Hundi *payable at sight—Holders for valuable consideration—Consideration money, return of.*

Section 83 of the Negotiable Instruments Act has no application to cases of *hundis* payable at sight, inasmuch as such *hundis* are presented not for acceptance but for payment. [p. 684, col. 1.]

Holders of *hundis* for valuable consideration are entitled to return of the consideration money paid by them to their endorsers, if the *hundis* subsequently turn out to be worthless and no payment can be obtained upon them. [p. 684, col. 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 17th February 1914, reversing that of the Subordinate Judge, Hardoi, dated the 30th August 1913.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *John Jackson* and Babu *Salig Ram*, for the Respondents.

JUDGMENT.—These two appeals (Nos. 200 and 201 of 1914) may be disposed of by one judgment. They have arisen out of two suits brought by two sets of plaintiffs against the same set of defendants. The principal defendants in the case were the third, fourth and fifth defendants whose names are Lalta Prasad, Mul Chand and Phul Chand. The facts of the case may be briefly set out. On the 24th of December 1912 two *hundis* were drawn by the first defendant Sheo Prasad upon a firm in Cawnpore, which was owned by the sixth defendant in the suit, Salik Ram. These *hundis* were handed to the second defendant Gur Dayal in payment of certain moneys due to him by Sheo Prasad. This defendant endorsed the *hundis* to the third and fourth defendants Lalta Prasad and Mul Chand. It is necessary to explain here that Lalta Prasad is the father of the fourth defendant Mul Chand and also of the fifth defendant Phul Chand, the latter being a minor whose age is given as nine years. Lalta Prasad and his two sons have two places of business, one at Kachhauna in the Hardoi district and another in Sandila also in the Hardoi district. The former business is run in the names of Lalta Prasad and Mul Chand while the business at Sandila is carried on in the names of Mul Chand and Phul Chand. After the *hundis* had been endorsed to the Kachhauna firm owned by Lalta Prasad and Mul Chand, the *hundis* were passed on by the Sandila firm to the present plaintiffs. The *hundis* were sent by these plaintiffs to the seventh defendant Gauri Shankar, who carries on business at Cawnpore. The *hundis* were endorsed to him not by way of negotiation but merely in order to enable him to present the *hundis* for payment as the agent of the plaintiffs. The seventh defendant Gauri Shankar took the *hundis* to the firm owned by Salik Ram upon which the *hundis* were drawn. They were first taken to Salik Ram's place of business on the 28th of December, on which date it is said Salik Ram was not there. On that date his *munim* wrote on the *hundis* the word '*dekha*', meaning that the *hundis* had been presented. Presentation for payment was made on successive dates from the 28th of December up till the 8th of January 1913 and on this latter date Salik Ram dishonoured the *hundis*. He took objection first of all to the endorsements in favour of the plaintiffs and he also made a further objection regarding the cancellation of the *hundi* stamps. As soon as this was done, the

hundis were returned by the seventh defendant Gauri Shankar to the plaintiffs, who thereupon communicated with their endorsers defendants Nos. 3 to 5, from whom they claimed the money. These defendants refused to pay and these suits were instituted. The Court of first instance decreed the claims. The Subordinate Judge held that there were irregularities in the endorsements in favour of the plaintiffs in this way, namely, that whereas the *hundis* had been endorsed to Lalta Prasad and Mul Chand by the second defendant Gur Dayal, the endorsers who passed the notes on to the plaintiffs were Mul Chand and Phul Chand, the members of the other firm trading at Sandila. He also was of opinion that the stamps had not been properly cancelled, and for these reasons it was held that the *hundis* could not be used in evidence, but he was of opinion that it having been proved that the plaintiffs had given value for these *hundis* which were subsequently dishonoured, the third, fourth and fifth defendants were liable. It may be noted here that in the defence put up by these three defendants it was contended that the endorsements in favour of the plaintiffs were in order and also that there was no irregularity about the stamps. For this reason they contended that there was no cause of action against them. A further plea was put forward to the effect that no reasonable notice of the fact of dishonour had been communicated to these defendants. This plea was based upon the terms of section 83 of the Negotiable Instruments Act, a section which can have no application to the facts of the present case. Section 83 provides a rule relating to the presentation of bills of exchange for the purpose of acceptance. Here the *hundis* were not being presented for acceptance, but for payment for they were payable at sight. The third, fourth and fifth defendants went in appeal to the District Judge, who dismissed the suits. He has taken a view of the law which in my opinion is altogether untenable. After adverting to the finding of the Court below regarding the informality in the endorsements and the irregularity about the cancellation of the stamps, he went on to say that there was no question of loan in the case. He pointed out that in the plaints and throughout the cases it had been alleged that the two *hundis* had been sold and that it was not the case for the plaintiffs that any money had been lent upon them. Then he went on to point out that the defendants Nos 3 to 5 were holders for valuable consideration and he argued in this way, namely, that as the plaintiffs wanted these *hundis* and paid for them, they took the *hundis* over with their eyes open and subject to all risks. One of the risks he mentioned was that the drawee might go bankrupt, as he apparently did in the present case; but I am informed and the matter has not been disputed that Salik Ram did not become bankrupt until after the date upon which he refused to cash the *hundis*. The learned Judge sums up his discussion by saying, "In any case the plaintiffs knew what they were getting or could have known and now that the *hundis* are worthless the loss must fall on them." This is an altogether mistaken view of the rights of the parties. The facts remain that the plaintiffs in these two suits gave money to the third, fourth and fifth defendants for *hundis* which have turned out to be worthless and upon which no payment could be obtained. This being so, they are in every way entitled to the return of their money. The third, fourth and fifth defendants were clearly liable to the plaintiffs. I, therefore, allow both these appeals, set aside the decree of the Court below and restore the orders of the Court of first instance with costs to the appellants both here and in the Court below. Babu Salig Ram, who has appeared in this Court on behalf of the respondent Gauri Shankar who was impleaded as the seventh defendant, has pointed out that his client was impleaded without any cause of action being shown against him and without any relief being sought against him. There can be no doubt as to the correctness of the plea. Gauri Shankar had only been acting as the agent of the plaintiffs and there was no relief which they could seek against him. I, therefore, direct that Gauri Shankar's costs be paid by the present plaintiffs-appellants in all three Courts.

Appeal allowed.

GOBIND MISSER *v.* BEHARI GOPE

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 636 OF 1917.
August 1, 1918.
Present—Mr. Justice Jwala Prasad.
GOBIND MISSER—PLAINTIFF—APPELLANT
versus
BEHARI GOPE AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata, *plea of, whether can be taken in appeal—Question left undecided by Appellate Court but decided by trial Court, whether* res judicata.

The plea of *res judicata* is a question of law and can be raised at any stage of a suit [p. 687, col. 1.]

An Appellate Court's judgment takes the place of and supersedes the decision of the trial Court, so that the principle of *res judicata* cannot apply where a question is left open and undecided by an Appellate Court, although it was decided by the trial Court. [p. 686, col 2.]

Appeal from a decision of the Subordinate Judge, Monghyr.

Syed *Mohammad Tahir*, for the Appellant.

Messrs. *Lalit Mohan Ghose* and *Baranasi Prasad Jhunjhunwala*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant. He brought a suit for ejecting the defendants from the lands in suit under section 66 of the Bengal Tenancy Act after serving them with a notice under section 49 of the Bengal Tenancy Act, alleging that they are his under-tenants. There is also a prayer to recover Rs. 26-9-0 the rent of the land as damages including cesses, and also mesne profits from 1322 F. S. up to the recovery of possession.

The defendants on the other hand claimed that they had acquired the rights of occupancy tenants and that the plaintiff was merely a tenure-holder on the basis of a *mustajri* lease, and not an occupancy tenant of the land. Thus the pleadings of the parties raised the following issues framed by the Munsif who tried the case. The issues were:—

(1) What is the status of the plaintiff in relation to the *jote* in suit? (Issue No. 4 of the Court below).

(2) Are the defendants *shikmidars* of the plaintiff? (Issue No. 5 of the Court below).

The Munsif decided both the issues against the plaintiff and held that the plaintiff was a tenure-holder and that the defendants were occupancy *raiyats* of the disputed land. The Munsif accordingly dismissed the suit of the plaintiff.

The plaintiff appealed to the District Court and raised the question that the defendants were precluded from claiming that they were occupancy tenants and that the plaintiff was a tenure-holder, inasmuch as the status of both the defendants and the plaintiff was decided in a previous litigation between the parties. In other words, the plaintiff contended that the plea of the defendants was barred by *res judicata*. Prior to the present suit there were two suits brought by the plaintiff against the defendants and the contentions of the parties are based upon the decisions in those cases It is, therefore, necessary to give briefly the history of those two cases.

In 1911 the plaintiff brought the first suit under section 66 of the Bengal Tenancy Act for the ejectment of the defendants in the Court of the Munsif of Monghyr, being Suit No. 43 of 1911. In that suit it was held that "the defendants are under-*raiyats* and the plaintiff is the *raiyat* of the land in suit." Upon that basis a decree for rent was made with the direction that "if the decree amount be not paid within 15 days, the plaintiff to get *khas* possession of the *jote* land." The judgment of the Munsif is Exhibit 12 and the decree is Exhibit 9. There was no appeal from that decree. Apparently the defendants paid the amount of the decree and hence they were not ejected.

Subsequently the plaintiff brought another suit in the same Court for the rent of 1318 and the first 8 annas *kist* of 1319, and for ejectment. This suit was numbered 123 of 1912. The same Munsif, who decided the first case, held contrary to his previous decision that the "defendants are under-*raiyats* and the plaintiff a *raiyat*" and dismissed the suit. The Munsif did not give effect to his former judgment on the ground stated by him in the following words: "the judgment, Exhibit 2, shows that the decree for ejectment in that suit was based upon the entry in the *khatian*, that is, the defendants are under-*raiyats* and the plaintiff a *raiyat*, but it has now been found in this case that the said entry is not correct. So I hold

that the defendants are not precluded from raising this question in this suit." This judgment is dated the 15th June 1912 and is Exhibit D filed by the defendants.

On appeal by the plaintiff, the Additional Subordinate Judge upheld the aforesaid decision of the Munsif on a ground quite different from that of the Munsif in the following words: "It appears to my mind that there would not have been a decree for ejectment in this suit on quite a different ground. The arrears sued for were one for the last half of 1318 and the first half of 1319", and hence "there could not be a decree for ejectment in this suit under section 66 as there was a claim for the arrears of the first half year of 1319..... ..The Pleaders on both sides now admit that there could not have been a decree for ejectment in this suit under section 66, as there was a claim for the arrears of the first half of 1318." The Subordinate Judge concluded his judgment in the following words:—

"It is, therefore, unnecessary for me to decide if the defendants were *raiyats* or under-*raiyats* of the land." This judgment is Exhibit D in Rent Appeal No. 136 of 1912.

Upon the judgment and the decree, Exhibits 12 and 9 respectively, in Suit No. 43 of 1911, the plaintiff contended before the lower Appellate Court that the plea by the defendants as to their status is barred by the principles of *res judicata*. The learned Subordinate Judge at one place in his judgment said that section 11 of the Code of Civil Procedure and the judicial decisions would "apparently make the decision of the first suit *res judicata* on the question of status." But curiously enough the learned Subordinate Judge did not give effect to his finding, on the ground stated by him "that in the peculiar circumstances of the case I cannot hold that the first previous judgment now relied upon by the appellant can operate as *res judicata* and disallow this contention of his". I fail to appreciate this. The principle of *res judicata* bars the jurisdiction of the Court to entertain the matter already decided between the parties by a Court of competent jurisdiction. All the requirements of section 11 of the Code of Civil Procedure were complied with, as held by the learned Subordinate Judge. Hence no circumstances would at all prevent the decision of that case from operating as a bar to the entertainment, by any Court, of the issues decided in that case. I, therefore, hold that the decision in suit No. 43 once for all determined the status of the parties. I cannot yield to the contention on behalf of the respondents that the decision arrived at in that suit was subsequently held in Suit No. 123 of 1912 to be wrong, and hence the judgment cannot operate as *res judicata*. It was for the defendants to set right the decision of the Munsif by an appeal or proper proceedings sanctioned by law. This was not done, and it was not open to the defendants to dispute in any way the validity of that judgment and to set up the plea that they have the status of occupancy tenants in the subsequent suit No. 123 of 1912, nor is it open to them to raise the plea in the present suit.

The judgment in Suit No. 43 of 1911 is final and is binding between the parties as to their respective status in the land in suit.

It is then contended that the decision in the second case operated as *res judicata*. The Subordinate Judge has accepted this view and I think that he is entirely wrong. The Appellate Court's judgment in that case is Exhibit 11 and the decree is Exhibit 8. No doubt the Munsif in his judgment Exhibit D, dated the 15th June 1912, held that the defendants were not under-*raiyats* and he did not at all take into consideration the decision in the first case. The Appellate Court, however, left the question undecided and thought that for the purpose of that case it was unnecessary to decide the status of the parties, inasmuch as the suit of the plaintiff was dismissed on the ground that it comprised claims for more than one year in contravention of section 65 of the Bengal Tenancy Act. The Appellate Court's judgment has taken the place of and superseded the decision of the Munsif. It is well known that the principle of *res judicata* cannot apply where the question is left open and undecided by the Court.

SAIYED-UN-NISA *v.* MAIKU LAL.

It was then contended that the question of the defendants' status was left open in the judgment of the Subordinate Judge in the second case, and hence it was open to the defendants to show by evidence that they have acquired the status of occupancy tenants in the lands in suit. It has been suggested that the decision of the Subordinate Judge in the second suit leaving the question of the status open would operate as *res judicata* upon the contention of the plaintiff that the question was concluded by the decision of the first case. I am not able to appreciate this argument. This appears to me to be an argument in circle. The decision of the first Court was a final adjudication of the status of the parties and is a permanent bar to the points decided therein being agitated in any Court.

Lastly it has been contended that the plea of *resjudicata* cannot be given effect to as it was not raised in the trying Court. The plea of *res judicata* is a question of law and can be raised at any stage.

In the case of *Muhammad Ismail* v. *Chattar Singh* (1) a Full Bench of the Allahabad High Court held that the plea of *res judicata* can be taken for the first time even in second appeal. Latterly the same Court in *Kanahai Lal* v. *Suraj Kunwar* (2), a Divisional Bench of the same Court qualified the above by holding that the Appellate Court is not bound to entertain the plea, for it cannot be decided upon the record before that Court if its consideration involves the reference of fresh issues for determination by the lower Court.

In the present case the plea of *res judicata* does not appear to have been raised in the first Court but the judgments and decrees of that case were filed and marked as Exhibits in that Court. The plea was not only definitely taken in the lower Appellate Court but was entertained and decided by that Court, On the other hand, it does not appear from the judgment of the lower Appellate Court that any objection was taken by the respondents to the plea being raised and determined by that Court. The materials were sufficient for the determination of the plea in the first Court and also in the lower Appellate Court and so in this Court as well. I, therefore, overrule the contention of the respondents and hold that the plea was rightly entertained by the lower Appellate Court and that the plaintiff is entitled to press it in second appeal in this Court. Upon the judgment and decree of the first case in Suit No. 43 of 1911, which were conclusive and operative as *res judicata*, the defendants are only under-*raiyats* and are liable to be ejected from the holding under section 66 of the Bengal Tenancy Act, the conditions of which have been fully complied with.

The Munsif has held that the notice under section 49 of the Bengal Tenancy Act was properly served and that it was valid and sufficient for the purpose of the suit and also that the issue regarding the payment was not pressed by the defendants (*vide* the decision of the Munsif on issues Nos. 3 and 8). These findings of the Munsif have not been challenged by the defendants either before the lower Appellate Court or in this Court, and must be accepted.

The plaintiff is, therefore, entitled to a decree for possession as well as to recover rent of the land for the year 1320 and damages and mesne profits from 1322 up to the date of recovery of possession.

The result is that the suit is decreed with costs throughout. The appeal is also decreed with costs.

Appeal decreed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 278 OF 1917.

February 5, 1918.

Present:—Mr. Lindsay, J. C.

Musammat SAIYED-UN-NISA—PLAINTIFF—APPELLANT

versus

MAIKU LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possessions, tacking of, when allowable—

(1) 4 A. 69; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 634.

(2) 21 A. 416; A. W. N. (1899) 164; 9 Ind. Dec. (N. S.) 992.

SAIYED-UN-NISA *v.* MAIKU LAL.

Mortgagee from trespasser, whether can tack possession of himself and trespasser as against true owner—Transfer of Property Act (IV of 1882), s. 41—Estoppel, doctrine of—Consent of true owner—Transferee from trespasser, position of—Acquiescence of real owner, effect of.

In cases where the tacking of possessions is allowed, it is essential that the adverse possessions which are to be tacked must be of the same or of an identical nature. Thus, a mortgagee from a trespasser cannot, as against the true owner, tack his mortgagee possession to that of his mortgagor, the reason being that the latter is a trespasser on the proprietary right, whilst the mortgagee holds adversely merely to the extent of his mortgagee interest. [p. 689, col. 2.]

The legal principle which is embodied in section 41 of the Transfer of Property Act is based upon the doctrine of estoppel, and the mere circumstance that the real owner kept silence and advanced no claim for a long time cannot be treated as evidence of such an implied consent on his part to the continuance of the trespasser's possession during that time, as can be profitably availed of by a transferee from the trespasser. [p. 690, col. 2.]

Appeal from the decree of the District Judge, Sitapur, dated the 11th April 1917, upholding that of the Probationary Munsif, Sitapur, dated the 31st January 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, Syed *Zahur Ahmad* and Pandit *Harkaran Nath Misra*, for the Appellant.

Mr. *Mohammad Wasim*, for the Respondents.

JUDGMENT.--The facts of this case are a little complicated and require to be set out in some detail. The suit was brought by the plaintiff appellant *Musammat* Saiyed-un-nisa for recovery of 1-anna 1-3/11-pies share in a property described as Chak Naya Gaon. The defendants in the case, Maiku Lal and others, are in possession of this property under a mortgage which was executed in their favour in the month of May 1904; and they resisted the plaintiff's claim on various grounds which will be presently noticed.

The plaintiff *Musammat* Saiyed-un-nisa is the daughter of a man named Fakir Bakhsh, who died in the year 1898. This man left the plaintiff and another daughter and also four sons Aziz Bakhsh, Amir Bakhsh, Sultan Bakhsh and Sattar Bakhsh. After Fakir Bakhsh's death the four sons took possession of the property to the exclusion of the plaintiff and her sister. Mutation was effected in their names in equal shares. After this in the year 1899 one of the sons, Aziz Bakhsh, executed a deed of gift in favour of his wife *Musammat* Khurshed Qadar Begam, by which he purported to transfer to her a 6-annas share in Chak Naya Gaon. Later on Aziz Bakhsh and his three brothers joined in executing a sale-deed of the whole 16-annas of Chak Naya Gaon in favour of Baldeo, Behari and others. After this took place a suit was brought by *Musammat* Khurshed Qadar Begam to recover the whole 16-annas of Chak Naya Gaon. From a reference to the proceedings in this previous litigation it would seem that Khurshed Qadar Begam never got possession of the property which her husband Aziz Bakhsh had transferred to her by gift. It is also clear from the revenue records that no mutation was ever made in Khurshed Qadar Begam's favour after the deed of gift had been executed by her husband. In her suit Khurshed Qadar pleaded that she was entitled to a 6-annas share of Chak Naya Gaon by virtue of the deed of gift executed by her husband, and she claimed to be entitled to the other 10-annas by right of pre-emption. The case was fought out to this Court and was eventually settled by a compromise. The result was that Khurshed Qadar Begam was given a decree for the whole 16-annas. She was to get 6 annas under the deed of gift and was to pay a sum of Rs. 5,800 for the purpose of pre-empting the remaining 10-annas. In order to enable her to raise the money which she was required to deposit in Court in satisfaction of the pre emption decree, Khurshed Qadar Begam mortgaged the entire 16 annas to the second defendant in this suit, Prag Dat, on the 23rd of May 1904. She borrowed a sum of Rs. 6,000 and deposited the necessary amount in Court retaining the balance for herself. The mortgage was a mortgage with possession and it is under this mortgage that the defendants now claim.

In the year 1909 the present plaintiff Saiyed-un-nisa and her sister sued their brothers and Khurshed Qadar Begam and certain other persons who were alleged to be transferees, for the purpose of recovering their shares of the estate left by their father Fakir Bakhsh. Those cases were also fought out to this Court and in the end the claim of *Musammat* Saiyed-un-nisa

was decreed. Her sister's suit failed on the ground that it was barred by limitation. After obtaining a decree from this Court, Sayed-un-nisa applied to the Revenue Court for mutation. She was resisted by the present defendants who pleaded that they were in possession and the result was that mutation was refused. She has, therefore, brought the present suit for the purpose of recovering her share of the property from these mortgagees.

In the fifth paragraph of the written statement, the defendants set up their title as mortgagees under the deed of the 23rd of May 1904. In the 11th and 12th paragraphs of the written statement, reference is made to the facts which have been set out above regarding the history of the dealings with this property since the time of Fakir Bakhsh's death. In the 13th paragraph of their statement of defence, the defendants pleaded that their mortgagor Khurshed Qadar Begam was the owner in possession of the entire 16 annas of Chak Naya Gaon, and they claimed that they were entitled to hold possession, being the mortgagees from the absolute owner. As an alternative plea to this, they pleaded that at any rate Khurshed Qadar Begam was the ostensible owner and that they were in possession as mortgagees in good faith and for consideration. In the 14th paragraph it was pleaded that the suit was barred by limitation and in the 15th paragraph the defendants stated that in any event the plaintiff was not entitled to recover possession without redemption of the mortgage of the 23rd of May 1904.

The Court of first instance dismissed the suit and its decree has been affirmed on appeal by the learned District Judge.

In second appeal two pleas are raised. In the first place it is argued that the Courts below were wrong in applying the provisions of section 41 of the Transfer of Property Act for the purpose of holding in favour of the defendants that they were transferees in good faith and for valuable consideration. The other plea is that the Courts were wrong in holding that the suit was barred by limitation. In my opinion both these pleas must be allowed.

To deal first with the question of limitation, it is obvious from what has been stated that the case for the defendants is that they are mortgagees in possession claiming under a deed which was executed in their favour on the 23rd of May 1904. They obtained possession under this deed, and as the present suit was brought on the 29th of January 1916 the suit, as a suit for possession, is clearly within time. It seems that these defendants imagine that they are entitled to join on to the period of their own possession as mortgagees the period during which *Musammat* Khurshed Qadar Begam and her predecessors, who were trespassers, were in possession. But the learned Counsel for the respondents had to concede in the course of the argument that this position was not open to him. If the case for the defendants is that by virtue of adverse possession they have acquired the right of mortgagees, then the answer is that their possession in this capacity has not extended over the full statutory period of 12 years; and for the purpose of resisting the plaintiff's claim to possession of the property, it is not possible for them to say that they are entitled to the benefit of the period during which Khurshed Qadar Begam or her predecessors were in possession. In cases where the tacking of possessions is allowed, it is well established that the adverse possessions which are to be tacked, must be of the same or of an identical nature. A mortgagee from a trespasser cannot, as against the true owner, tack his mortgagee possession to that of his mortgagor, the reason being that the latter is a trespasser on the proprietary right, whilst the mortgagee holds adversely merely to the extent of his mortgagee interest. It is plain therefore that the defendants cannot be heard to say that they have acquired the rights of usufructuary mortgagees by prescription as against Saiyed un-nisa, and no case is or can be set up on their behalf that they are in any way entitled to possession as absolute owners. So much for the plea of limitation.

There remains the other question of the applicability of section 41 to the transaction of mortgage relied upon by these

defendants. I have already mentioned that in the 13th paragraph of the written statement the defendants set up a plea that Khurshed Qadar Begam was "at any rate the ostensible owner of the Chak Naya Gaon" at the time she made the mortgage in the defendants' favour. For the purpose of section 41 of the Transfer of Property Act, it is not sufficient for the defendants to say that Khurshed Qadar was the ostensible owner of the property. It was also necessary for them both to plead and to prove that Khurshed Qadar was the ostensible owner with the consent, express or implied, of *Musammat* Saiyed-un-nisa. In this respect it seems to me that the defendants' case has failed entirely. No such consent on the part of the present plaintiff as is required by section 41, has been established. All that has been made to appear, is that from the time of Fakir Bakhsh's death up till the time when Saiyed-un-nisa brought the suit against her brothers and Khurshed Qadar, she never attempted to make any claim with respect to her share of the inheritance. In dealing with this question, the learned Judge of the Court below has made the following observations:— "It has been argued that the plaintiff did not consent to the ostensible ownership of Khurshed Qadar. It seems to me that the argument that she afterwards claimed that she had been dispossessed, does not help her. If a person on being dispossessed of property, does not take immediate action to recover possession, it seems that until such action is taken, the person must be said to be consenting to the continuance of the possession." In the first place this is not a correct statement of the facts in this case. It is quite clear that Saiyed-un-nisa never obtained possession of this property after the death of her father Fakir Bakhsh. It was not until she brought her suit against her brothers and Khurshed Qadar that she got a decree for possession. She had not been in possession before that time; and again it is not in my opinion a correct statement of the law to say that mere acquiescence on the part of Saiyed-un-nisa, that is to say, her failure to come forward and assert any claim to the property, can be treated as evidence of consent in law. I may mention here that it was proved in the previous case, and the fact is practically admitted, that at the time when her father died, *Musammat* Saiyed-un-nisa was not more than 15 or 16 years of age. The property was seized by her brothers immediately after the death of her father and no question of consent on the part of Saiyed-un-nisa can arise in these circumstances. Being a minor, she was incapable in law of giving any consent. Again it is not sufficient in a case of this kind to prove that the real owner of the property merely kept silence and advanced no claim. The legal principle which is embodied in section 41 of the Transfer of Property Act is based upon the doctrine of estoppel, and unless the defendants can point to some positive conduct on the part of Saiyed-un-nisa from which an implied consent could be inferred, they cannot be allowed to avail themselves of the provisions of this section. No express consent is, of course, pleaded in the present case. There is nothing whatever to show that Saiyed-un-nisa took any steps for the purpose of deceiving persons who were dealing with the property. She did not stand by or encourage the dealings of the defendants with her property and it cannot be said that she was under any duty to the present defendants to come forward and tell them at any time that she had a claim to the property, even if we are to suppose that a lady in her position had the means of knowing that her property was being alienated. On the facts it would be difficult to assume that she had any knowledge of what was going on. Silence or acquiescence on the part of the owner only amounts to deception where there is a duty to speak. All that the defendants can point to here is that *Musammat* Saiyed-un-nisa never came forward to claim the property between the date of her father's death in 1893 and the year 1908 or 1909 when she brought her suit against her brothers and Khurshed Qadar Begam. If the view of the law accepted by the lower Appellate Court is recognized as correct, there is an end to the doctrine of adverse possession, for, if, as the learned Judge supposes, a person, who is dispossessed of property, must be deemed to be consenting to the continu-

ance of the possession of the trespasser during the interval he remains quiescent and does not advance any claim, it necessarily follows that the possession of the trespasser is not adverse possession but possession with the consent of the true owner.

Another point which has been raised on behalf of the appellant, is that the defendants also failed to show that in taking this mortgage they had acted with reasonable care for the purpose of ascertaining that their mortgagor had power to make the transfer. As regards this, it seems to me unnecessary to discuss the matter, for in view of what I have said, it must be held in the appellant's favour that there was no proof whatever that she consented either expressly or impliedly to Khurshed Qadar's posing as the ostensible owner of Chak Naya Gaon. Section 41, therefore, did not apply to this case.

The result is that I allow the appeal, set aside the decree of the Court below and direct that the plaintiff's claim be decreed with costs in all three Courts.

Appeal allowed.

LOWER BURMA CHIEF COURT.
CIVIL MISCELLANEOUS APPLICATION No. 10 OF 1918.
August 14, 1918.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.
MA ON BWIN—PLAINTIFF—APPELLANT
versus
MA SHWE MI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Appeal—Default of appellant in paying translation and copying fees—Procedure.

A Court does not act *ultra vires* in dismissing a suit or appeal where materials essential for the progress of a suit or appeal such as translation of vernacular documents, preparation of Bench copies, etc., are wanting owing to the plaintiff's or appellant's default. [p. 692, col. 1.]

Mr. *Robertson*, for the Appellant.

Mr. *Giles*, for the Respondents.

ORDER.—In Civil Miscellaneous Appeal No. 161 of 1917 time was allowed to the appellant to pay translation and copying fees by the 25th February. The fees had not been paid on that date and there was no appearance on behalf of the appellant before the Assistant Registrar although the case had appeared on the warning list on the 22nd February and on the daily list of the 25th February. The Assistant Registrar ordered that the Advocate should be reminded and that the case should be laid before the Bench on the 4th March. When the case was called on the 4th March no cause was shown for further extension of time. It was admitted that no intimation had been sent to appellant up to that date. The Court thereupon directed that the appeal should be dismissed for default.

Subsequently an application was made to review the order of dismissal on the ground that the Court had exceeded its jurisdiction under Order XVII, rule 3, in making the order of dismissal. The application was admitted and notice was issued to the respondent. The learned Advocates on both sides have now been heard. Mr. Robertson for the appellant cites the Allahabad case of *Sitara Begam* v. *Tulshi Singh* (1). In that case it was held that a Court had no power to dismiss summarily a plaintiff's suit merely because the plaintiff had failed to comply with an order of the Court directing him within a certain time to pay in a sum of money as the cost of preparing a map which the Court considered to be necessary for the decision of the suit. But the learned Judges remarked that the Munsif in that case was certainly not bound to adjourn the hearing of the suit, that it was for the plaintiff to establish her claim by such evidence as she was in a position to adduce on the date fixed and if that evidence failed to substantiate the claim, it should, of course, be dismissed. It is true that Order XVII, rule 3, does not expressly authorise the Court to dismiss the suit where the party to whom time has been granted, fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit. What the rule says is that the Court may, in those circumstances, proceed to decide the suit forthwith notwithstanding the party's default. Mr. Giles argues that

(1) 23 I.A. 462; A. W. N. (1901) 149.

this is intended to be a concession to the party who is at fault inasmuch as it permits the Court to pronounce a decision there and then on such deficient materials as it may have before it. The wording of the rule certainly favours this view. We have to consider what course remains for the Court to follow when it does not or cannot on the materials before it, pronounce a decision. It is certainly not bound to grant an adjournment to the party at fault for the purpose of doing that which he has already had sufficient time to do. The wording of the rule shows that the default of the party may be such as to prevent the suit from proceeding any further. In such circumstances it seems reasonable to infer that the suit must be struck off or dismissed. The default in the present case consisting in omitting to take necessary steps for the preparation of Bench copies and translation of vernacular documents without which it was obviously impossible that the case could proceed, it was not a case in which the Court could proceed to decide the suit forthwith, the materials before the Court being insufficient for that purpose. In the Allahabad case it was no doubt possible for the Munsif to decide the case without the aid of the map which he had called for, but if Bench copies and translations are not provided for a Bench appeal, it is obviously impossible for the case to proceed at all.

Two Madras cases of *Shaik Saheb* v. *Mahomed* (2) and *Pethaperumal Chetti* v. *M. Servaigaran* (3) were also cited on behalf of the applicant. These cases are authorities for holding that an order of dismissal for default does not always operate as a bar to a subsequent suit. But they do not show that a Court acts *ultra vires* in dismissing a suit when materials essential for the progress of the suit are wanting owing to the plaintiff's default.

We are of opinion that the order dismissing the appeal in the present case was a lawful order and we dismiss the application for review with costs, Advocate's fee 3 gold *mohurs*.

Application dismissed.

(2) 13 M. 510, 4 Ind. Dec. (N. S.) 1067.
(3) 18 M. 466; 6 M. L. J. 189; 6 Ind. Dec. (N. S.) 675.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1311 OF 1917.

April 19, 1918.

Present :—Mr. Justice Phillips and Mr. Justice Krishnan.

SUNDARAM AYYANGAR—LEGAL REPRESENTATIVE OF DEFENDANT No. 1—APPELLANT

versus

RAMASWAMI AYYANGAR AND ANOTHER PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Madras Revenue Recovery Act (Mad. II of 1864*)*, *s. 37A*, 38 (1), *proviso*, 99—*Madras Regulations I and II of* 1803—*Madras Regulation VII of* 1828, *s.* 3—*Sale for arrears of revenue—Confirmation by Deputy Collector and approval by Collector, effect of—Finality of order—Board of Revenue, powers of, to direct Collector to cancel sale—Suit to set aside cancellation and for possession—Limitation.*

Where a certain power is given to the Collector by Statute, it is not open to the authority having only general powers of revision over him, to direct him to pass a special order contrary to what he has already done. [p. 693, col. 1.]

Where a revenue sale is confirmed by the Deputy Collector and approved by the District Collector under section 3 of Madras Regulation VII of 1828, the order becomes final under section 38 (3) of the Madras Revenue Recovery Act. [p. 693, col. 1.]

The Board of Revenue has no jurisdiction to interfere with such order and direct the Collector to cancel the sale. [p. 693, col. 1.]

Where, therefore, a Collector, under the Board's directions, in supersession of his order approving of a sale, cancelled it and the purchaser brought a suit for setting aside the order of cancellation and for possession:

Held, (1) that the action of the Board of Revenue was wholly without jurisdiction; [p. 693, col. 1.]

(2) that the suit was not governed by the limitation period prescribed in section 59 of the Madras Revenue Recovery Act as the order cancelling the sale was only a review of the previous order confirming the sale. [p. 693, col. 2.]

Damodra Nadar v. *Manicka Vachaka*, 3 Ind. Cas. 463; 33 M. 65; 19 M. L. J. 725; 6 M. L. T. 177, followed.

Venkata v. *Chengadu*, 12 M. 168; 4 Ind. Dec. (N. S.) 467, *Raman Naidu* v. *Bhassoori Sanyasi*, 26 M. 638 and *Iswara Pattar* v. *Karuppan*, 3 M. L. J. 255, distinguished.

The proviso to section 38 of the Madras Revenue Recovery Act does not give power to set aside a sale after it has been confirmed under the first part of the section. [p. 693, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Salem, in Appeal Suit No. 135 of 1916 (Appeal Suit No. 62 of 1915, on the file of the District Court, Salem) preferred against the decree of the Court of the Addi-

tional District Munsif, Salem, in Original Suit No. 578 of 1914.

Mr. *K. Bhashyam Aiyangar*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

The Government Pleader, for the Crown.

JUDGMENT :—In this case a revenue sale was held, in which 1st defendant's land was sold under Revenue Recovery Act (II of 1864). A petition under section 37A of that Act to set aside the sale, was dismissed and also a petition under section 38 (1), Act II of 1864. These two orders were passed by the Deputy Collector, and his order of confirmation of sale, was approved by the District Collector under the powers conferred on him by section 3 of the Madras Regulation VII of 1828. By this confirmation the order of confirmation under section 38 (3) of Act II of 1864 became final. Later on, however, the Board of Revenue directed the Collector to cancel the sale and he cancelled it accordingly. Plaintiff's suit to set aside this last order and to recover possession of the property purchased by him at the revenue sale, has been decreed by the Subordinate Judge. The first objection taken is that under Madras Regulations I and II of 1803 which gave the Board of Revenue power of general superintendence over Collectors, the Board had the power to set aside the sale. When a certain power is given to the Collector by Statute it is not open to the authority having only general powers of revision over him, to direct him to pass a special order contrary to what he had already done. In this case the order cancelling the sale though purporting to be passed by the Collector was really the order of the Board of Revenue who had no such power under Act II of 1864. We have not been referred to any authority in support of this contention and we cannot accept it.

It is next argued that as the District Collector has powers of revision over Assistant Collectors exercising the powers of a Collector, under Madras Regulation VII of 1828, he had under section 38 (3) of Act II of 1864 power to pass the final order cancelling the sale. The order under section 38 (3) of Act II of 1864 was, however, passed in this case by the Deputy Collector, and when his order was confirmed by the District Collector, it became a final order passed by the Collector within the meaning of section 38 (3) and neither he nor the District Collector had himself power under the Act to pass any further order. We cannot accept a further contention that the proviso to clause (3) of section 38 gives power to set aside a sale after it has been confirmed under the first part of the section. The power given under that clause is one that must be exercised in lieu of the confirmation of the sale.

The third point is that this suit is barred by limitation under section 59 of Act II of 1864, as it has not been brought within six months of the order complained against. The order setting aside the sale, was in effect a review of the previous order confirming the sale and, therefore, following *Damodra Nadar* v. *Municka Vachaka* (1), we think that section 59 is inapplicable, for it was an order passed wholly without jurisdiction, and not under any power conferred by the Act. In this view *Venkata* v. *Chengada* (2); *Raman Naidu* v. *Bhassoori Sanyasi* (3) and *Iswara Pattar* v. *Karuppan* (4) can be distinguished.

The last argument is that, on the merits, the sale should have been set aside. The finding of the Subordinate Judge that no substantial injury was proved to be due to the only irregularity in the conduct of the sale, concludes this point.

The second appeal is accordingly dismissed with costs of the 1st respondent. The memorandum of objections is dismissed.

M. C. P. *Appeal dismissed*;

Memo. of objections dismissed.

(1) 3 Ind. Cas. 463; 33 M. 65; 19 M. L. J. 725; 6 M. L. T. 177.

(2) 12 M. 168; 4 Ind. Dec. (N. S.) 467.

(3) 26 M. 638.

(4) 3 M. L. J. 255.

SAJJAD MIRZA *v.* NANHI KHANAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 254 OF 1917.

February 18, 1918.

Present :—Mr. Lindsay, J. C.

SAJJAD MIRZA AND ANOTHER—DEFENDANTS Nos. 1 TO 3—APPELLANTS

versus

Musammat NANHI KHANAM AND OTHERS—PLAINTIFFS AND *Musammot* JINA BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Benami purchase—Government servant, purchase by, in contravention of Government orders, validity of—Public policy—Possession of benami purchaser under void transfer for more than 12 years, effect of—Adverse possession.

A purchase made *benami* by a Government servant in contravention of Government orders in that respect is void on the ground of public policy, and the real purchaser acquires no title under such a purchase. [p. 695, col. 2.]

A *benami* purchaser, holding under a void transfer but remaining in possession of the property for more than 12 years from the date of the purchase, acquires by prescription a good title to the purchased property as against the ostensible purchaser. [p. 696, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 2nd May 1917, confirming that of the Subordinate Judge, Sitapur, dated the 22nd December 1916.

The Hon'ble Syed *Wazir Hasan*, for the Appellants.

Mr. *Mohammad Wasim*, holding brief of Mr. *Mohammad Nasim*, for Respondents Nos. 1 to 4.

JUDGMENT.—The suit out of which this appeal has arisen, was brought for the purpose of recovering a 10-*biswa* share in the village of Muradnagar, the plaintiffs claiming title as heirs of one Murtaza Beg to whom it is alleged the property once belonged. One of the plaintiffs, Ali Husain, a son of Murtaza, subsequently withdrew from the suit: the result of this is that the remaining plaintiffs claim to recover a one-third share of the property in question.

The defendants were the heirs of one Asad Beg, the brother of Murtaza, and certain others claiming under them by transfer, and various pleas were raised for the purpose of defeating the plaintiffs' claim: such of them as require to be discussed at this stage, will be referred to in the course of this judgment.

Meantime a short statement of the facts will serve to elucidate the points which arise for determination in this Court.

It is now admitted that Murtaza Beg was at the time after the history of the property in suit begins, a Government servant in the district of Sitapur where he was employed as a Sadr Munsarim in the Settlement Department. In this capacity he was subject to certain orders of Government published in a Resolution No. 1252 A, dated the 17th September 1870, prohibiting servants of Government from acquiring landed property in the districts in which they were employed under pain of dismissal from service.

It has been found by the Courts below and the matter is no longer in dispute that Murtaza Beg in contravention of these orders, acquired this 10-*biswa* share in Muradnagar by means of three sale-deeds executed in the year 1871. The transactions were *benami*, the object of Murtaza being to conceal from Government the fact that he had acted in defiance of its orders. One of the deeds was drawn in favour of Asad Beg, the brother of Murtaza; a second was in favour of his brother-in-law, Muhammad Jafar, who was also a son-in-law of Asad Beg, the third deed was in favour of Murtaza's son Abul Hasan.

The finding is that Murtaza paid the price in each instance and that he was the real purchaser and this disposes of the defence set up to the effect that the property was in fact acquired by Asad Beg for himself.

Murtaza Beg died in the year 1875 and there is evidence on the record to show that at the time of his death, he was actually in possession of this property the rents of which were collected on his behalf by an agent of his named Ahmad Khan.

At the time of Murtaza's death, his children were young, and there is evidence, accepted by the Courts below, to show that Asad Beg assumed management of the property at the request of Murtaza's widow.

In the year 1877 Asad Beg made a mortgage of this Muradnagar property in favour of Mehrban Khan to secure a loan of Rs. 250 which, according to the recital in the deed, was borrowed for the purpose of paying Government revenue due in respect of the estate. Asad Beg then died in the year 1880 and mutation was thereafter effected in favour not of Asad Beg's heirs but in favour of Abul Hasan who was Murtaza's eldest son and soon after this

on the motion of Abul Hasan himself, mutation was made in favour of the other heirs of Murtaza as well. After this had been accomplished, we find that in the year 1881 Abul Hasan executed three deeds of further charge in favour of Mehrban who had taken the mortgage above referred to from Asad Beg in the year 1877, and later on the equity of redemption was transferred to this mortgagee by the heirs of Murtaza.

In the year 1907 Sajjad Mirza, the son of Assad Beg (the first defendant in the present suit), sued for redemption of the mortgage executed by his father in 1877 and obtained a decree in spite of the mortgagee's defence that he had no real title to the property and that the equity of redemption had passed to him by a transfer from the true owners, *i. e.*, the heirs of Murtaza Beg. It was held that the mortgagee could not be permitted to deny the title of his mortgagor Asad Beg. The result was that Sajjad got possession in 1908 by virtue of the decree for redemption.

Having lost the property, the representatives of the mortgagee brought a suit against the vendors of the equity of redemption and succeeded in recovering the purchase money on the ground that consideration for the transfer had failed.

These are the circumstances which have led to the filing of the present suit.

I have now to notice the pleas which have been urged here in second appeal, premising that the trial Court has given the plaintiffs a decree for recovery of a one-third share of the 10 *biswas* of Muradnagar subject to payment of a one-third share of the money which Sajjad Mirza had to pay for redemption; this decree has been upheld in appeal by the District Judge.

The first point urged is that the plaintiffs have no right to recover on the ground that the transfers of the year 1871 now found to have been made in favour of Murtaza Beg, were void as being opposed to public policy. Another point of a kindred nature is that the transfers were fraudulent in the sense that Murtaza Beg worked a fraud upon the Government which employed him by concealing the fact that he had acquired property in contravention of Government orders and thereby avoiding the dismissal from service which would have ensued had the real facts been known.

This latter aspect of the case does not seem to have been presented in either of the Courts below: the other argument was advanced, however, and repelled on the strength of two Full Bench rulings of the Allahabad High Court reported as *Bhagwan Dei* v. *Murari Lal* (1) and *Kamala Devi* v. *Gur Dial* (2) respectively. The judgments in these cases overrule two previous decisions of the same Court reported as *Shiam Lal* v. *Chhaki Lal* (3) and in *Sheo Narain* v. *Mata Prasad* (4).

I may say at once that I am unable to accept the doctrine laid down in the Full Bench judgments just mentioned and that if the decision of this case turned solely upon the question of the validity or invalidity of these transfers to Murtaza Beg regarded from the point of view of public policy, I should have had no difficulty in finding that Murtaza acquired no title under the three *benami* deeds of the year 1871.

However, I need not go into this question for the purpose of deciding this appeal.

Let it be assumed that the deeds did not operate to transfer any title to Murtaza Beg either on the ground that the transactions of transfer were against public policy, or constituted a fraud upon the Government.

The findings of fact are that Murtaza actually had possession of this Muradnagar property from the time of its acquisition till the time of his death and that his heirs were in possession after his death as far as it was possible for them to be. The Courts below hold that Asad Beg's ostensible possession after Murtaza's death, was in reality possession on behalf of Murtaza's heirs and that he was acting for them when he made the mortgage with possession in favour of Mehrban in the year 1877. The possession of the mortgagee from that year up till the

(1) 36 Ind. Cas. 259; 14 A. L. J. 962; 39 A. 51.
(2) 36 Ind. Cas. 319; 14 A. L. J. 969; 39 A. 58.
(3) 22 A. 220; A. W. N. (1900) 30; 9 Ind. Dec. (N. S.) 1177.
(4) 27 A. 73; 1 A. L. J. 412; A. W. N. (1904) 167.

time of redemption in 1905 was the possession of the real owners and no possession adverse to them began to run prior to the latter year when Sajjad Mirza got redemption and began to assert an adverse title.

On these facts it appears to me to be impossible to argue that Murtaza's heirs have still no title to the property. If their father began to hold without any title in the year 1871 and if after his death, his heirs have held proprietary possession till the year 1908 (actual possession having been with their mortgagee from 1877 till 1903) a good title to the property has been acquired by prescription. It could not for a moment be contended that the persons who sold this Muradnagar property in 1871 and who, if it be assumed that the transfers were void, continued to be the true owners, could have successfully maintained a suit against Murtaza's heirs after the lapse of twelve years' possession on their part: the title void in its inception became a good title by virtue of more than twelve years' adverse possession.

These being the facts, the heirs of Asad Beg, the defendants to this suit, cannot claim that they have a title to this Muradnagar property. They have failed to prove that the property was acquired by Asad Beg in 1871 as they asserted: and at the most they can only show about eight years' adverse possession for they came into possession only in 1908 and the present suit was brought in 1916.

I am clear, therefore, that title to this property is with the plaintiffs and that the suit was brought within limitation. This finding disposes of the pleas raised in the first, second and fourth grounds of appeal.

There remains to be noticed only the point taken in the third ground it is pleaded that the judgment in the redemption suit brought by Sajjad Mirza operates as *res judicata* on the question of title.

It was admitted before me that this point was not taken in the Courts below. There the argument was that the judgment which barred the present suit, was the one which was delivered in the suit brought by the ex-mortgagee after redemption to recover from the heirs of Murtaza the money which he had paid to them for the equity of redemption. That plea was bound to fail because the present defendants were no parties to that suit.

As for the plea of *res judicata* now raised, if it is possible for the defendants to raise it for the first time in second appeal, I am of opinion that it cannot prevail.

In the first place the heirs of Murtaza were not and could not have been parties to the redemption suit for at the time that suit was brought, they had lost all interest in the mortgaged property as they had conveyed the equity of redemption to the mortgagee. The suit was not, therefore, one *inter partes* and it cannot be said that the present plaintiffs claim through the mortgagee who was the defendant in that suit. On the contrary, it has been explained that after the mortgagee was obliged to submit to redemption and lost the property he compelled the present plaintiffs, by means of a suit, to refund to him the money which he had paid to them as the price of the equity of redemption.

Further it was never decided upon the merits in that suit that the present plaintiffs had no interest in the property now in dispute. It is true that the mortgagee tried to put forward the defence that they and not Sajjad Mirza were the real owners, but the defence was ruled out on the ground of estoppel as the mortgagee who had taken the mortgage from Asad Beg, the father of Sajjad Mirza, could not be heard to allege want of title in his own mortgagor. The result was to prevent the mortgagee defendant from raising a question of title to the mortgaged property and consequently there was not and could not be any determination of that question. There is nothing, therefore, arising out of the litigation in the redemption suit to bar the claim now put forward by the plaintiffs. I have now disposed of all the pleas raised in second appeal. The decree of the Court below is right and is affirmed.

I dismiss the appeal with costs.

Appeal dismissed.

RAM SUMRAN PROSAD *v.* SHYAM KUMARI.

PATNA HIGH COURT.
FIRST CIVIL APPEAL NO. 78 OF 1915.
August 9, 1918.
Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.
Babu RAM SUMRAN PROSAD AND ANOTHER
PLAINTIFFS—APPELLANTS
versus
Musammat SHYAM KUMARI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Compromise by widow, whether binding on reversioners—Collusion—Burden of proof

A Hindu widow is entitled to avoid the expenses of litigation by compromising a *bona fide* claim, subject to the qualification that the compromise is made for the benefit of the estate and not for the personal advantage of the widow. [p. 699, col. 1.]

Where, however, the reversioners seek to set aside such a compromise, the burden is on them to show that the compromise was entered into by the widow collusively for the purpose of conferring upon herself a benefit at the expense of the estate. [p. 700, col. 2.]

Appeal from a decision of the Subordinate Judge, Darbhanga.

Messrs. *S. M. Mulick*, *Harihar Prasad Sinha*, *P. N. Sinha* and *Naresh Chandra Sinha*, for the Appellants.

Messrs. *Fugh*, *Sultan Ahmed*, *Chandra Sekhar Banerji*, *Saroshi Chandra Mitter*, *B. N. Mitter*, *Tahir* and *Murari Prasad*, for the Respondents.

JUDGMENT.

ROE, J.—The plaintiffs in this case are aggrieved by a decree of the Subordinate Judge of Darbhanga, dismissing their suit for a declaration that certain agreements entered into by a Hindu widow with regard to the estate to which they are reversioners, be set aside as fraudulent and collusive. The facts of the case and pleadings thereon, have been clearly set forth in the judgment of the learned Subordinate Judge. On the 18th July 1895 the former holder of the estate, Brij Mohan Lal, brought a suit against the defendants Brij Bihari Lal and Gobind Lal to recover Rs. 44,893 with interest upon two mortgage bonds, dated 23rd June and 30th December 1894. During the pendency of the suit Brij Mohan Lal died and his widow, the present defendant No. 1 *Musammat* Shyam Kumari, was substituted as plaintiff. The suit was not defended by Brij Bihari Lal and Gobind Lal, but a claim was made by the Maharajah Bahadur of Darbhanga upon a prior mortgage, The learned Subordinate Judge in decreeing the suit against the mortgagors made an order that the prior mortgage of the Maharajah should be redeemed by deposit of nearly Rs. 25,000 before the mortgaged property could be brought to sale on the mortgage of Brij Mohan Lal. The matter was taken to the Judicial Committee and in 1904 the decree made by the learned Subordinate Judge was upheld. The widow *Musammat* Shyam Kumari made the necessary deposit and proceeded to take steps to bring the mortgaged property to sale. Finally on the 20th June 1912, all the mortgaged properties, ten in number, were put to auction and purchased by the decree-holder *Musammat* Shyam Kumari herself for Rs. 65,075. At this stage the sum due under the mortgage amounted to Rs. 1,41,959-2-6. The mortgagors Brij Bihari Lal and Gobind Lal were connections of the late Brij Mohan Lal. They approached the widow for a lenient treatment of their case. They had put in an application for the setting aside of the sale on the ground of fraud and irregularity and had also put up a minor member of their family to bring a suit contesting the mortgage decree. The widow apparently was tired of the litigation which had been going on for eighteen years, but her main idea in compromising the matter was to spare as far as possible Brij Bihari Lal, her husband's relative She says in her evidence that her main reason for compromising the suit was to avoid further expenses in litigation; but this statement seems to have been put into her mouth by her own Pleader. The arrangements for the settlement of the dispute were as follows :—

The widow was to allow the sale to be set aside, and private purchasers, one of whom was the widow's own brother, were to purchase eight of the mortgaged properties for some Rs. 69,000. Of this Rs. 66,000 was to be paid to the widow in cash and the balance Rs. 3,000 was to remain with Brij Bihari Lal. On receipt of the Rs. 66,000 in cash the widow was to certify full satisfaction of the decree. The two properties not sold to private parties, were to remain in possession of Brij Bihari subject to a

mortgage lien to the widow to the extent of Rs. 5,000. When these negotiations came to the ears of the present plaintiffs, the reversioners to the estate, they put in a petition praying that the widow be restrained from settling the matter on these terms and asking permission to contest the judgment-debtors' application to set aside the sale. This petition was refused. The arrangements made with the widow were carried into effect The sale was set aside and full satisfaction certified. On the following day, the reversioners put in the present suit asking for a declaration that all the defendants, that is to say, the widow, the judgment-debtors and the purchasers of the property, have in collusion and concert with one another, with a view to make wrongful gain and to deprive the plaintiffs of their reversionary rights quite improperly and without any right and lawful necessity, caused the sale of the properties mentioned, to be set aside by means of collusive and fraudulent proceedings and that the plaintiffs are not bound thereby. To this plaint there was a note or postscript added, that in case the defendant first party, that is the widow, intentionally fails to take out execution of the decree on the mortgage, the plaintiffs will bring a suit for the appointment of a Receiver and get the said decree executed through the Receiver. The learned Subordinate Judge devoted his attention to two main issues in the case. *Firstly*, whether the parties were governed by the Mitakshara or Mithila Law and *secondly*, whether the compromise made by the widow was fraudulent and collusive. He decided the first of these issues in favour of the plaintiffs, and it is admitted at the Bar on behalf of the respondents that he could not on the evidence have arrived at any other decision. Upon the question of fraud and collusion, he was of opinion that the plaintiffs had not made out their case. He summarises his conclusions on the evidence as follows:—"I, therefore, find that in compromising the case, her intention was far from injuring the plaintiffs' reversionary rights in any way, but she was moved by pity towards the condition of Lala Babu and while she was so moved, she did not forget the interest of the estate which was duly protected."

If we could agree with the learned Subordinate Judge that this was the logical conclusion to be drawn from the evidence, the case would, of course, be at an end. For my own part I entirely fail to see what benefit the reversioners got out of this arrangement. The difficulty that confronts us is that there is on the record no tangible evidence upon which we can satisfy ourselves as to the actual value of the property that had been sold in execution of the decree. There is a great deal of evidence to show that in the circumstances of the case no one was prepared to give more for it than was obtained. But this unwillingness to buy the property at a higher figure was due less to considerations of the value of the property than to considerations of the somewhat complicated legal position that would arise from the setting aside of the sale and the disposal of the properties by private treaty. It would have been easy for either side to have produced the papers of the recently completed Record of Rights as the basis for an accurate computation of the value of the property. But neither side took this step. We must assume that if it had been possible for the plaintiffs to have proved that the sale by private treaty was at prices grossly inadequate, they would have produced these papers. On the other hand, it may be equally said that if the prices paid actually represented the value of the thing sold, the defendants would have put these papers upon the record. The whole question, therefore, seems to me to be one of the burden of proof.

That it was accepted in the Court below that the burden of proof lay upon the plaintiff, is clear from the frame of the 6th and 8th issues. Are the applications for setting aside the sale and also the applications dated the 19th August 1912, filed in Execution Case No. 179 of 1910, certifying satisfaction of the decree under execution and agreeing to the sale being set aside fraudulent, collusive and illegal? If not, whether the order setting aside the sale will stand good?

Whether the sale of the properties by defendants second party to defendants third party was fraudulent and invalid? and

have the purchasers acquired a valid title to them against the reversioners?

In dealing with the decisions of the Judicial Committee upon the right of a Hindu widow to compromise litigation which is in her charge as representing the estate, the Courts in Calcutta have taken two broad lines, the one based on the decision in *Imrit Konwur* v. *Roop Narain Singh* (1), the other on *Katama Natchier* v. *Rajah of Shivagunga* (2). And the broad line of decisions has been that a widow has no right to bar the succession of the reversioners to the estate as a whole but is entitled to release a part of the estate by compromise of a *bona fide* claim, provided that the compromise is not shown to be unfair or made solely for her own benefit to the prejudice of the interests of the reversioners. The whole case law was reviewed in the arguments in *Khunni Lal* v. *Gobind Krishna Narain* (3). The standpoint from which compromises such as the compromise before us, have been attacked, has invariably been that the release of a part of the estate by the widow is in fact an alienation, and the conclusion of their Lordships was upon a review of the case law "That the true test to apply to a transaction which is challenged by reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case," they say at page 367*, "Khairati Lal acquired no right from the daughters of Daulat, for 'the compromise,' to use their Lordships' language in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (4), 'is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is.'"

The parties in the case before us whose purchase is challenged, derived their title not from the widow but from the owners, Brij Bihari Lal and Gobind Lal. Their rights to hold it free of all incumbrances was not derived from the widow, but from the right of the mortgagor judgment-debtor to set the property free from the mortgage by a deposit of the whole decretal amount at any time prior to the confirmation of the sale. This right was established in the Calcutta High Court by the decision in *Bibijan Bibi* v *Sachi Bewah* (5). A right to redeem is not extinguished until the sale has been actually completed and the proceeds of the sale dealt with. The learned Chief Justice at paragraph 868 quotes the views of the Courts of Madras, Bombay and Allahabad as consistent with his own. The question before us, therefore, is whether the widow was competent to compound with the mortgagor judgment debtor upon his right to redeem by accepting in full satisfaction of her claim less than half of the amount actually due upon it. It is immaterial in my view whether we regard the subsisting mortgage decree as moveable or immoveable property. If by the composition made, she was wasting it to the detriment of the reversioners, her action would not be binding upon them. But I hold that the burden of proof is on the reversioners to show that this composition entailed waste of the property. A widow's power to compromise has frequently been compared with the powers of a guardian to compromise and the power of the Karta of a Mitakshara family to effect a settlement. In *Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (6) it was said that the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud, and at page 615* of the same Volume dealing with an order treating the widow as the sole representative of

(1) 6 C. L. R. 76 (P. C.).

(2) 9 M. I. A. 539 at p. 604; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

(3) 10 Ind. Cas. 477; 33 A. 356; 21 M. L. J. 645; (1911) 1 M. W. N. 432; 10 M. L. T. 25; 13 Bom. L. R. 427; 13 C. L. J. 575; 8 A. L. J. 552; 15 C. W. N. 545; 38 I. A. 87 (P. C.).

(4) 1 I. A. 157 at p. 166; 13 B. L. R. 312; 3 Sar. P. C. J. 314 (P. C.).

(5) 31 C. 863; 8 C. W. N. 684.

(6) 14 M. I. A. 393 at p. 399; 17 W. R. 117; 10 B. L. R. 35; 2 Suth. P. C. J. 536; 3 Sar. P. C. J. 43; 20 E. R. 833.

*Page of 33 A.— *Ed.*

*See *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramapat Singh*, 14 M. I. A. 695 at p. 615—*Ed.*

an estate it was said: "From the above statement it is clear, that unless there be some fatal irregularity in the mode in which the decree of the appellant was obtained or drawn up, or some fatal irregularity in the mode in which that decree has been prosecuted, the estates have been regularly sold, and that the suit of the respondent, seeking to set aside the order for sale must fail." These cases, however, do not deal directly with the power of the widow to settle disputes. The basis of all decisions upon the effect of a contested decree against a widow is to be found in *Katama Natchier* v. *Rajah of Shivagunga* (2): "The same principle which has prevailed in the Courts of this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." In *Taranee Churn Gangooly* v. *Watson & Co.* (7) Markby, J., said at page 417, column 2: "It seems to us much more reasonable to hold that, as representative of the entire estate in the litigation, she has the same control with respect to compromise as she has with respect to the assertion of rights and with respect to appeal against an adverse decision. It is, of course, possible that the trust thus reposed in the widow may be abused without detection, as may the very large discretion which, as the law now stands, she undoubtedly possesses in other matters. But, on the whole, we think it will be found most favourable for the heirs that she should have the power of compromise at every stage of the proceedings."

And in *Karimuddin* v. *Gobind Krishna Narain* (8) it was said that the preservation of the estate and the costs of litigation for that purpose, are objects which justify a widow incurring debt and alienating a sufficient amount of property to discharge it. It seems to me clear that if a widow is entitled to encumber the estate for the purpose of carrying on a litigation, she is equally entitled to avoid the expenses of litigation by compromising a *bona fide* claim. Mookerjee, J., in *Mohendra Nath* v. *Shamsunnessa* (9), referring apparently with approval to the decision of Markby, J., above quoted, lays down the rule that the principle in *Katama Natchier's case* (2) is not limited to decrees in suits contested to the end and is subject to the qualification that the compromise was made for the benefit of the estate, and not for the personal advantage of the limited owner. Upon consideration of this point he held that "the decree which has not been successfully impeached on the ground of fraud, coercion, collusion or any like reason, operates as *res judicata* between the parties to the present suit."

I hold that in the case before us the burden of proof was on the plaintiffs to show that the compromise entered into by the widow *Musammat* Shyam Kumari was entered into collusively for the purpose of conferring upon herself a benefit at the expense of the estate. All that has been shown, is that instead of stripping the judgment-debtors, near connections of the family, of every item of property which they possessed, they were allowed to retain a sum of Rs. 3,000. The litigation had already lasted 18 years; there were cases pending which might prolong it for many years further. It is our common experience that though there may be nothing valid in the objections taken to an auction sale, the judgment-debtors will almost invariably carry on their objections to the sale from Court to Court merely for the purpose of holding on to the property for a few more years. The widow would no doubt have succeeded in the end, but she would have spent perhaps Rs. 3,000, perhaps Rs. 10,000 in the ensuing litigation. The compromise of the claim whereby she avoided this expense, seems to me to have been a fair and reasonable settlement. The whole facts of the case were clearly before the Court. The Court was aware from the petition of the present plaintiffs that there were reversioners to be considered. There was no fraud upon the Court. There is nothing to indicate

(7) 12 W. R. 413; 3 B L R. A. C. 437.

(8) 3 Ind. Cas. 795; 13 C. W. N. 1117 at p 1123; 31 A. 497; 19 M. L. J. 687; 10 C L. J. 243; 11 Bom. L. R. 911; 6 A. L. J. 807; 6 M. L. T. 275; 36 I. A. 138 (P. C.).

(9) 27 Ind. Cas. 954; 21 C L J. 157; 19 C. W. N. 1280

that the widow proposes to waste the money that has gone into her hands or to give it away. If it remains in the estate, or if it remains in her hands, it will come to the reversioners in due course, and in the absence of proof that the sum obtained by the compromise was grossly inadequate, it cannot be said that it has been proved that there was a fraud on the reversioners. The relief which the reversioners might and should have applied for, was a declaration that the widow be required to pay into Court the sum received upon the compromise in order that it might be invested for their own benefit. This relief they have not asked for. Instead they seek to make the property, which purchasers have taken in good faith, free of all encumbrances on payment of Rs. 69,000 (as far as we know its full value), subject to the residue of the mortgage debt, another Rs. 75,000. In asking that this compromise be set aside, the reversioners are seeking to impose upon the purchasers of this property a loss of Rs. 75 000 to which they should not be held legally liable, and a gain to themselves of Rs. 75,000 to which they are certainly not in equity entitled. The compromise made by the widow was at least a far fairer arrangement than that by which the reversioners seek to set it aside. In my view the learned Subordinate Judge was right in refusing to the reversioners the declaration which they sought. I would dismiss these appeals with costs.

JWALA PRASAD, J.—I agree to the order proposed by my learned brother.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 54 OF 1915.

May 31, 1916.

Present:—Mr. Kendall, A. J. C.

AJODHIA BANK, LIMITED, FYZABAD—PLAINTIFF—APPELLANT

versus

Sheikh ABDUL GHANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage, suit on—Interest from date fixed for payment to date of realisation—Contractual rate of interest, whether can be allowed—Discretion of Court.

The rate of interest which a Court can allow in a mortgage decree from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion, however, the Court will ordinarily refer to the contractual rate, if it be a reasonable one. [p. 701, col. 2.]

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 23rd April 1915.

Mr. *Har Narain Dass*, for the Appellant.

JUDGMENT.—The suit out of which this appeal has arisen, was brought on a registered mortgaged deed for Rs. 3,500. Interest at 10 per cent. per annum was provided for in the deed. The suit was undefended. The lower Court decreed principal and interest to the date of suit and costs. Six months were allowed for payment; and for that six months the lower Court decreed the contractual rate of interest, but decreed it only upon the principal sum. It further decreed interest at 6 per cent. per annum from the date of payment till realisation, but this again only on the principal sum of Rs. 3,500. Hence this appeal.

Respondents have not appeared.

There was no reason whatever why the contractual rate of interest should not have been decreed upon the decretal amount from the date of the decree to the date of payment.

The rate of interest which the Court can allow from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion the Court will ordinarily refer to the contractual rate, if it be a reasonable one. It was laid down by Lindsay, J. C., in *Allahabad Bank, Limited, Lucknow* v. *Rani Suraj Kuar* (1) that according to the practice of this Court, the interest at the contract rate can be awarded in cases of this kind up till the date of realisation, provided the rate is deemed to be reasonable. I do not find that the rate of interest in the present case can be termed unreasonable.

I, therefore, allow this appeal and pass a decree for Rs. 5,628-13-6 and costs. If this amount with interest at the rate of 10 per cent. per annum be not paid within a further period of 3 months of this date,

(1) 26 Ind. Cas. 177; 1 O. L. J. 544.

the mortgaged property shall be sold, future interest being allowed to the date of realization at the contractual rate. Appellant may have his costs of this appeal.

Appeal allowed.

MADRAS HIGH COURT.
APPEAL SUIT No. 78 OF 1917.
February 5, 1918.
Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.
BOBBA PADMANABJUDU AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
BOBBA BUCHAMMA—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Declaration that Will containing power to adopt was not executed, suit for, maintainability of—Discretion of Court.

A suit lies under section 42 of the Specific Relief Act for a declaration that a Will giving power to the testator's widow to adopt a boy was not in fact executed. [p. 704, col. 2.]

Saudagar Singh v. *Pardip Narayan Singh*, 43 Ind. Cas. 484; 34 M. L. J. 67; 4 P. L. W. 52; 23 M. L. T. 31; 16 A. L. J. 61; 7 L. W. 146; 27 C. L. J. 186; 22 C. W. N. 436; (1918) M. W. N. 323; 20 Bom. L. R. 509; 45 C. 510 (P. C.), followed.

Sreepada v. *Sreepada*, 12 Ind. Cas. 176; 35 M. 592; (1911) 2 M. W. N. 194 and *Govinda* v. *Perumdevi* 12 M. 136; 4 Ind. Dec. (N. S.) 444, not followed.

(Authorities reviewed.)

Per *Seshagiri Aiyar, J.*—Whenever a cloud is cast or attempted to be cast on the title of a plaintiff, he is entitled to come to Court under section 42. But where the cloud is flimsy or of a shadowy character or where the machinery of the Court is utilised to unnecessarily harass the defendant, the Court might refuse to grant relief even though the plaintiff can exercise his right of suit. [p. 702, col. 2; p. 703, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Bezwada, dated the 1st November 1916, in Original Suit No. 48 of 1916.

Mr. *P. Narayanamurthi*, for the Appellants.

Messrs. *B. Narasimha Row* and *C. Rama Rao*, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—Plaintiffs sue for a declaration that a Will said to have been made by their brother, the deceased husband of the defendant, authorising her to adopt a boy, was never executed. The defendant pleaded *in limine* that such a suit is incompetent. The Subordinate Judge dismissed the suit; the only question in appeal is whether this decision is right.

The diversity of judicial opinion on the construction of section 42 of the Specific Relief Act is so great that I have resolved upon confining my citations to the cases decided in Madras and to the decisions of the Privy Council. If I may say so with respect, the consideration of this question has been rendered difficult by mixing up two distinct issues. Section 42 of the Specific Relief Act, while indicating the character of the right which may be declared by a Court of Law, leaves it to the discretion of such Court to grant or refuse the relief claimed. In arguments addressed to Courts, and not infrequently in decisions also, the question of the right of suit has been mixed up with the question of exercising discretion in regard to the relief.

If I had only the language of the section to guide me, I would have little hesitation in holding that suits like the present are within section 42 of the Act. There can be no doubt that the plaintiffs are entitled to protect their alleged legal right as surviving co-parceners to their deceased brother's estate. It must also be admitted that the defendant is denying that character by setting up the Will which, if true, would deprive the two plaintiffs of a third of their property There is a further consideration: in seeking the aid of section 42, a plaintiff may consider that if time elapses, the pretensions of the defendant who is interested in denying the plaintiff's title, may gain momentum and may in the course of years render the task of refuting those pretensions very difficult. In fact, as I said in *Gandla Pedda Naganna* v. *Sivanappa* (1), whenever a cloud is cast or attempted to be cast on the title of a plaintiff, he is entitled to come to Court under section 42.

It may be that, in many instances, the apprehended danger or the cloud on title may be of such a shadowy character and so flimsy that the Court in its discretion might refuse to grant the relief prayed

(1) 26 Ind. Cas. 232; 38 M. 1162; 27 M. L. J. 520; 16 M. L. T. 310.

for. But that is no ground for saying that the suit is not maintainable.

There have been numerous instances in which notwithstanding an undoubted right to litigate, Courts have refused in their discretion to grant relief. The object to be borne in mind in such cases is to see that the machinery of the Court is not utilised for unnecessarily harassing the defendant.

With these preliminary observations, I shall proceed to consider the decisions bearing on the section. In Madras there are cases which hold that where the plaintiff is not likely to be immediately affected, the suit should be dismissed as incompetent. Apparently the old English doctrine which prevailed before the enactment of the Specific Relief Act, to the effect that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, has been accepted as a correct interpretation of section 42 of the Act. In *Kathama Nachiar* v. *Dorasinga Tever* (2), *Sheo Singh Rai* v. *Dakho* (3), *Nogendro Chundro Mittro* v. *Sreemutty Kishen Soondery Dossee* (4) and *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (5), the Judicial Committee enunciated this view with reference to cases which arose before the passing of the Specific Relief Act. In Madras even after the Act, that view was adopted. *Govinda* v. *Perumdevi* (6) is one of this class. The decision which the Subordinate Judge has relied on, *viz.*, *Sreepada* v. *Sreepada* (7), belongs to the same category. On the other hand, we have *Govinda Pillai* v. *Thayammal* (8) and *Chinnasawmy Mudaliar* v. *Ambalavana Mudaliar* (9), which seem to take a broader view of the section. It is true in the latter case an adoption was set up; but apparently no hostile act followed upon the setting up of the adoption. In *Puttanna* v. *Ramakrishna Sastri* (10) the learned Judges held that the relief under section 42 is not restricted to cases covered by illustrations (*e*) and (*f*) to that section, and granted a declaration that a Will alleged to have been made by the last male owner, was never made. There are three recent Madras cases which may be shortly noticed. In *Ramakrishna Pattar* v. *Narayana Patter* (11) all that was laid down, was that section 42 is not intended to enact a declaration in respect of a personal contract. In *Muchirazu Ramachandra Row* v. *Secretary of State* (12) Mr. Justice Ayling with Mr. Justice Tyabji held that a declaration can be given against an order debarring a person from acting as a Vakil to another in a village Court. My learned colleague there said that even if the suit may not be covered by the Specific Relief Act, the relief can be granted. These are the only Madras cases which need be considered.

Now as regards the Privy Council cases, reliance was placed by both the parties on *Pirthi Pal Kunwar* v. *Guman Kunwar* (13). The real decision in that case was that in the exercise of the discretion vesting in the Court below, it had rightly refused to grant the prayer. It was a suit in which the son's widow in possession sued for a declaration that an adoption by the father's widow was void and ineffectual. The Judicial Committee did not say such a suit would not lie. They said that they saw no reason to interfere with the discretion exercised by the Court below. In *Janaki Ammal* v. *Narayanasami Aiyar* (14), which was relied on by Mr. Narasimha Row, it was pointed out that a cause of action with which the plaintiff came to Court, namely, *waste* by the widow, having been found to be untrue,

(2) 2 I. A. 169; 23 W. R. 314; 15 B. L. R. 83; 3 Sar. P. C. J. 456; 3 Suth. P. C. J. 106 (P. C.).

(3) 5 I. A. 87; 1 A. 688; 2 C. L. R. 193; 3 Sar. P. C. J. 807; 3 Suth. P. C. J. 529; 2 Ind. Jur. 396; 1 Ind. Dec. (N. S.) 481 (P. C.).

(4) Sup. Vol. I. A. 149; 19 W. R. 133; 11 B. L. R. 171; 3 Sar. P. C. J. 203 (P. C.).

(5) Sup. Vol. I. A. 165; 19 W. R. 171; 11 B. L. R. 203; 3 Sar. P. C. J. 229 (P. C.).

(6) 12 M. 136; 4 Ind. Dec. (N. S.) 444.

(7) 12 Ind. Cas. 176; 35 M. 592; (1911) 2 M. W. N. 194.

(8) 28 M. 57; 14 M. L. J. 209.

(9) 29 M. 48.

(10) 30 M. 195; 17 M. L. J. 374.

(11) 26 Ind. Cas. 883; 39 M. 80; 27 M. L. J. 634; (1914) M. W. N. 912.

(12) 31 Ind. Cas. 310; 39 M. 808.

(13) 17 C. 933; 17 I. A. 107; 5 Sar. P. C. J. 569; Rafique & Jackson's P. C. No. 118; 8 Ind. Dec. (N. S.) 1167 (P. C.).

(14) 37 Ind. Cas. 161; 43 I. A. 207; 31 M. L. J. 225; 39 M. 634; 20 M. L. T. 168; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530 (P. C.).

it was not open to the plaintiff to ask that his right as reversioner to succeed at some future time should be declared. In the last but one paragraph of the judgment, it is said that if the plaintiff came to Court for a bare declaration of his rights without alleging that there was any infringement of such a right, the Court would reject such a suit, and the fact that a false cause of action was alleged in the plaint, was no ground for deciding the contingent title of the plaintiff. I do not think that this decision helps the respondent. In another Privy Council case, *Sheoparsan Singh* v. *Ramnandan Prashad Narayan Singh* (15), Sir Lawrence Jenkins sounds a note of warning against the machinery of the Court being abused by suits under section 42 of the Specific Relief Act. Here again it was decided that a mere declaration of the right of the plaintiffs to succeed at some future time should not be granted. In *Saudagar Singh* v. *Pardip Narayan Singh* (16) Lord Parker in delivering the judgment of the Judicial Committee says: "It appears to their Lordships to be clear on this section that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed." Applying that principle to the present case, it may be said that where a Will is set up the result of which may be to prejudice the interest of the plaintiffs, though ultimately the adoption referred to in the Will may not take place, the plaintiffs are entitled to the declaration they have claimed. In my opinion this latter pronouncement of the Judicial Committee which is binding on us is decisive of the question; and if I may say so with the greatest respect, gives effect to the true intent of section 42 of the Specific Relief Act.

[4(15) 33 Ind. Cas. 914; 43 I. A. 91; 14 A. L. J. 466; 20 C. W. N. 738; 18 Bom. L. R. 397; 23 C. L. J. 621; (1916) 1 M. W. N. 419; 20 M. L. T. 1; 3 L. W. 544; 31 M. L. J. 77; 43 C. 694 (P. C.).

(16) 43 Ind. Cas. 484; 34 M. L. J. 67; 4 P. L. W. 52; 23 M. L. T. 31; 16 A. L. J. 61; 7 L. W. 146; 27 C. L. J. 186; 22 C. W. N. 436; (1918) M. W. N. 323; 20 Bom. L. R. 509; 45 C. 510 (P. C.).

An examination of some of the Madras cases to which I have referred, notably *Govinda* v. *Perumdevi* (6) and *Sreepada* v. *Sreepada* (7), tends to show that where there is no possibility of immediate injury flowing from a contemplated act, deed, or other instrument, the Courts should not allow a suit to be instituted. With all respect I should like to point out that instead of saying that a suit does not lie under such circumstances, it would be more correct to say that Courts should not grant relief in such cases. *Govinda* v. *Perumdevi* (6) and *Sreepada* v. *Sreepada* (7) are really instances of cases in which the Courts in their discretion would have been justified in refusing the relief: and I do not think any harm will be done by interpreting them in the way I have indicated.

In the present case it may be open to the lower Court to find on hearing the evidence that the allegations are not of such a character as to compel the Court to grant the relief. In my opinion the conclusion come to, that the suit is not within the meaning of section 42 of the Specific Relief Act, is wrong. I would, therefore, reverse the decree of the Subordinate Judge and remand the suit for disposal on the merits. Costs to abide the result.

AYLING, J.—I am in entire agreement with the conclusion arrived at by my learned brother, whose judgment I have had the advantage of perusing, and to which I can add little. It seems to me that the defendant in this case (widow of plaintiff's undivided brother) was interested in setting up and utilising the power to adopt contained in her late husband's alleged Will, in other words, in denying plaintiffs' right of succession by survivorship to the whole joint family property. In such circumstances, the present suit would appear to be under section 42 of the Specific Relief Act. I can see nothing in the section to justify the view which seems to have been taken by the learned Judges in *Sreepada* v. *Sreepada* (7) and having regard to the other rulings quoted in my learned brother's judgment, and in particular to the spirit of the latest Privy Council case of *Saudagar Singh* v. *Pardip Narayan Singh* (16), I think we are justified in declining to follow it. It seems to me

that there can be no question of the expediency of allowing the genuineness of such documents as the present to be tested as early as possible. The difficulty of ascertaining the truth, tends in almost every case to increase with the lapse of time, we have recently heard arguments in a case in which an adoption was made, based on a disputed authority to adopt said to have been given 28 years before. A view of the law which in such a case precludes the possibility of determining the facts as to the alleged authority until so late is one which I should be loth to adopt unless compelled by irresistible reasoning to do so.

I concur in the order proposed by my learned brother.

M.C.P. *Appeal allowed.*

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 63 AND 76 OF 1916.

August 1, 1918.

Present :—Mr. Justice Jwala Prasad and Justice Sir Ali Imam, KT.

HANUMAN BAKSH AND OTHERS—PLAINTIFFS—APPELLANTS IN NO. 63 AND RESPONDENTS IN NO. 76

versus

TIKAIT GANESH NARAYAN SAHA DEO AND OTHERS—DEFENDANTS—RESPONDENTS IN NO. 63 AND APPELLANT IN NO. 76.

Chota Nagpur Encumbered Estates Act (VI of 1876 B. C.), ss. 3 (c), 12A—Contract by disqualified proprietor, validity of—Ratification of contract to pay debts incurred during period of disqualification, validity of.

A disqualified proprietor under the Chota Nagpur Encumbered Estates Act is incompetent to enter into any contract which may involve him or his heirs in pecuniary liability. [p. 706, col. 2.]

No suit can be brought upon a contract entered into by a disqualified proprietor after he emerges out of his disqualification by which he promises to pay any debt incurred by him during his disqualification. [p. 707, col. 1.]

Appeals from a decision of the Subordinate Judge, Ranchi, dated the 31st January 1916.

Messrs. *Saroshi Charan Mitra* and *Baranashi Prasad Jhunjhunwala*, for the Appellants in No. 63 and Respondents in No. 76.

Messrs. *Rai Guru Saran Prasad* and *Atul Krishna Ray*, for the Respondents in No. 63 and Appellant in No. 76.

JUDGMENT.

JWALA PRASAD, J.—This is an appeal by the plaintiffs who are proprietors of a firm in the town of Ranchi, called the firm of Hukami Chand-Hardatt Rai. Hardatt Rai is dead, and the plaintiffs, his sons, are now the proprietors of that firm. They brought a suit in the Court of the Subordinate Judge of Ranchi for recovery of Rs. 48,225-1-10 principal and interest, on the basis of a hand-note, dated the 4th May 1911. The hand-note is said to have been executed by Raja Raghubar Sahi Deo, father of defendant No. 1 and grandfather and great-grandfather of defendants Nos. 2 and 3 respectively.

The hand-note in question is said to have been executed in respect of Rs. 31,315, which was found due from Raja Raghubar Sahi Deo to the plaintiffs' firm on the date of the hand-note.

The Raja was the owner of the Zemindari known as Burway Estate, and defendant No. 5, Manmotha Nath Chatterji, was the manager and agent holding general power-of-attorney. Manmotha Nath Chatterji executed the hand-note on behalf, and with the permission, of Raja Raghubar Sahi Deo. The Raja died in January 1914. The defendants are the heirs and surviving members of the family. The present suit was accordingly brought against them on the 4th of May 1914.

The defendants in their written statement took all possible pleas, the most important of which was that the Raja was a disqualified proprietor under the Chota Nagpur Encumbered Estates Act (VI of 1876 B. C.) and was, therefore, incompetent to incur debt or to enter into any contract involving pecuniary liability, and that the debts for which the hand-note in suit was executed, were all incurred during the said disqualification of the Raja and therefore the plaintiffs are not entitled to recover anything on the basis of the said hand-note.

The defendants denied that the Raja ever borrowed any money from the plaintiffs' father, or that there was any necessity for the debts, or that the defendant No. 5, the Manager had any authority to execute the hand-note in question.

The Court below, however, held that the hand-note was genuine and was executed by Manmotha Nath Chatterji as a duly constituted agent on behalf of the Raja, and that the loans were taken from time to time for valid purposes of the Raja and

the family. The entire sum with the exception of Rs. 533-2-0 was advanced by the plaintiffs' firm between December 1907 and 1st October 1908 and on an adjustment of account, Rs. 17,790 was found due from the Raja to the firm on 1st October 1908, on which date a hand-note was executed for the said sum. Thereafter Rs. 533-2 0 was borrowed. The total sum, principal and interest, amounted to Rs. 21,999-8-6 on 26th July 1909 for which another hand-note was executed. On the 4th of May 1911, the amount due from the defendants' father came to be Rs. 31,315, for which the present hand-note on the same date was executed. The Court further held that "the debts were contracted for the purposes of the management of the estate and the estate was certainly benefited." Upon these findings, the Court below held that "the debts are binding upon the defendants unless by law they are not recoverable."

As to the question of limitation raised by the defendants, the Court below held that the suit was brought within 3 years from the date on which the hand-note in question was executed and hence it was not barred by time, although the debts were actually contracted long before the execution of the hand note. This view appears to be correct inasmuch as the hand-note in question created a new contract between the parties and affords a new starting point for the purposes of limitation.

The Court below gave a decree to the plaintiffs for Rs. 533-2-0 with interest, against all the defendants and dismissed the suit in respect of the rest of the claim on the ground that the debts were incurred during the period that the Raja was a disqualified proprietor under the protection of Act VI of 1876 of the Chota Nagpur Encumbered Estates Act and was, therefore, incompetent to enter into any contract involving him in pecuniary liability under section 3, clause (c) of the Act, and hence the suit of the plaintiffs is barred by section 12A, added to the Act by virtue of the Amending Act III of 1909 B. C.

The plaintiffs have appealed to this Court and contend that the Court below is wrong in dismissing any portion of their claim. On the other hand, the defendants have appealed against the order of the Court below giving a decree to the plaintiffs in respect of Rs. 533-2 0 with interest.

The principal question that arises in connection with the plaintiffs' appeal is, whether the debts incurred by the Raja covered by the hand-note in question are recoverable or not from the defendants. The Court below has held that the debts were all incurred (with the exception of Rs. 533-2 0) between December 1907 and 1st October 1908. This finding is borne out by the evidence on the record and in fact it has not been seriously challenged. The Burway Estate belonging to the Raja was brought under the operation of the Chota Nagpur Encumbered Estates Act, on the 29th September 1897 and was released on the 16th July 1909 (*Vide* Exhibits D and 4) with a cash balance of Rs. 12,000 after discharging all the liabilities of the estate. The aforesaid debts, therefore, were incurred while the Raja was under the disqualification imposed by the said Act. The disqualification is contained in section 3, clause (c) of which enacts "so long as such management continues, the holder of the same property and his heir shall be incapable of entering into any contract which may involve them or either of them in pecuniary liability." The Raja and his heirs, the present defendants, were, therefore, incompetent to enter into any contract involving them or either of them in pecuniary liability up to the 1st October 1908. The disability ceased on that date.

It is contended on behalf of the plaintiffs that the hand-note in question of the 4th of May 1911 was executed long after the Raja had emerged from the disability and was free to enter into any contract. It is said that the hand-note in question is not only a ratification of the original contracts when the debts were actually incurred, but was also a new contract. Reliance is placed upon the case of *Gregson* v. *Udoy Aditya Deb* (1), where their Lordships held that "It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole," and at page 233*: "He became as free to manage his affairs as any other person." Upon the principle of ratification their Lordships held that the

(1) 17 C. 223 at p. 232; 16 I. A. 221; 13 Ind. Jur. 410; 5 Sar. P. C. J. 416; 8 Ind. Dec. (N. S.) 686 (P. C.)

*Page of 17 C.—*Ed.*

plaintiff in that case was entitled to the specific performance of the agreement to lease entered into by the defendant while under the protection of the Encumbered Estates Act, which was not only confirmed by him but that benefits were obtained by him from the plaintiff on the basis of the agreement after the lease of his estate. The same principle was applied in the case of *Roy* v. *Thakur Ram Jiwan Singh* (2) and in the same volume *Jagadis Chandra Deo Dhabal* v. *Satrughan Deo Dhabal* (3).

In *Raja Satrughan Deo Dhabal* v. *Raja Jagadish Chandra Deo Dhabal* (4), Rampini, J., held that "The intention of the Act was to render the holder of an estate so taken charge of entirely capable of contracting, and that a void contract cannot be revived." This is based upon section 11 of the Indian Contract Act, according to which a person is competent to contract provided he is not disqualified from contracting by any law to which he is subject. To remove the doubt created by the conflict of authorities and to prevent the disqualified proprietors from confirming or ratifying any contract entered into by them during the period of their disqualification, or from entering into any new contract in respect of the aforesaid debts, section 12A was added to the Act in 1909. This section enacts that "no suit shall be brought to charge any person to whom property is restored (1) upon any promise made after such restoration to pay any debt contracted while the management of the property was vested in the Manager, or (2) upon any ratification, made after such restoration, of any promise or contract made while the management of the property was vested in the Manager." The Amending Act was brought into force on the 24th March 1909 and it is, therefore, contended that it could not have the retrospective effect of taking away the right of the Raja, which he, as a disqualified proprietor, had before the release of his estate, to confirm or ratify any debt incurred by him during the disqualification or to enter into any contract in respect thereto. It is more than doubtful whether he had any such vested rights. Even if he had any, the Raja ceased to be a disqualified proprietor on the 16th July 1909 and, therefore, when the Act came into force (24th March 1909) the right to enter into any contract in respect of the debts in question had not accrued at all. Besides, the Amending Act does not at all purport to take away the right, if any, in the disqualified proprietor to confirm, ratify or deal with the debts incurred by him during the incompetency and, therefore, does not destroy any existing vested right that a disqualified proprietor may have. The section simply bars a suit in respect of the debts incurred during the disqualification by reason of any promise or ratification subsequent to the cessation of the disqualification. The bar in the section affects a creditor, and not a debtor (disqualified proprietor). The contention, therefore, of the plaintiffs fails. They are not entitled to enforce their claim by means of a suit. In other words, their suit is incompetent.

It is then contended that the section bars the suit against only the "person to whom the property is restored." In the present case it is said that the property was restored to the Raja, and not to the present defendants, who are his heirs, and hence the suit against the heirs is not barred. It may be conceded that the Act being a penal one, must be strictly construed and that no bar can be placed upon the plaintiffs' suit unless it comes within the express terms of the section. We have, therefore, to see whether the section contemplates any bar against the present defendants. The estate of the Raja was taken under the Act. The Raja and his *heirs* were disqualified from entering into any contract involving them or either of them in pecuniary liability; *vide* section 3 (*c*). The notification, Exhibit C, will show that the estate was restored to the owner thereof, and in Exhibit D the name of Raja Raghubar Sahi Deo is mentioned as the person to whom the estate was restored. From Exhibit A, report of the Manager, paragraph 12, it is clear that the members of the family, namely, the defendants were maintained at the expense of the estate. In fact they claim to be the heirs of the Raja and that the estate has devolved upon them as such. Therefore when the estate was restored to the Raja, in effect it was restored to the defendants who are the son, the grandson

(2) 33 C. 363; 10 C. W. N. 149.
(3) 33 C. 1065; 4 C. L. J. 238.
(4) 7 C. L. J. 578.

and the great-grandson of the Raja and were fully represented by him. I, therefore, hold that section 12A bars the present suit against the defendants. The appeal is accordingly dismissed with costs.

As to the Appeal No. 76 of 1916 I am also of opinion that it should be dismissed with costs. This appeal relates to the sum of Rs. 533-2-0 which the Court below has decreed with interest against the defendants. This sum was borrowed at the time when the hand-note of the 26th July 1909 was executed, and hence after the Raja ceased to be a disqualified proprietor. The Court below has found it as a fact and I agree with that finding. It has also been held by the Court below that the debt was contracted for the family purposes which benefitted the defendants. There is no substance in this appeal and it is accordingly dismissed with costs.

IMAM, J.—I agree.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 92 OF 1917.

February 26, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

Maistry RAJABHAI NARAIN OF CUTCH, ANJAR—DEFENDANT—APPELLANT

versus

Haji KARIM MAHOMED OF BOMBAY THROUGH HIS RECOGNISED AGENT HUSSAN IYOOD SAIT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20—'Cause of action', meaning of—Carriage by sea—Short delivery, damages for—Freight illegally collected, suit for return of—General average contribution, claim for—Jurisdiction—Peril to crew and cargo—Jettison—Principles governing general average—Municipal Courts, jurisdiction of, over foreigners.

The term 'cause of action' as used in section 20, Civil Procedure Code, means the whole bundle of material facts which it is necessary for a plaintiff to allege and prove in order to entitle him to succeed. [p. 709, col. 2.]

A claim for general average contribution can be sustained only when the voyage has been completed and the vessel has reached its place of destination or some other port safely. If there are several general average acts during the same voyage the principle is to make each owner of a sacrificed interest contribute to all the sacrifices in whatever order of time they may have occurred. The time of jettisoning cannot be taken as the time when the value of the goods is to be ascertained because the whole adventure may afterwards be brought to an end by the total loss of the ship and cargo when there can be no contribution at all. [p. 710, col. 1; p. 709, col. 2.]

A claim for general average may be laid at the place where the voyage has safely ended. [p. 710, col. 1.]

A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree can be enforced against him in the foreign State is a question for disposal for the Courts of that State. [p. 710, col. 2.]

Plaintiff chartered 1st defendant's vessel to sail from Cutch to Basra; where it was to take 700 bundles of dates and discharge them at Calicut. First defendant was a resident of Cutch where the charter party was entered into. The ship experienced rough weather on her way from Basra to Calicut, in consequence whereof the master (2nd defendant) had to jettison 165 bundles. The ship, however, reached Calicut in safety. The master refused to deliver to plaintiff any of the goods till the whole freight was paid. Plaintiff paid the freight under protest and sued the owner of the ship and the master in the Calicut Munsif's Court for (1) the return of the excess freight collected, and (2) the price of the bundles short-delivered, or (3) the amount due on a general average contribution. The defendants objected to the jurisdiction of the Court:

Held, (1) that the claim for return of freight was properly laid in the Calicut Court as the freight was collected at Calicut; [p. 709, col. 2.]

(2) that, as Calicut was the place of performance of the contract, the Calicut Court had jurisdiction to entertain the claim for the price of the short-delivered goods. [p. 709, col. 2.]

(3) that as the voyage safely came to an end at Calicut, plaintiff's cause of action for general average arose in Calicut. [p. 710, col. 1.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 274 of 1916, preferred against the decree of the Court of the Principal District Munsif, Calicut, in Original Suit No. 1035 of 1913.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Ayyar* (with him Messrs. *A. Sundaram*, *T. R. Krishnaswamy Ayyar* and *V. A. Krishna Ayyar*), for the Appellant.—The Munsif's Court at Calicut had no jurisdiction to entertain the claim for general average. The jettisoning was not in Calicut. As soon as the sacrifice was made and the peril ended, the cause of action for contribution was complete.

The Calicut Court could not also exercise jurisdiction over 1st defendant who was a subject of a foreign State. Any decree that it might pass, could not be enforced against him. The vessel against which the claim was made, was a foreign ship.

The Hon'ble Mr. *T. Richmond*, for the Respondent.—The vessel landed at Calicut, the port of destination and the cause of action for general average arose only on the date of its arrival. No claim of that nature

could be sustained while the ship was still on its voyage.

Though the 1st defendant was a resident of a Native State, he submitted to the jurisdiction of the British Court and is bound by its decree, though it is a question whether it can be enforced against him in Cutch.

JUDGMENT.

KRISHNAN, J.—The question raised before us in second appeal is one of jurisdiction. The facts necessary to be stated for the decision are these. The plaintiff chartered a vessel named "Ganga Patharath" belonging to the 1st defendant to sail from Cutch to Basra and there to take on board 700 bundles of dates and to discharge the same at Calicut. The charter-party was entered into at Cutch, the 1st defendant being a resident of that place and a subject of the State of Cutch. Second defendant is the tindal or the master of the ship. The ship sailed to Basra and took on board 651 bundles of date, but on her voyage to Calicut she met with rough weather in the Arabian Sea and to save her and the cargo the master had to jettison 165 bundles of dates. On her subsequent arrival in Calicut the master refused delivery of any of the plaintiff's goods till the freight for the whole consignment was paid and the plaintiff thereupon paid it under protest and took delivery of the remaining bundles. He has now sued in the Calicut Court for the return of the excess freight collected and for the price of the bundles short-delivered or in the alternative, for what is due to him on a "general average" account.

The objection as to jurisdiction was taken in the first Court but it was overruled and a decree was passed against the 1st defendant for the refund of the excess freight and for money due as "general average contribution." The 1st defendant has appealed to us and has again raised before us this question of jurisdiction.

The plaint, as I read it, combines 3 claims based on three different causes of action; the first, for the refund of freight, based on the fact that it was illegally collected from the plaintiff and this took place in Calicut; the second for the price of goods short-delivered which, according to the contract in the charter-party, were to be delivered in Calicut and the third, in the alternative, a claim for "general average" if the Court found that the goods were properly jettisoned. The cause of action for the first arose wholly in Calicut and for the second, in part in Calicut, as that was the place of performance. It is clear that as regards these two causes of action, the Calicut Court had jurisdiction but, as to the cause of action for the 3rd claim, the learned Pleader for the appellant had argued that no part of it arose in Calicut. It is, therefore, necessary to see what exactly is the plaintiff's cause of action for his claim for general average. It is now settled that the term 'cause of action' as used in section 20, Civil Procedure Code, means the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to entitle him to succeed. To sustain the plaintiff's claim in the present case, it was necessary to establish that his goods were properly on board ship, that they were properly jettisoned to avert a danger which threatened the whole adventure and that, as a result, the ship and cargo against which contribution is claimed, were saved from damage or destruction. As laid down by Bovil, C. J., "The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest, is to be compensated according to the loss sustained on the one hand and the benefit derived on the other." See *Fletcher* v. *Alexander* (1). To decide the extent of such sacrifice and the amount of contribution properly claimable, the voyage must have been completed or must have been definitely brought to an end at another port. See Carver on Carriage by Sea, section 416. Before the claim for contribution can arise, the ship and cargo must have been brought to a safety in port for as observed by Bovil, C. J., in the case above cited, page 383*, the time of jettisoning cannot be taken as the time when the value of the goods is to be ascertained because the whole adventure may afterwards be brought to an end by the total loss of the ship and cargo when there can be no contribution at all. To complete, therefore, the cause of action for "general average" it is necessary to allege that the voyage has ended and the ship or the goods against which it is claimed, had been brought to

(1) (1868) 3 C. P. 375 at p. 382; 37 L. J. C. P. 193; 18 L. T. 432; 16 W. R. 803.

*Page of (1868) 3 C. P.—*Ed.*

safety in port. In fact it was held in *Whitecross Wire Co.* v. *Savill* (2) that a maritime adventure is not at an end till all the goods are delivered. At any rate it is clear that it cannot be ended till the ship reaches its destination or if the voyage be abandoned, some other place of safety. Appellant's Vakil relied on the observations of the Privy Council in *Strang, Steel & Co.* v. *A. Scott & Co.* (3), *viz.*, "In jettison the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed and the property of the others has been thereby preserved," and argued that as soon as the particular peril which necessitated the sacrifice passed away, the cause of action for contribution was complete. But it seems to me that it cannot be predicated that the property of the others has been preserved till the maritime adventure has come to an end. Their Lordships' observations are, therefore, not against the view I am taking. If there are several general average acts during the same voyage, the principle is to make each owner of a sacrificed interest contribute to all the sacrifices in whatever order of time they may have occurred. See Carver, section 417. This can hardly be correct if the right to contribution regarding any one sacrifice is to be taken to be complete as soon as the particular peril is past. I am, therefore, of opinion that the fact that the voyage safely came to an end, is a part of plaintiff's cause of action for general average and as that took place in Calicut the Calicut Court had jurisdiction under section 20, Civil Procedure Code, to try the suit so far as it referred to general average as well.

The learned Vakil for the appellant raised a further objection to jurisdiction on the ground that his client was a foreign subject, residing in Cutch and not in British India and that the vessel itself against which the claim was made, was a foreign ship.

(2) (1882) 8 Q. B. D. 653; 51 L. J. Q. B. 426; 46 L. T. 643; 43 W. R. 588; 4 Asp. M. C. 531.

(3) 17 C. 362 at p. 370; 16 I. A. 240; 5 Sar. P. C. J. 338; 8 Ind. Dec. (N. S.) 780 (P. C.).

This objection is not valid, as a Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree could be enforced against him in the foreign State, is a question for disposal for the Courts of that State. If the 1st defendant did not wish to be bound by the decree, he should not have appeared and pleaded to the cause and appealed and filed a second appeal as he has done; he has clearly submitted to the jurisdiction of the British Court. This objection must also be overruled.

It may be mentioned that the respondent urged that, under section 21 of the Civil Procedure Code the objection as to jurisdiction could not be urged before us without showing that there was a failure of justice. In the view I am taking it is not necessary to discuss the scope of this section.

No objection has been urged on the merits The second appeal, therefore, fails and is dismissed with costs.

PHILLIPS, J.—I agree. Plaintiff's cause of action against the ship-owner with whom he contracted, is primarily the non-delivery of the goods contracted to be delivered, and it is only in order to meet the defence of 'jettison' set up, that he has to rely on the doctrine of "general average" according to which the ship-owner is still liable to contribute to the loss sustained although to a limited extent. In this view at least a part of plaintiff's cause of action arose at Calicut and the suit was rightly filed in the Court there.

Appeal dismissed.

M. C. P.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 584 OF 1917.

July 29, 1918.

Present:—Mr Justice Jwala Prasad and Mr. Justice Coutts.

RAMA SINGH—DEFENDANT No. 2—APPELLANT

versus

HARAKHDHARI SINGH AND OTHERS—PLAINTIFFS AND *Musammat* SAKALBASI KOER—DEFENDANT No. 1—RESPONDENTS.

Evidence Act (I of 1872), s. 3—Bengal Land Regis-

RAMA SINGH *v.* HARAKHDHARI SINGH.

ration Act (VII B. C. of 1876)—'Court,' meaning of—Deputy Collector holding enquiry under Land Registration Act, whether Court—Judicial enquiry—Construction of document—Compromise restraining powers of transfer of widow.

A Deputy Collector holding an enquiry under the Bengal Land Registration Act for the purpose of registering the names of rival claimants, is a Court within the meaning of section 3 of the Evidence Act, and the enquiry held by him is a judicial enquiry. [p. 712, col. 1.]

Where a compromise deed entered into between a Hindu widow and her husband's reversioners provided that if the widow made any transfer or created any incumbrance it would be null and void and that there would be no injury to the title of the reversioners:

Held, that the compromise gave the widow the rights of a Hindu widow in her husband's estate. [p. 712, col. 2.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Sami* and *Khurshed Husnain*, for the Appellant.

Messrs. *Fakhuruddin*, *Abani Bhusan Mukherji* and *Ram Gopal Choudhry*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit brought by the plaintiff for a declaration that a sale-deed dated the 8th January 1915 executed by *Musammat* Sakalbasi Kuer, defendant No. 1 in favour of the appellant is invalid and inoperative as against the plaintiffs that the appellant did not derive any title thereunder, and that it cannot in any way be binding upon them.

The plaintiffs are agnatic relations or reversioners of Hiabal Singh who died in the month of Fagoon 1309 Fasli without any issue. The defendant No. 1 is his widow. The defendant No. 2 the appellant purchased from the defendant No. 1 the properties in question by a sale-deed dated the 8th January 1915 which is the subject-matter of the suit. Shortly after the death of Hiabal Singh, the plaintiffs and defendant No. 1 applied to the Collector for registration of their names in respect of the properties left by Hiabal Singh under Act VII of 1876 (Land Registration Act). The plaintiffs who are the reversioners claimed to have succeeded to the properties by right of survivorship. The defendant No. 1 the widow on the other hand said that her husband was separate from the plaintiffs and that she inherited the properties as an heir under the Hindu Law. The land registration dispute was settled between the parties and a compromise petition embodying the terms of the settlement was filed before the Land Registration Deputy Collector. On the 1st of December 1902 the Deputy Collector passed an order in the following words: "Petition of compromise filed. Draw up decree accordingly and put up on 3rd instant." On the latter date the order was "No objection filed; decree recorded, make entry in revised Register D etc." By the terms of the compromise the widow defendant No. 1 was registered in the Collectorate Register D as a proprietor of the properties and accordingly she was in possession until the 8th January 1915 when she executed the sale-deed in question in favour of the appellant. The reversioners, therefore, brought the present suit for a declaration referred to above. There were other reliefs also sought in the plaint, namely, that the right of the widow to remain in possession was extinguished on account of the invalid transfer and for the immediate registration of the plaintiffs' names. We are not, however, concerned at all with those reliefs, nor are we concerned with the allegations of the plaintiffs in the case that the husband of defendant No. 1 was joint with them and that she had not inherited the property nor was she in possession thereof. The learned Subordinate Judge who tried the case, held that the husband of defendant No. 1 was separate from the plaintiff and that the defendant No. 1 was herself in possession of the property but that the sale-deed in question was executed without any legal necessity. Accordingly he passed a decree in favour of the plaintiffs declaring that the alienation of the properties in favour of the defendant No. 2 is invalid and not binding upon the plaintiffs "after the death of the defendant No. 1." The reversioners felt themselves aggrieved by the last few words, namely, "after the death of the defendant No. 1" and preferred an appeal to the District Judge. The learned District Judge held that it was agreed between the parties according to the terms set forth in the compromise petition filed in the land registration case that "if *Musammat* Sakalbasi Kuer (widow) makes any transfer or creates any incumbrance that will be null and void and there will

be no injury to the title of Jadunath Singh and Palakhdhari Singh and their heirs and representatives." The learned District Judge accordingly held that the alienation made by defendant No. 1 was null and void and that it conferred no title upon the alienee the appellant. Upon this finding the judgment of the Court below was varied. The transferee of defendant No. 2 has, therefore, preferred the present appeal to this Court.

It is contended on his behalf that the terms of the compromise petition could not be used in evidence inasmuch as it purported to affect immoveable properties of over Rs. 100 in value and, therefore, required to be registered under section 17 of the Indian Registration Act III of 1877. The learned Subordinate Judge had given effect to this contention but there is no reference of this in the judgment of the learned District Judge. Apparently the point was not taken in appeal before him. There is no mention of this plea in the written statement filed by any of the defendants. The plaintiffs based their claim upon the terms of the compromise petition and filed a certified copy of it and also of an order-sheet of the land registration case wherein the Deputy Collector directed a decree to be prepared in terms of the compromise. No decree, however, appears to have been filed and perhaps no decree was prepared by the land registration department, but there can be no doubt that the compromise petition was given effect to inasmuch as the name of the defendant No. 2 was registered. It was in respect of the property about which there was a dispute between the parties in the land registration department that the clause in question was inserted curtailing the right of the defendant No. 1 to transfer or incumber the property. On behalf of the appellant it is contended that the enquiry held by the land registration department for the purpose of registration of the rival claimants, was not a judicial proceeding, or an equiry by a Court. There does not appear to be any substance in this contention regard being had to the definition of the word "Court" given in the Evidence Act, section 3, which says Court includes all Judges, Magistrates and all persons except arbitrators legally advised to take evidence. Sections 52 and 53 of the Land Registration Act require the officer holding the enquiry under the Act to take evidence. Be that as it may, there can be no doubt that the compromise petition itself purported to give the defendant No. 1 the right of a Hindu widow neither more nor less. The terms of that compromise referred to above namely that the transfer made by her will be null and void and would not in any way prejudice the right of the reversioners and their heirs and representatives, are intended to give her a life estate with such powers and limitations as are vested in a Hindu widow. This is obvious from the position of the parties and from a true interpretation of the terms of the compromise. All that appears to have been intended is that alienation made by the widow should not be binding upon the reversioners at all. There is no intention that the widow shall not be able to deal with the property as a Hindu widow under the Hindu Law. This appears to be the view of their Lordships of the Privy Council in the case of *Bibi Sahodra* v. *Rai Jang Bahadur* (1) dealing with a compromise petition exactly of the nature that we have in this case. The finding of fact in this case has not been challenged that the alienation by the widow was without any legal necessity. Apart from the compromise petition the result is the same under the Hindu Law that the alienation in question, namely, the sale-deed executed by the defendant No. 1 in favour of the defendant No. 2 the appellant is invalid and not binding upon the plaintiffs. This is the only relief that we can give. There is no occasion for adding to the decree the words "after the death of the defendant No. 1" as was done by the learned Subordinate Judge, or in holding that the alienation was absolutely void and conferred no title upon the alienee as held by the learned District Judge. The plaintiffs themselves do not want to disturb the possession of the lady; they simply want a declaration that the alienation is not valid and not binding upon them. This is obvious from relief No. 1 in the plaint.

In supersession of the decree of the Court below, a fresh decree will be prepared in

(1) 8 C. 224; 8 I. A. 210; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108; 4 Ind. Dec. (N. S.) 143 (P. C.).

terms of this judgment. The appeal is decreed in a modified form. There will be no order as to costs.

The cross-objection relates only to the order of the Court below whereby no costs were given to either party. I think that the learned District Judge is right in holding that no party was entitled to any costs.

COUTTS, J.—I agree.

Appeal partly allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3782 OF 1916.

November 18, 1917.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

Sree Raja MANAYAM MAHALAKSHAMAMMA GARU—COUNTER-PETITIONER—PLAINTIFF—PETITIONER

versus

MUCHIKA APPALARAJU—PETITIONER—DEFENDANT No. 1—RESPONDENT.

Godaveri Agency Rules, rr. 10, 16—*Decree of Government Agent, execution of, by Agency Munsif—Order by Agency Munsif in execution proceedings, nature of—Appeal to Government, maintainability of.*

The employment of an Agency Munsif by the Government Agent to execute a decree of the latter's Court under rule 10 of the Godaveri Agency Rules does not make the Agency Munsif the incumbent of the judicial office of the Government Agent himself. The Government Agent continues to preside in his own Court and the Agency Munsif is only an employee under the Government Agent in the matter of the execution of that particular decree. He occupies the same position as a Commissioner or an Amin or a Ministerial officer employed by an ordinary Court to assist it in particular judicial proceedings. [p. 715, cols. 1 & 2.]

An order, therefore, passed by the Agency Munsif in the course of execution of a decree of the Government Agent, is not a decree, and no appeal lies against it to the Government under rule 16 of the Agency Rules. [p. 716, col. 1.]

Maharaja of Jeypore v. *Sri Niladevi Pattamahadevi*, 27 M. 109; 13 M. L. J. 151, distinguished.

The proceedings of a Subordinate Officer of a Court of Justice do not become the proceedings of the Court itself unless the Statute Law makes them so in respect of paticular matters or unless those proceedings are submitted to the Presiding Officer of the Court and adopted or approved of by him. [p. 715, col. 2.]

Petition under rule 16 of the Godaveri Agency Rules referred to the High Court by the Government of Madras in its proceedings G. O. No. 3023, Home (Judicial), dated the 16th December 1916, preferred against the Order of the Court of the Agency District Munsif of Polavaram, dated the 4th October 1916, in Civil Miscellaneous Petition No. 6 of 1915, in Execution Petition No. 93 of 1910, in Execution Petition No. 65 of 1903, (Original Suit No. 1 of 1897 on the file of the Court of the Government Agent, Godaveri).

Mr. *T. R. Ramachandra Aiyar*, for the Petitioner.

Mr. *V. Ramesam*, for the Respondent.

ORDER.

SADASIVA AIYAR, J.—This is a petition to the Government under rule 16 of the Godaveri Agency Rules which has been preferred to the High Court for disposal. The petition prays to set aside the order of the Agency Munsif of Polavaram, dated 4th October 1916 passed in Execution Petition No. 93 of 1910 on his file.

The appellant was the decree-holder on Original Suit No. 1 of 1897 on the file of the Government Agent's Court, the decree of the High Court in appeal in that suit being dated January 1902.

As regards execution of decrees of the Agency Courts, the relevant rules are as follows :—"Rule 10 (1) with the exception of the Court of the Government Agent, who shall be at liberty, in the execution of decrees, to employ an assistant or Munsif, all decrees of other Courts within his jurisdiction shall be carried into effect by the Court by which the suit may have been decided." "If the person against whom, or the property against which, it is sought to execute any decree resides, or is situated within the jurisdiction of a Court of the same Agency other than the Court issuing the decree, such decree shall be executed in the manner provided in rule 14, clause (2) R" (that is, by forwarding the process in execution to the Court of the Divisional Assistant within whose jurisdiction the person or property resides or lies who shall *ordinarily* cause the same to be executed). Clause (2) "decrees shall be executed by an order addressed to the proper officer of the

Court." In the present case, the Government Agent seems to have employed the Polavaram Agency Munsif to execute the Agency Court's decree of 1902. That decree awarded to the plaintiff possession of the forest lands of Singanapalli. To give such possession in execution, the boundary lines between the Singanapalli forest and Chengondepalli forest had to be demarcated. On the 18th July 1904 the Agency Munsif determined by description on paper the boundary lines as follows: (*a*) East by a line drawn from Maredukoyya Dimma to the summit of Racha Kodutula Konda and (*b*) thence midway between the plateau on the top of the said hill and of Darakonda to the centre of Yerrakonda, (*c*) summit shall rest in Singanapalli. Then in 1910, the plaintiff applied by Execution Petition No. 93 of 1910 for the cutting of the boundary line as above fixed in the order of July 1904. The Munsif appointed a Commissioner to cut the boundary line and he cut the boundary line according to the best of his ability and according to the three directions (*a*), (*b*) and (*c*) above given in the Munsif's order. While the Commissioner was thus cutting the boundary line, the defendant presented Civil Miscellaneous Petition No. 6 of 1915 against the Commissioner's proceedings to the Agency Munsif, his principal objections to the Commissioner's doings being that Yerrakonada and Darakonada referred to in direction (*b*) in the order of 1904, were not the hills which the Commissioner thought to be of those respective names but that they were two other hills and that the Commissioner should be directed to draw the boundary line between the tops of the two correct hills and not of the wrong hills. The Munsif practically accepted the defendant's (judgment-debtor's) contention and passed an order accordingly. It is against that order, that the present appeal in the usual form of a petition to the Government under rule 16 has been filed.

It is clear that if this order of the Agency Munsif in execution of the Government Agent's decree is the judicial order of the Agency Munsif's Court itself in execution, no appeal is provided against it under the Godaveri Agency Rules. Those Rules are published in the Madras Code, Volume II, 1915, pages 1258 to 1263 and it is only against the decree in original suits (see rule 4) that appeals lie from the Munsif to the Assistant Agent, a second appeal from the Assistant Agent to the Agent and a third appeal from the Agent by petition to the Government (which means practically to the High Court) under rule 16. The Civil Procedure Code not applying, orders passed in execution are not decrees. [See *Sri Sri Sri Vikramadeo Maharajulum Garu* v. *Sri Neladevi Pattamadhadevi Garu* (1).] Hence no appeal lay even to the Assistant Agent from the order in dispute and much less, of course, a third appeal to this Court. (See Civil Miscelloneous Petition No. 513 of 1911 decided by Sundara Aiyar, J. and myself).

Mr. T. R. Ramachandra Aiyar who appeared for the petitioner-decree-holder, (who might be called the appellant) was, therefore, obliged to argue that though the order purports to be one passed by the Agency Munsif, it is, in the eye of the law, an order of the Government Agent himself and hence rule 16 which allows a petition against all proceedings of the Government Agent (including proceedings in execution) to the Government applies in this case. The sole question, therefore, is whether the order of the Agency Munsif under appeal, is in the eye of the law a proceeding of the Government Agent himself. Mr. Ramachandra Aiyar's arguments, if I followed him aright, were formulated in two ways, (1) an Agency Munsif employed by the Government Agent under rule 10 to execute the decree of the Government Agent's Court becomes himself the Government Agent or the Government Agent's Deputy by delegated authority and his order became a proceeding of the Government Agent himself; (2) even if the Munsif's Court did not become the Government Agent's Court, the Munsif became an officer of the Government Agent's Court and his proceedings as an officer of the Government Agent's Court became the proceedings of the Government Agent himself. On the first branch of the argument, he cited Broom's Legal Maxims, page 655: "It may,

(1) 26 M. 266.

likewise, be well to observe, that delegated jurisdiction, as distinguished from proper jurisdiction, is that which is communicated by a Judge to some other person, who acts in his name, and is called a deputy; and this jurisdiction is, in law, held to be that of the Judge who appoints the deputy, and not of the deputy; and in this case the maxim holds, *delegatus non potest delegare*." "Nor can an individual clothed with judicial functions delegate the discharge of those functions to another, unless as in the case of a County Court Judge, he be expressly empowered to do so. 51 and 52 Vict. Ch. 43, sections 18 to 21." 51 and 52 Vict. Ch. 43, sections 18 to 21 allow a County Court Judge to appoint a Barrister of not less than 7 years' standing to act for him as his deputy when he is temporarily incapacitated through illness etc. It is clear that such a deputy is the only Judge of the County Court during the period of his deputation and his employment does not create another judicial office. Now the employment of the Agency Munsif by the Government Agent to execute a decree of the latter's Court under rule 10 cannot make the Agency Munsif the incumbent of the judicial office of the Government Agent himself. The Government Agent continues to preside in his own Court and the Agency Munsif is only an employee under the Government Agent in the matter of the execution of that particular decree. I at first thought when considering these obscure and unsatisfactory Agency Rules that rule 10 probably meant that the Government Agent might transfer the execution from his own Court to that of the Agency Munsif. But seeing that rule 10, clause 1 does not provide even for the transfer of a decree for execution from one Court under the Government Agent to another Court even under the same Agent but only for execution of processes sent by one such Court to another and that the word 'transfer' seems to have been scrupulously avoided, I think, after the best consideration that I have been able to give to the subject that the Munsif or the Assistant Agent employed by the Government Agent to execute the latter's decree, does not thereby acquire independent judicial powers over the execution proceedings and that he does not become the Government Agent's Court by and in being so employed, and is only in the same position as a Commissioner or an Amin or a Ministerial Officer employed by an ordinary Court to assist it in particular judicial proceedings. The analogy of a delegation by a County Court Judge to a Barrister who is the sole County Court Judge for the time being cannot, therefore, be invoked so as to make the proceedings of the Agency Munsif the proceedings of the Government Agent himself.

As regards the second branch of the argument, the proceedings of a Subordinate Officer of a Court of Justice do not become the proceedings of the Court itself unless the Statute Law makes them so in respect of particular matters or unless those proceedings are submitted to the Presiding Officer of the Court and adopted or approved of by him. Mr. Ramachandra Aiyar referred us to the decision in *Maharaja of Jeypore* v. *Sri Niladevi Pattamahadevi* (2) as supporting his contention. That case arose out of a petition under rule 31 of the Vizagapatam Agency Rules corresponding to rule 16 of the Godaveri Agency Rules and there is some obscurity in the statement of facts in the report of that case. The order in execution, in that case is said in the report (preceding the judgment) to have been passed by the Acting Senior Assistant Agent and to have been confirmed by the Agent on appeal against which appellate judgment the petition is said to have been presented under rule 20 which relates, however, to appeals against decrees. This report seems to be a mistake because orders in execution are not decrees. In the body of the judgment, however, rule 31 is referred to and that is also the rule mentioned in the report of the same case as found in 13 Madras Law Journal 151 [*Maharaja of Jeypore* v. *Sri Niladevi Pattamahadevi* (2).] Hence we must take it that the appeal in that case was against an order in execution passed by the Government Agent himself and not against an order in appeal from a Senior Assistant Agent. This is also confirmed by the following sentence at page 111* of the report: "It was further urged that the order was not that of the

(2) 27 M. 109; 13 M. L. J. 151.

*Page of 27 M.—*Ed.*

Agent but of his Assistant, and so rule 31 was inapplicable, but we find that the order was passed under the authority of the agent as is expressly stated therein." Thus the order in that case was the order of the Agent himself though signed by the Assistant Agent under the express authority of the Government Agent. That is, the Government Agent applied his judicial mind to the matter, passed an order and asked the Assistant Agent to sign the order for him (the Agent). Hence the High Court held in that case that rule 31 corresponding to Godaveri Rule 16 applied and an appeal by way of petition lay. Similarly in Civil Miscellaneous Petition No 532 of 1911, Sir Sankaran Nair and Sir William Ayling, JJ., treated that petition as an appeal against the order of the Agent directing the Special Assistant Agent to dismiss certain petitions as barred by limitation while conceding that against an order of the Special Assistant Agent himself, no appeal lay. In the present case, the order of the Agency Munsif was not passed with the knowledge or signed under the "authority" of the Government Agent. The Government Agent did not pass the order himself and did not give authority to the Agency Munsif to sign the order for him. I do not, therefore, think that the decision in *Maharaja of Jeypore* v. *Sri Niladevi Pattamahadevi* (2) applies to this case.

In the result, I would uphold the preliminary objection put forward by Mr. Ramesam that rule 16 cannot be invoked in this case as there was no order by the Government Agent himself. I think that where the Government Agent employs the Munsif to execute the Government Agent's decree, the Agent retains full control over the proceedings which are being conducted by the Agency Munsif as the Government Agent's employee and that the appellant's proper course was to have made representations to the Agent against the proceedings of the Munsif and if the Agent passes proceedings on such representations against the appellant, to apply afterwards by petition under rule 16. I would, therefore, dismiss the present petition with costs.

I wish to state in conclusion that it seems to be high time that these unsatisfactory Agency Rules are revised by a proper draftsman. In *Rajendra Singh* v. *Maharaja of Jeypore* (3), Seshagiri Aiyar and Napier, JJ., state: "It is somewhat anomalous that the Agent should hear appeals from cases which he alone has power to entertain and which are beyond the pecuniary jurisdiction of the Divisional Assistants. The analogy of the Civil Courts Act in the Presidency is against such a procedure. But we have to interpret the rules as we find them however much we may consider that they should have been different." I find also that in 1863 itself, the rules relating to criminal justice had been cancelled in the Ganjam and Vizagapatam Agency and the Code of Criminal Procedure seems to be now in force in the Agency tracts. It is to be desired that though all the elaborate rules of the Civil Procedure Code may not be made at once applicable to the Agency tracts, the rules actually framed should follow the language of the corresponding sections of the Civil Procedure Code as far as possible, instead of using the loose expressions found in most of the existing rules.

BAKEWELL, J.—I agree with the order proposed by my learned brother.

M. C. P.

Petition dismissed.

(3) 30 Ind. Cas. 76.

MADRAS HIGH COURT.

APPEAL SUIT No. 291 OF 1917.

April 25, 1918.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

VENKATA REDDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUPPA REDDI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Partition—Jostabagam, *or allotment of extra share to eldest member, validity of—Living in commensality and failure to keep accounts after partition, effect of—Re-union or release—Throwing extra share into hotchpot, effect of—Registered document, whether necessary—Registration Act (XVI of 1908), s.* 17.

VENKATA REDDI *v.* KUPPA REDDI.

The old idea of giving *jestabagam* or an extra share to the eldest member of a Hindu family has become obsolete and the allotment of such a share at a partition will not be binding on the other shares. [p. 718, col. 2.]

The fact that after partition, the members lived in commensality, incurring marriage expenses indiscriminately will not, under Hindu Law, amount to a re-union. [p. 717, col. 2.]

Ram Pershad Singh v. *Lakhpati Koer*, 30 C. 231; 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103; 8 Sar. P. C. J. 380 (P. C.); and *Balabux* v. *Rukhmabai*, 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.), followed.

The joint living of the members after partition, or their failure to keep accounts, or their incurring marriage expenses indiscriminately or making acquisitions jointly or even the throwing in of an extra share by the eldest members into hotchpot will not have the effect of converting separate property into common property. The extra share cannot be given up except by a document duly registered. [p. 718, cols. 1 & 2.]

Thyalambal v. *Krishna Pattar*, 32 Ind. Cas. 955' considered.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 32 of 1916.

Mr. *A. Krishnaswamy Aiyar*, for the Appellants.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—One Kuppa Reddi had four sons. The eldest was Ramasami Reddi the father of defendants Nos. 1 to 3. He died in 1914. The last was one Muthu Reddi, who died fifteen years ago, and the plaintiffs are his sons. There were two other sons. In July 1906 there was a partition among the brothers evidenced by Exhibit U. The family properties were divided into two schedules. Schedule B, was allotted to the second and to third brothers and schedule A was given to the first and the sons of the fourth brother. These latter were represented by their mother as guardian. The document also says that "as No. 1 out of us has been managing the affairs as the head of the family, one share in addition is included."

The present suit is for a half share in the properties which were taken by the first and the fourth brothers. The defendants' case is that the plaintiffs are entitled only to a third share, and that the plaintiff can have no right to the eldest brother's extra share. The Subordinate Judge came to the conclusion that the A schedule properties, which fell to the first and fourth branches, should be shared equally by the two branches. He found that, since the partition, the two branches lived in commensality, kept no accounts and enjoyed the properties as if they were members of an undivided family. This conclusion on facts is not seriously disputed in appeal.

The real question argued before us was whether Exhibit U effected a division in status between the first and the fourth branches of the family, and whether since 1906 their properties were enjoyed by the two branches as tenants-in-common or as co-parceners. There can be no question of re-union because, on the date of the partition, the plaintiffs were minors. That is now settled by the decision of the Judicial Committee in *Ram Pershad Singh* v. *Lakhpati Koer* (1), *vide* also *Balabux* v. *Rukhmabai* (2).

There are some outstanding facts which incline me to hold that the first and the fourth branches of the family became divided *inter se*. In the first place, if the object was to send away the second and the third branches, there was no necessity for the members of the fourth branch being represented by their mother as guardian. Under the Hindu Law although the mother may be the natural guardian as long as the family remains undivided, she has no right of respresentation in respect of the family property.

Another circumstance is that an extra share was in terms given to the eldest member who was the manager of the family. This, in my opinion, points to the fact that the properties were divided into five shares, that each brother took a share and an extra share was given to the eldest member. The fact that Exhibit U does not say that the properties were divided into five shares, does not, in my opinion, negative this view. The shares of the four brothers under the Hindu Law are well-ascertained and the document speaks of an extra share. It can only mean that an additional fifth share was given to the managing member. This view of mine is strengthened by the

(1) 30 C 231; 30 I. A. 1; 7 C W. N. 162; 5 Bom. L. R. 103; 8 Sar. P. C. J. 380 (P. C.).

(2) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

oral evidence given in the case. Three of plaintiffs' own witnesses speak to the properties having been divided into five shares and one extra share having been given to the managing member. P. Ws. Nos. 3, 10 and 32 give definite evidence on this question. D. W. No. 1 says that the property was divided into five shares. D. W. No. 5 who is a paternal uncle of plaintiffs and of defendants says that there was a division into five shares and an extra share was given to the managing member. D. W. No. 7 also gives similar evidence. It may be said that D. W. No. 12 is an interested witness. Apart from his evidence, the evidence I have referred to, is so clear and consistent and fits in so well with the probabilities of the case that I am not prepared to reject this evidence as contended for by Mr. Ramachandra Aiyar. I have, therefore, come to the conclusion that in the partition of 1906, the shares of the brothers were ascertained and that an extra share was given to the senior brother. In that view there can be no doubt that the A schedule properties were held by the two branches as tenants-in-common. The decision of the Judicial Committee in *Balkishen Das* v. *Ram Narain Sahu* (3) and *Ram Pershad Singh* v. *Lakhpati Koer* (1) are practically on all fours with the present case.

The next question is whether the joint living, the failure to keep accounts and the fact that marriage expenses were incurred indiscriminately without reference to the shares belonging to the two branches and the fact that acquisitions were made jointly, would constitute what was originally separate property into the co-parcenary property.

Mr. Ramachandra Aiyar suggested that it was open to the first branch to throw its extra share into the hotchpot. A transaction of this nature can only be regarded as a gift of a half of the extra share to the fourth branch. Such a transaction must be in writing and registered. It can bear no analogy to renunciations by a member of a joint family in favour of others. Mr. Krishnasami Aiyar quoted the decision in *Thyalambal* v. *Krishna Pattar* (4), where a learned Judge of this Court suggested that, even when members are undivided, in order that the self-acquisitions of any one of them may become joint family property, there must be a document which the law would recognise as a proper conveyance. It is not necessary in this case to go that length. In my opinion, the giving up of the extra share by the senior branch can only be by a duly executed registered document and, as that has not been done, I must hold that that share has not become the common property of the two branches of the family.

Of course the plaintiffs are entitled to an account of the income due to their share from Ramasami Reddi, the managing member and his sons. Whether Article 44 or Article 144 of the Indian Limitation Act applies to the case, it is not necessary to decide at this stage.

The question as to whether more than three years have elapsed since the 1st plaintiff attained majority, has not been put in issue. If the suit was brought within three years of his attaining majority, the question as to whether Article 44 applies, need not be considered.

There can be no question that the act of the mother in consenting to give an extra share to the managing member, is not binding on the plaintiffs. The old idea of Jeshtabagam has now become obsolete and consequently the consent of the mother to Ramasami Reddi taking an extra share could not prejudicially affect the plaintiffs. If there is no bar of limitation, the plaintiffs will be entitled to a fourth of the extra share given to the first branch.

On the question of accountability, Mr. Krishnasami Aiyar suggested that Article 62 of the Limitation Act applied. Here again it is not necessary to express an opinion until the question of the age of the first plaintiff is settled.

The further question as to whether the first plaintiff can be regarded as competent to give a discharge in respect of the rights of his brother who is still a minor, will also have to be dealt with only if the first plaintiff is found to have been more than 21 years of age on the date of the suit.

(3) 30 C. 738; 30 I. A. 139; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489 (P. C.).

(4) 32 Ind. Cas. 955.

BRAJA BHUSAN TRIGUNAIT *v.* SRIS CHANDRA TEWARI.

The decree of the Subordinate Judge must be reversed in so far as it gives to the plaintiffs an equal share with the defendants in A schedule properties. In lieu of that, there will be a declaration that the plaintiffs are entitled to one-third of the properties and to a fourth in the extra share provided that claim is not barred by limitation. There must be a further declaration that the plaintiffs are entitled to an account of the income from the defendants provided that also is not barred by limitation.

As regards the memorandum of objections Mr. T. R. Ramachandra Aiyar confined his argument to five items disallowed by the Subordinate Judge. As regards item 68 we think the conclusion of the Subordinate Judge cannot be supported. P. W. No. 19 gives definite evidence that the money which he borrowed, was from Ramaswami Reddi and that, at the request of the 3rd defendant, he executed a promissory note for the amount of the consideration to Narayanasami Reddi, the brother-in-law of the defendant. The third defendant in the witness-box in a non-committing way says that he did not collect but he does not say that the debt did not exist. We think that the plaintiffs are entitled to their share in item 68.

As regards items 23, 65 and 74 we see no reason to differ from the Subordinate Judge. The original document has not been produced and there is not sufficient evidence to connect the items with moneys belonging to the family. As regards item 35, the evidence of P. W. No. 25 is very definite and clear. The third defendant in his deposition says that he collected item 35. There is no reason for not giving the plaintiffs decree for the balance of Rs. 410 in respect of this item. We must modify the decree of the Subordinate Judge in this behalf.

As regards items 50 and 69 Mr. Ramachandra Aiyar finally admitted that they are not included in the valuation of his memorandum of objections. We must, therefore, confirm the judgment of the Subordinate Judge as regards these items. As a result, in addition to the declaration already indicated, the decree of the Subordinate Judge must be modified by giving the plaintiffs their share in items 68 and 35.

The costs of all the parties here and in the Court below will be provided for in the final decree.

ABDUR RAHIM, J.—I agree.

M. C. P.

Appeal partly allowed.

PATNA HIGH COURT.
CIVIL REVISION CASE No. 141 OF 1918.
July 24, 1918.
Present:—Mr. Justice Mullick and
Mr. Justice Thornhill.
BRAJA BHUSAN TRIGUNAIT
AND OTHERS—PETITIONERS
versus
SRIS CHANDRA TEWARI—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Receiver, leave to sue, application for—Procedure—Revision—High Court, power of interference of.

The general principle applying to cases in which application is made to sue a Receiver in respect of properties in charge of the Court is that unless the Court is satisfied that there is no question at all to try or there is no legal foundation to the claim, leave should not as a matter of course be refused. [p. 721, col. 2; p. 722, col. 2]

A petitioner in an application to sue a Receiver is entitled to an enquiry upon the materials furnished by the parties and if he so desires, to ask the Court to take evidence if the Court is not inclined to give leave as a matter of course. If the Court refuses to take evidence and proceeds to dispose of the application summarily, it acts with material irregularity in the exercise of its jurisdiction, and the High Court is, therefore, entitled to interfere in such a case under section 115 of the Civil Procedure Code. [p. 721, col. 2; p. 722, col. 2.]

An application for leave to sue a Receiver is a case within the meaning of section 115 of the Civil Procedure Code. [p. 722, col. 2.]

There is no statutory provision which requires a party to take the leave of the Court to sue a Receiver. The rule is based on public policy and the grant of leave is made not in exercise of any power conferred by Statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority. [p. 723, col. 1.]

A High Court is entitled in the exercise of its powers of superintendence under section 107 of the Government of India Act to correct and supervise subordinate Courts whenever they appear to have wrongly exercised their inherent powers. [p. 723, col. 1.]

BRAJA BHUSAN TRIGUNAIT *v.* SRIS CHANDRA TEWARI.

Application for revision against the order of the Subordinate Judge, Manbhum.

Messrs. *P. R. Das*, *S. N. Palit* and *Achalendra Nath Das*, for the Petitioner.

Messrs. *Hasan Imam*, *S. M. Mullik* and *S. K. Mitra*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—This is an application for revision of an order made by the Subordinate Judge of Manbhum refusing leave to the petitioners to sue a Receiver who has been appointed by the Court in an administration suit between certain members of a family known as the Trigunait brothers.

It appears that so far back as 1894 a Mokarrai lease of certain properties was given by the Trigunait brothers to one Nagendra Nath Mitra. In 1899 Nagendra Nath gave a sub-lease of 101 *bighas* out of that property to Jogendra Nath Bose, whose interest by subsequent transfers devolved in 1908 upon a company called the Angarpatra Coal Company. Charu Chandra Mitra, the representative of Nagendra Nath subsequently defaulted in payment of rent and royalty upon his lease and in 1914 it became necessary for the Receiver who had, as stated above, been appointed in the administration suit between the co-sharers to sue Charu Chandra Mitra for arrears amounting to something like Rs. 61,000.

On the 4th May 1914, an application was made in the course of that suit by the Receiver for an attachment before judgment and a conditional attachment was in fact issued by the Court.

In the meantime, the Angarpatra Coal Company had gone into liquidation and on the 4th November 1914, Charu Charndra Mitra purchased the right, title and interest of the Company from the liquidator.

On the 6th November 1914, Charu Chandra Mitra executed a sub-lease of those properties in favour of the present petitioners, Braja Bhusan Trigunait and others who were at that time and still are also one-third co-sharers in the property which is the subject of the administration suit.

The case of the petitioners is that the purchase of the 4th November 1914, made by Charu Chandra Mitra was in fact made with the money of the petitioners and in their behalf and that Charu Chandra Mitra was a mere *benamidar*.

It is contended that by that purchase and the subsequent lease, the petitioners have entered into the shoes of the Angarpatra Coal Company as sub-lessees under the lessee, and that their interest has not merged in the interest of Charu Chandra Mitra, the judgment-debtor in the above-mentioned rent suit, which ended in a decree on the 27th April 1915.

It next appears that when the decree-holders proceeded to bring the leasehold properties to sale, the Executing Court discovered that the conditional order of attachment of the 4th May 1915, was defective and on the 11th June 1917 made the following order:—"Copies of attachment, peon's reports etc., filed. No description or mention of the properties attached given in the writ (copy of which has been filed) under the circumstances ordered: Issue process of attachment of immoveables fixing 3rd July for its return. Decree-holder to file process-fee at once."

Apparently nothing was done before the 3rd July by the decree-holder, but we find that without issuing a fresh attachment, the Court did proceed to issue a sale proclamation fixing the 15th June 1918, for the sale.

Desirous of protecting their leasehold interest, the petitioners on the 18th May 1918 applied to the Subordinate Judge before whom the administration suit was pending, for leave to sue the Receiver or in the alternative, for an order that the Receiver should sell the properties subject to the right, title and interest of the petitioners. The Court called for a report from the Receiver and on the 4th June 1918 recorded an order declining either to sell the property subject to the right of the petitioners or to give leave to the petitioners to sue the Receiver. Against that order the petitioners came to this Court on the 13th June 1918, and obtained a Rule calling upon the Receiver to show cause why leave should not be granted. There was an application for an interim stay of the sale which was refused, but we learn

that in fact no sale has yet taken place.

Since the issue of notice upon the Receiver and in anticipation of sanction from this Court, the petitioners have filed their threatened suit.

Now the question for decision is whether or not this Court should interfere with the Subordinate Judge's order refusing leave to the petitioners to sue the Receiver.

It will be convenient to deal with the merits of the case first.

The general principle applying to cases of this kind in which application is made to sue a Receiver in respect of properties in charge of the Court, is that unless the Court is satisfied that there is no question at all to try or there is no legal foundation to the claim, leave should not, as a matter of course, be refused. The onus is, therefore, strongly, on the Court to show that no foundation for any claim has been made out.

In this case the petitioners contend that they are the purchasers of the right, title and interest of the Angarpatra Coal Company and that on the 4th May 1918 when the conditional order of attachment was made, Charu Chandra Mitra, the defendant, had no possession or title thereto. In the second place the petitioners desire to establish that they and not Charu Chandra Mitra are the real purchasers of the interest of the Coal Company. If they can establish that Charu Chandra Mitra is their *benamidar* and that he acquired that status on the 4th November 1914, then obviously that which can be sold in pursuance of the attachment of the 4th May 1914, must be something exclusive of the right, title and interest of the Angarpatra Coal Company.

It is contended by the opposite party and found by the Subordinate Judge that the petitioners have no *bona fide* claim, that the allegation of *benami* purchase is on the face of it false and that on the 4th May 1914, what was attached, was the whole right, title and interest of Charu Chandra Mitra in the 101 *bighas* of land leased out to Nagendra Nath Mitra. It is also argued as an alternative that if the property purchased by Charu Chandra Mitra on the 4th November 1916, was not included within the property attached on the 4th May, then upon the principle of merger that which was acquired on the 4th November 1916, merely augmented the right, title and interest which Charu Chandra Mitra had on the 4th May 1914, and, therefore, is liable to be sold in execution of the decree, and reliance is placed in support of this contention on *Umes Chunder Sircar* v. *Zahur Fatima* (1).

Now if the petitioners can establish as a fact that there was a *benami* purchase made in their behalf and with their money by Charu Chandra Mitra, then obviously the argument as to augmentation is needless. That contention can only be supported if Charu Chandra was the real purchaser and the true owner of the properties on the 4th November. In the case above cited, the interest of a mortgagor was augmented by a subsequent addition of properties and what was attached, was the whole right, title and interest of the mortgagor judgment-debtor and it was held that it was perfectly competent to the decree-holder to bring to sale by reason of the principle of accession all the properties of which the mortgagor became possessed after the mortgage, and before the sale. That case, however, has no application here. The question of merger and augmentation can only apply if in fact the whole right, title and interest of Charu Chandra was attached on the 4th May and Charu Chandra was the true owner on the 4th November 1916. Now both these points are points which the petitioners desire to establish by a suit.

On what materials then has the Court below come to the finding that there is no shadow of a claim, that there is no legal foundation and that there is no question for trial?

It appears to me that the learned Judge has proceeded on suspicion. He may be right but the petitioners in an application to sue the Receiver, are entitled to an inquiry upon the materials furnished by the parties, and if they so desire, to ask the Court to take evidence if the Court is not inclined to give leave as a matter of course. The question whether there was a *benami* sale, is a question of fact which cannot be determined without investigation. The

(1) 18 C. 164; 17 I. A. 201; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. s.) 110.

question whether the whole right, title and interest of Charu Chandra was attached on the 4th May, is again a question which certainly requires a fuller investigation than that which has been made by the learned Subordinate Judge. From the attachment order it appears that no boundaries are shown to have been published by the Court on the 4th May 1914. But it is contended by the opposite party before us that the Court was subsequently satisfied that the attachment order was sufficient, and on that footing, the Court proceeded to advertize the properties for sale. That again is a question which depends upon evidence. If it should turn out that there was no specification of boundaries which would entitle the decree-holder to sell the properties which are now in suit, the petitioners will be seriously prejudiced if the sale is allowed to proceed. The learned Subordinate Judge, however, brushes these considerations aside by the observation that the application is premature and that in any event the petitioners will have ample remedy after the sale by bringing a suit against the purchasers. In my opinion such a course will seriously prejudice the petitioners.

If the properties of the petitioners are about to be wrongfully sold, then it is very little comfort to inform them that they will have ample remedy after the properties have passed to third party purchasers.

It is for these cases that an action in the nature of a "*quia timet*" is designed so that the party who apprehends injury to his property, may obtain a declaration from the Court as to his interest in the property before any damage in fact takes place. Therefore unless the Court can show strong ground for throwing out the petitioners' application, I think the petitioners are entitled to get leave to sue the Receiver. It is not necessary in this connection to cite many authorities. The principle is well recognised in the Courts in England and has been followed among others in the case of *Lane* v. *Capsey* (2) and in *Pound, Son and Hutchings, In re* (3). In my opinion upon the materials at our disposal there is *prima facie* evidence of a case to be tried and the foundation of a legal claim.

We will now deal with the legal question which has been raised as to our jurisdiction to interfere with the order of the Subordinate Judge either under section 115, Civil Procedure Code, or under section 107, Government of India Act, 1915. Reliance has been placed by Mr. Hasan Imam on behalf of the opposite party on *Balakrishna Udayar* v. *Vasudeva Aiyar* (4), where their Lordships of the Privy Council affirmed the principle that section 115 applies to jurisdiction alone, or the irregular exercise, or the non-exercise of it, or the illegal assumption of it. In other words, where a Court with jurisdiction makes an order erroneous either in law or in fact that order cannot be revised under section 115. To like effect has reliance been placed upon *Kumar Chandra Kishore Roy* v. *Basat Ali* (5).

On the point whether the decision in the present matter was a case within the meaning of section 115, Civil Procedure Code, I will assume that it was. An *ex parte* application or an application to a Court for leave to sue a Receiver may upon the analogy of the case which their Lordships of the Privy Council were called upon to consider in the above cited decision may, I think, be held to be covered by section 115.

Then a more serious question is whether there was material irregularity in the exercise of the jurisdiction which was admittedly vested in the Subordinate Judge. In my opinion the omission of the Subordinate Judge to go into the allegations which were made, was material irregularity. If a Court which has jurisdiction to try a suit, declines to go into evidence when required to do so, but merely proceeds to dispose of the suit upon the pleadings or upon allegations made in petitions, that is material irregularity in the exercise of jurisdiction which is, I think, revisable under section 115, Civil Procedure Code. Upon the view that I take of the proceedings of the learned Subordinate Judge, there was such material irregularity in this case. On the other hand if he had inves-

(2) (1891) 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87.

(3) (1889) 42 Ch. D. 402 at p. 471; 58 L. J. Ch. 792; 62 L. T. 137; 38 W. R. 18; 1 Meg. 363

(4) 40 Ind. Cas. 650; 23 C. L. J. 143; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48.

(5) 44 Ind. Cas. 763; 22 C. W. N. 627; 27 C. L. J. 418.

tigated the facts either by taking evidence or by some other adequate mode of enquiry, I should have said that there was no irregularity in the exercise of his jurisdiction and our interference would not have been warranted on that ground.

But apart from section 115, the petitioners are on much stronger ground under section 107, Government of India Act. There is no statutory provision which requires a party to take the leave of the Court to sue a Receiver. The rule has come down to us as a part of the rules of equity, binding upon all English Courts of Justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court and, therefore, the party contemplating such a suit, is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by Statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority. Now it is a settled principle that the High Court is entitled in exercise of its powers of superintendence to correct and supervise subordinate Courts whenever they appear to have wrongly exercised their inherent powers. The question is fundamentally one of jurisdiction and, therefore, attracts the operation not only of section 107, Government of India Act, but also of section 115, Civil Procedure Code.

This jurisdiction under section 107 of the Government of India Act must of necessity be vague, but there is no doubt that there is a residue of jurisdiction which the Court will always exercise whenever it appears that there has been something in the nature of a denial of the right of fair trial. In the case before us there has been, in my opinion, such a denial.

As to what the effect of the grant of leave will be, it is scarcely our province to inquire at the present moment, but we may mention that an offer was made by Mr. Das on behalf of the petitioners that he was ready to pay the whole of the decree money into Court pending the trial of the suit. No doubt an application will be made in the Court in which the suit is instituted for an injunction prohibiting the defendants from proceeding with the sale. Whether that injunction will be granted, and, if so, on what terms, are matters for the trial Court. Possibly the parties may be able to arrange that the whole of the decree money or at least that part of it which is due to the opposite party as proprietors of the two-thirds share, may be paid into Court and that those proprietors will be permitted to draw it out on giving adequate security for the same. We have, however, already observed that we cannot at this stage give any directions upon these matters.

The result is that the application is allowed with costs. Hearing fee three gold *mohurs*.

THORNHILL, J.—I agree.

Application allowed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 160 OF 1917.
February 22, 1918.
Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.
KRISHNA IYER REPRESENTED BY HIS AUTHORISED AGENT V. KRISHNA IYER—PLAINTIFF—APPELLANT
versus
SWAMINATHA IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Reversioners, suit by—Compromise, whereby reversioners take on widow's death—Reversioner predeceasing widow—Survivor, interest of, nature of—Transfer of Property Act (IV of 1882), s. 19.

A suit by two of the reversioners of a deceased Hindu against his widow for a declaration that an alleged Will by the deceased was not genuine ended in a compromise which provided that the property should go to the reversioners on the widow's death. One of the reversioners having predeceased the widow, the survivor claimed the entire property, on

the death of the widow, to the exclusion of the deceased reversioner's sons:

Held, that, by the compromise, the reversioners took a vested interest in the property which did not pass by survivorship, but was heritable and divisible between the two donees.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 28 of 1916.

Messrs. *T. K. Muthukrishna Aiyar* and *N. Muthuswamy Aiyar*, for the Appellant.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—The facts of the case are as follows:—One Kuppuswami Aiyar was the last male owner of the properties in suit and of other properties. He made a Will under which his mother, his widow and his natural brother were the legatees. Original Suit No. 27 of 1901 was brought by the widow Minachi against her mother-in-law Seshiammal and against her husband's natural brother Srinivasa Iyer disputing the genuineness of the Will. The suit ended in a compromise Exhibit D. Thus the widow's claims were settled. Thereupon two persons claiming themselves to be the nearest reversioners of Kuppuswami Aiyar sued in Original Suit No. 32 of 1902 the widow, the mother and the natural brother for a declaration that the Will was not genuine. This suit also ended in a compromise, Exhibit F. The present suit is by one of the two plaintiffs in Original Suit No. 32 of 1902 for a declaration that he is solely entitled to the property secured under the compromise. It may be mentioned that the the other plaintiff in Original Suit No. 32 of 1902 predeceased Seshiammal. Seshiammal died a few months before the present suit. Plaintiff's case is that as of the two plaintiffs who got the compromise decree, he alone was alive when Seshiammal died, the heirs of the other plaintiff are not entitled to any rights. The compromise provided for the property being taken possession of on the death of Seshiammal. We are unable to agree with the appellant that the two plaintiffs did not take a vested interest in the property. The widow of the last male holder having been bought off by the mother by the compromise of the previous litigation, she was virtually the full owner of the property of Kuppuswami, with the exception of some of the properties given to his natural brother. It was competent to Seshiammal to have alienated the property in any way she liked. Consequently the compromise which secured to the then plaintiffs rights dependent upon the death of Seshiammal, was a vested interest. See section 19 of the Transfer of Property Act and *Rewun Persad* v. *Musammat Radha Feeby* (1) and *Bhagabati Barmanya* v. *Kali Charan Singh* (2). This vested interest under the Indian law does not pass by survivorship, but is heritable and divisible between the two donees. We do not think they can be said to have sued or obtained the properties as reversioners because they were not reversioners to Seshiammal. In this view, the Subordinate Judge was right in holding that plaintiff is not the sole owner.

But he was wrong in refusing to give a decree for partition. We must reverse the decree of the Subordinate Judge and direct him to give a decree to plaintiff for one-half of the suit properties including in those words also the properties for which the suit properties may have been exchanged.

Plaintiff is entitled to mesne profits at the rate admitted in Exhibit IIIB. Future mesne profits from the date of Exhibit IIIB up to delivery will also be provided for. Appellant must pay the respondent's costs in this Court. Costs in the lower Court will be provided for in the revised decree.

M.C.P.

Appeal allowed.

(1) 4 M. I. A. 137; 7 W. R. P. C. 35; 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E R. 651.

(2) 10 Ind. Cas. 641; 38 C. 468; 21 M. L. J. 387; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 8 A. L. J. 433; 13 Bom. L. R. 575; (1911) 2 M. W. N. 295; 38 I. A. 54 (P. C.).

ABDUL HAQUE *v.* MUHAMMAD YAHYA KHAN.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 293 OF 1917 WITH CIVIL REVISION No. 4 OF 1918.

July 4, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

Sheikh ABDUL HAQUE—PLAINTIFF—APPELLANT

versue

Babu MUHAMMAD YAHYA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Government of India Act 1915 (5 & 6 Geo. V, C. 61), s. 107—Addition of parties—Application to add defendant rejected — Appeal, whether lies — Revision— High Court, power of superintendence of.

Where an application under Order I, rule 10 of the Civil Procedure Code asking that a certain person be added as a party defendant to the suit and praying for permission to amend the plaint accordingly is rejected, no appeal lies against the order rejecting the application. Where, however, it appears that the Court has exercised wrong discretion in rejecting the application, the High Court can interfere in revision under section 107 of the Government of India Act.

Appeal from a decision of the Subordinate Judge, 2nd Court, Saran, dated the 8th September 1917.

Mr. *Muhammad Hasan Jan.* for the Appellant.

Messrs *Fakhruddin* and *Panchanan Banerjee*, for the Respondents.

JUDGMENT.

MULLICK, J.—The plaintiff brought a suit against the defendants for specific performance of a contract of sale in respect of some immoveable property and the defendants filed written statements between the 4th June and 12th June 1917, although the plaint was filed very nearly seven months before. When the written statements were filed, the plaintiff discovered that the property was alleged to have been sold by the defendants to a lady named Bibi Batul and on the 3rd July 1917, the plaintiff applied to the Court for leave to add Bibi Batul as a party defendant and to amend the plaint by adding a prayer to the Court to declare that the alleged sale in favour of Bibi Batul was fraudulent and not binding upon the plaintiff.

On the 25th July the learned Subordinate Judge declined both prayers observing "the plaintiff wants to kill two birds with one shot, which he cannot be allowed to do".

It is to be observed that the plaintiff purported to make this application for amendment and addition of parties under Order XXII, rule 10 of the Civil Procedure Code, but as a matter of fact, the assignment of the property having been made previous to the institution of the suit, this rule had no application and the proper provision under which the plaintiff should have applied, was Order I, rule 10 of the Civil Procedure Code.

On the 27th August 1917, the plaintiff again repeated his prayer asking substantially for the same reliefs. That second request also was refused. The plaintiff has accordingly filed first of all an appeal against the order of the 27th August 1917 refusing for the second time leave to add Bibi Batul and has also by way of precaution filed an application for revision.

Now it is quite clear that the application having been made under Order I, rule 10, no appeal lies. Appeal No. 293 of 1917 will, therefore, be dismissed with costs.

Let us turn next to the application for revision. Now I fail to see what prejudice would have been caused to the defendants by the addition of Bibi Batul. On the contrary, it is in every way desirable that the litigation should finally end and finality can only be reached by investigating the rights of Bibi Batul in this matter. The learned Subordinate Judge has exercised a wrong discretion in refusing leave to amend as well as in refusing to allow Bibi Batul to be made a defendant. The Courts have always reserved to themselves a residual power of superintendence under the provisions of the Charter Act which are now reproduced in section 107 of the Government of India Act, to interfere in cases of this sort, and in exercise of that power I think we should direct the learned Subordinate Judge to make the additions in the plaint which the plaintiff asked for in his petition of the 3rd July 1917, and to dispose of the case according to law. We also direct the Court to fix an early date for the filing of a written statement by Bibi Batul and to see that the trial is prosecuted more expeditiously than it has hitherto been.

As these alterations in the plaint are indulgences, which the plaintiff is obtaining, he will have to pay to the defendants

the costs of this hearing, which will be assessed at one gold *mohur*.

It appears that in the matter of the appeal the learned Vakil for the plaintiff has already paid the costs for the appointment of a guardian to the minor defendants. This item will be excluded from the costs which will be payable by the plaintiff to the defendants in the appeal.

THORNHILL, J.—I agree.

Appeal dismissed.
Revision allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 581 OF 1917.

March 20, 1918.

Present :—Mr. Justice Shah and Mr. Justice Marten.

HARGOVIND FULCHAND—AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NAJA SURA—DEFENDANT—RESPONDENT.

Gujarat Talukdars' Act (VI Bom. of 1888), s. 29 E—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Decree against talukdar—*Execution, application for, unaccompanied by certificate of managing officer, whether "in accordance with law"—Time between date of decree and submission of decretal claim, exclusion of.*

The plaintiff obtained an instalment decree on the 16th September 1910 against the defendants who were *talukdars* The first instalment became payable on the 1st April 1911, and in consequence of the default in payment, the whole amount became payable on that day. The plaintiff presented an application for execution on the 1st April 1914, but it was rejected on the 15th June 1914 as the certificate of the managing officer required by section 29 E of the Gujarat Talukdars' Act was not produced. Subsequently the plaintiff applied to the managing officer for a certificate in August 1914 and obtained a certificate on the 29th August 1914. He then made the present application for execution on the 28th February 1916 accompanied with the certificate of the managing officer:

Held, that the plaintiff was entitled under section 22E, sub-section (3) of the Gujarat Talukdars' Act to exclude the period from the 16th September 1910, the date of the decree, to August 1914, the date of the submission of the claim under the decree, from the period allowed for the execution of the decree, and that, therefore, the application of the 28th February 1916 was within time. [p. 732, col. 1.]

Per *Shah, J.*—The application of the 1st April 1914 was in accordance with law within the meaning of Article 182 (5) of Schedule I of the Limitation Act and operated to save limitation, although no certificate of the managing officer was produced as required by section 29 E (1) of the Gujarat Talukdars' Act. [p. 729, col. 1]

The words "in accordance with law" in Article 182 (5) of Schedule I of the Limitation Act refer to the form and procedure relating to the application, unless there is a clear and definite prohibition outside the Act which would render an application not in accordance with law within the meaning of the Limitation Act. [p. 727, col. 2.]

Section 29E of the Gujarat Talukdars' Act does not lay down any prohibition against execution, but only provides a method of securing the result that execution shall not be proceeded with until the certificate that the decree-claim has been duly submitted, is produced or until the prescribed period has expired after the decree-holder has made a proper effort to obtain the certificate. Therefore in spite of the provisions of section 29E it is permissible to a decree-holder to apply in accordance with law for execution in order to save limitation under Article 182 of the Limitation Act without obtaining the certificate under section 29E, though it is not permissible to proceed with the actual execution in the absence of the certificate. [p. 729, col. 1.]

Per *Marten, J.*—An application for execution of a decree against a *talukdar* which is not accompanied by the certificate required by section 29E (1) of the Gujarat Talukdars' Act, is neither "in accordance with law" nor made to the "proper Court" within the meaning of clause (5) of Article 182 of Schedule I of the Limitation Act and does not, therefore, operate to extend the limitation under that clause. [p. 732, col. 2.]

Appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 344 of 1915, confirming the order passed by the Subordinate Judge, Dhandhuka, in Darkhast No. 94 of 1916, dismissing the application.

Mr. *G. S. Rao*, for the Appellants.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

SHAH, J.—The facts which have given rise to this second appeal, are few and undisputed. The plaintiff obtained an instalment decree on the 16th September 1910 against the defendants, who are Talukdars. The first instalment became payable on the 1st April 1911, and in consequence of the default in payment, the whole amount became payable on that day. The plaintiff presented an application for execution on the 1st April 1914, but it was rejected on the 15th June 1914 as the certificate of the managing officer required by section 29E of the Gujara

Talukdars' Act was not produced. Subsequently the plaintiff applied to the managing officer for a certificate in August 1914 and obtained a certificate on the 29th August 1914. He then made the present application for execution on the 28th February 1916 accompanied with the certificate of the managing officer.

Both the lower Courts have dismissed this application on the ground that it has been made more than three years after the amount became payable under the decree, and that the intermediate application of the 1st April 1914 cannot save the bar of limitation as it is not in accordance with law within the meaning of Article 182 of the Indian Limitation Act, the certificate under section 29E not having been produced with it.

This appeal was adjourned to ascertain the dates of the notice under section 29B and of the submission of the 'decree-claim'. It is now admitted that the notice under section 29B was published on the 5th November 1908, and the claim in respect of which the decree was subsequently passed, was submitted on the 27th April 1909. It is not disputed before us that apart from the submission of the claim before the date of the decree, in fact there was no submission of the decree-claim before August 1914, when the application for the certificate under section 29E was made.

On behalf of the appellants two points are urged in support of the appeal: *first*, that the Darkhast of the 1st April 1914 was in accordance with law within the meaning of Article 182 in spite of the absence of the certificate under section 29E, sub-section (1), and *secondly*, that under sub-section (3) of section 29E the appellant is entitled to exclude the time from the date of the decree to the date of the application for the certificate, which must be taken to be the date of the due submission of the decree-claim within the meaning of that sub-section. It is common ground that if either of these contentions is allowed, the present application would be in time.

As regards the first contention, I am of opinion that it should be allowed. The expression used in Article 182, clause 5, in the third column of the Schedule of the Limitation Act is "applying in accordance with law to the proper Court for execution." In the present case in form the application was in accordance with law, *i.e.*, in accordance with the provisions of the Code of Civil Procedure relating to such an application, and it was an application to the proper Court for execution. Unless the words "in accordance with law" are to be very widely construed, I think that a person applies 'in accordance with law', when he makes an application in the prescribed form, and asks for the execution of the decree, *i.e.*, for relief granted by the decree and not for any relief outside the decree, nor for any relief which is prohibited by law. I think that sufficient meaning is given to the expression by interpreting it in that way.

It is clear that the Limitation Act must be construed strictly, and any provision, in the nature of an exception, should be liberally construed. The expression, in my opinion, is fairly susceptible of a limited construction, and for the purposes of the Limitation Act, the "applying in accordance with law" may fairly be understood to refer to the form and procedure relating to the application, unless of course there is a clear and definite prohibition outside these Acts, which would render such applying not in accordance with law within the meaning of the Limitation Act.

It is contended for the respondents that section 29E of the Gujarat Talukdars' Act contains such a prohibition. That section provides that on the publication of a notice under section 29B no proceeding in execution shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree-claim has been duly submitted or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree. No doubt the expression "no proceeding shall be instituted" if literally construed, is susceptible of the interpretation that there is a prohibition to make any application for execution until the proper certificate is produced or the prescribed period of one month has

elapsed after the written application is made. But these provisions, in my opinion, should be read in the light of the scheme and the main purpose of these groups of sections in the Act. The scheme is to secure a due submission of all the claims to the managing officer with a view to ascertain and liquidate the liabilities of a Talukdari estate which is taken under management, and in the case of decree-claims to secure their due submission before the execution is proceeded with. The purpose is not to prohibit the filing of any suit or the execution of a decree, but to give the managing officer an opportunity of considering the claim before the claimant or the decree-holder pursues his usual remedy in the Civil Courts. This is clear from sub-section (3) of section 29D and sub-section (2) of section 29E. In sub-section (3) of section 29E the proceedings have been referred to as "stayed or temporarily barred by reason of the claim not having been duly submitted." It shows that the effect of sub-section (1) is not to prohibit the making of any application, which may be necessary to keep alive the decree for the purpose of the Limitation Act, but to insist upon a clear proof of the due submission before the execution is proceeded with or to allow the execution to be proceeded with after one month has elapsed from the date of the application for a certificate of the due submission of the decree-claim. It seems to me that the certificate is entirely extraneous to the application contemplated by the Limitation Act, and its production is undoubtedly a condition precedent to the actual execution of the decree but not necessarily to the making of the application.

The use of the expression 'in accordance with law' in Order XXI, rule 17, sub-rule (2) of the Code of Civil Procedure lends some support to the view that the same expression in Article 182 may be appropriately construed as referring to the application itself and not to any extraneous accompaniment like the certificate under section 29E of the Gujarat Talukdars' Act.

It has been urged with some force by Mr. Divatia that the section provides that no proceedings in execution shall be instituted or continued without the certificate or without allowing the necessary period to lapse. But, in my opinion, in effect it means no more than this that the execution shall not be proceeded with unless the necessary certificate is produced or unless the prescribed time has elapsed after the application for such a certificate. In the Code of Civil Procedure and the Limitation Act the word 'institute' is used with reference to a suit, and in the course of the argument no instance of its use with reference to an application, has been pointed out to us. Taking the meaning of the word with reference to the context in section 29E it seems to me that sufficient effect is given to it by reading it in the sense I have just mentioned.

I am fortified in this view by the consideration that there is no provision allowing the decree-holder any deduction of the time between the date of his application for such a certificate and the date of the certificate or of the month which must elapse before an application for execution can be filed. It may happen in some cases that the period of limitation prescribed by the Limitation Act may expire during this interval; and it is not reasonable to attribute to the Legislature the position that while the filing of an application for execution within the period prescribed by the Limitation Act, may be practically prohibited, no provision should be made for deducting the time taken up in obtaining the certificate which is rendered obligatory by the Act. It is noticeable that under sub-section (3) the time up to the date of "due submission" can be excluded, and not the time taken up in obtaining the certificate. Further unless the due submission of the decree-claim, and the application for a certificate under section 29E, were intended by the Legislature to be simultaneous, there would be some provision excluding the time that may be reasonably allowed after the due submission of the decree claim and before the application for the certificate under section 29E in order to enable the managing officer to deal with the claim. But there is no such provision.

I do not say that the expression "no proceeding shall be instituted" is not susceptible of the construction put upon it by

the lower Courts and urged by Mr. Divatia with ability before us. But on the whole I think that in spite of the provisions of section 29E it is permissible to a decree-holder to apply in accordance with law for execution in order to save limitation under Article 182 of the Limitation Act without obtaining the certificate under section 29E, though it is not permissible to proceed with the actual execution in the absence of the certificate.

I have not so far referred to the various cases which have been cited on either side. No case has been cited to us in which the effect of section 29E of the Gujarat Talukdars' Act has been considered with reference to the meaning of the expression 'in accordance with law'. I do not consider it necessary to refer to cases which deal with the provisions in other Acts, as they would have a bearing on the point only by way of analogy. I may, however, observe that the case of *Chatur Kushalchand* v. *Muhadu Bhogaji* (1), which has been relied upon for the respondents, is clearly distinguishable, because the applications in that case were held to be not in accordance with law as they were forbidden by section 22 of the Dekkhan Agriculturists' Relief Act; the expression then used in section 22 was that "no agriculturists' immoveable property shall be attached or sold." The case of an express prohibition stands on a different footing.

I do not read section 29E as laying down any prohibition against execution, but only as providing a method of securing the result that the execution shall not be proceeded with until the certificate that the decree-claim has been duly submitted, is produced or until the prescribed period has expired after the decree-holder has made a proper effort to obtain the certificate.

I am, therefore, of opinion that the application made on the 1st April 1914 was in accordance with law within the meaning of Article 182 though no certificate of the managing officer was produced. The present application is, therefore, not barred by limitation.

The second point urged on behalf of the appellant in the course of the argument has not been considered by the lower Courts. It is really a new point; but as the facts relating to it are not in dispute, and as it is a point of limitation, we have heard the Pleaders on the point fully; in fact we invited arguments on the point in view of the difficulty and the doubt that we felt on the first point in the course of the hearing. The point is whether apart from the intermediate application for execution, the present application is within time by reason of the exclusion of the time from the date of the decree to the date of the due submission of the decretal claim, *i.e.*, on the facts of this case to the date of the application for the certificate. Mr. Divatia has argued that sub-section (3) has no application to the present case as the original claim was duly submitted before the decree was passed and that no further submission of the claim was necessary under the decree.

It may be that the Legislature did not contemplate what in substance would be a second submission of the same claim to the managing officer. But the fact remains that section 29E clearly refers to the due submission of the 'decree-claim' which would mean the decretal claim or the claim under the decree and not the original claim in respect of which the decree has been subsequently passed. Now in this case we are not concerned with the submission of the claim before the decree but with the due submission of the decree-claim. Mr. Divatia's contention must, therefore, be disallowed.

On the facts either admitted before us or appearing on the record, the decree-claim was brought to the notice of the managing officer when the decree-holder applied in August 1914 for a certificate of the due submission thereof. The officer has given the certificate under section 29E and the fact of the due submission of the claim in respect of the decree, is beyond dispute. But whether the officer had in view the submission of the claim in 1909 before the decree was passed or the submission of the decretal claim when the application for the certificate was received, is a question which it is by no means easy to decide. From the terms of the certificate, however, it can be inferred that the managing officer had in view the due submission of the decretal claim after the date of the decree. In the absence of any further information, on the facts of this

(1) 10 B. 91; 5 Ind. Dec. (N. s.) 445.

case, it is a fair inference that the decree-claim was submitted when the application for the certificate was made. There is no particular form prescribed for the submission of the decretal claim and if the certified copy of the decree with a proper certificate from the Court as provided in section 29C, sub-section (1) is sent to the managing officer, it may be a due submission of the claim. This was done in August 1914, and the managing officer has certified that the claim in respect of the decree was duly submitted to him. It follows, therefore, that the appellant is entitled to exclude the time from the date of the decree to some period in August 1914.

No doubt this view involves the result that in such a case as we have here, the decree-holder may practically extend the time for execution according to his own choice by making the application for the certificate at any time. It is probably a result not contemplated by the Legislature, and it may not be desirable that it should be possible to extend the time in that manner. It constitutes a difficulty in the way of the appellant on this point. But if the Legislature will insist upon certificates in all cases of decretal claims without any exception and if cases of this kind are not provided for in any other way, I do not see how sub-section (3) can be held to be inapplicable to the present case; and after all it has no further effect than that of saving limitation.

After giving the point my best consideration I am of opinion that the decree-holder is entitled to exclude the time from the date of the decree up to August 1910. On this ground also the present application for execution would be within time.

I would, therefore, allow this appeal, set aside the orders of the lower Courts and remand the Darkhast for disposal according to law.

Costs throughout to be costs in the Darkhast.

MARTEN, J.—The respondent is a Gujarat Talukdar whose estate is being managed under the Gujarat Talukdars' Act, 1888, in pursuance of a Government Notification dated the 5th November 1903. The appellant is the holder of a money-decree, against the respondent, dated the 16th September 1910. In endeavouring to execute this decree under a Darkhast, presented on the 28th February 1916, the appellant has been met by Article 182 (5) of the Indian Limitation Act and section 29E (1) of the Gujarat Talukdars' Act and has failed in both Courts below.

Before us the appellant has re-argued the points on which he failed in the Courts below and has also urged an alternative point, suggested to his Pleader by my brother Shah, *viz.*, that his Darkhast is saved on the facts of this particular case by section 29E (3) of the Gujarat Talukdars' Act. I propose to deal with this alternative point first. Section 29E (1) and 29E (3) run as follows:—

"Section 29E (1). On the publication of a notice under section 29B, sub-section (1), no proceeding in execution of any decree against the Talukdar whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree-claim has been duly submitted, or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree."

"Section 29E (3). In computing the period of limitation prescribed by the Indian Limitation Act, 1877, or by section 230 of the Code of Civil Procedure for any application for the execution of a decree, proceedings in which have been stayed or temporarily barred by reason of the claim not having been duly submitted, the time from the date of the notice published under section 29B, sub-section (1), or of the decree if it was passed subsequently to the publication of the notice, to the date of due submission, shall be excluded."

I think the words 'decree-claim' in sub-section (1) mean "the claim under or by virtue of a decree." In other words a decree is essential, and consequently it is not sufficient to submit the claim to the managing officer before any decree is obtained. This construction is, I think, borne out by the concluding words of sub-section (1), which require the written application for a certificate to be accompanied by a certified copy of the decree. It is the decree and the execution thereof which is

particularly important to the managing officer. A suit may or may not end in a decree. It is the decree and above all the execution of it which effects a practical alteration of the position.

For the purposes, therefore, of sub-section (1) I disregard the respondent's submissions of his claims to the managing officer in April 1909 as they were prior to the decree and for the matter of that to the suit as well. Further, his Pleader before us has formally admitted that there was no submission between the date of the decree (16th September 1910) and some date from 11-29th August 1914, and that the submission, if any, made after the decree was in August 1914 when the managing officer gave his certificate. I have already said that the Government Notification was published on 5th November 1908. Consequently sub-section (1) prevented the appellant from instituting execution proceedings till August 1914 when he got the requisite certificate.

This brings one to sub-section (3). That sub section is still dealing with proceedings for the execution of a decree and, in my opinion, the word 'claim' means the same as 'decree-claim' under sub-section (1). This is, I think, borne out by the context, *viz.*, the words "application for the execution of a decree proceedings in which have been stayed or temporarily barred by reason of the claim not having been duly submitted." On my construction of sub-section (1) no bar can arise from a non-submission before decree, and consequently the above words in sub-section (3) must refer to a bar arising from a non-submission of a decree-claim.

Further, in the present case, time has to be calculated under sub-section (3) from the date of the decree, as it was passed subsequently to the Government Notification, and under sub-section (3) this time has to be calculated up "to the date of due submission." I think the words "due submission" refer again to due submission of the decree-claim. I do not accept the respondent's contention that the due submission in the present case was in April 1909 before the decree and consequently that sub-section (3) has no application. On the contrary, I think, the Legislature intended the exemption in sub-section (3) to apply to all execution proceedings barred under sub-section (1) and did not intend to omit one branch of them; *viz.*, proceedings in which a submission had been made before decree of a claim which might or might not correspond to the amount awarded by the decree itself.

Respondent's Pleader has urged that the above construction of sub-sections (1) and (3) would unduly favour a decree holder in the matter of limitation. That, however, is for the Legislature to decide on. The Gujarat Talukars' Act is an Act of a special nature. Its details may cause difficulty owing to the drafting. But in its broad outlines the scheme of the Act seems to me as follows. For certain reasons a Talukdari estate may be attached and managed by a Government Officer (section 26). In that event all creditors must submit their claims [section 29B (1)], which are then investigated [section 29D (1)] and may be compromised [section 29D (2)]. If the estate appears to be hopelessly involved or there is any other sufficient reason, then Government management may be withdrawn and possession of the estate restored to the owner (section 29).

How then does the Act deal with the claims of creditors in the event of such withdrawal, *e.g.*, (1) creditors who have submitted their claims and been paid nothing; (2) creditors who have submitted and compromised their claims and been paid an instalment; and (3) cerditors who have not submitted their claims?

As regards class (2), the proviso to section 29D (2) would apparently prevent claims being time-barred prior to the withdrawal, of management. Similarly as regards class (3), it would seem from section 29F (2) (*c*) and (3) that on the withdrawal their claims would revive and that the period of Government management would, be excluded in calculating the periods of limitation. The words "during the continuance of the management or *afterwards*" in section 29B (3) cause some difficulty in this respect but as the cases provided for by section 29F (2) (*c*) are expressly saved, presumably the latter section is intended to have some operation. Counsel have not, however, referred me to any clause keeping alive expressly the claims of class (1) of creditors unless it

be by the joint operation of sections 29D (3) and 29E (1) and (3).

Be that as it may, I think that section 29F (3) shows that in certain cases the whole period of Government management is to be excluded in reckoning limitation. That being so, I see nothing strange in the Legislature saying in section 29E that in certain other cases, a portion of the period of Government management is to be excluded, *viz.*, down to the date of the submission of the claim under the decree.

In the view, therefore, which I take of section 29E (3), the period from 16th September 1910 (decree) to August 1914 (date of submission of claim under decree) must be excluded in the present case. Consequently in my judgment the Darkhast of 28th February 1916 was in time, and, therefore, this appeal ought to be allowed.

Apart then from costs, it is unnecessary in the view I take, to consider the other branch of the appellant's case, *viz.*, that time should run from another Darkhast which was presented on the 1st April 1914 and which in the absence of any certificate, was dismissed. But as the point was argued and has a bearing on costs I ought perhaps to state the view which I take. Mr. Rao contended that this Darkhast was an application "in accordance with law to the proper Court for execution" within the meaning of Article 182 (5) of the Indian Limitation Act. He had to contend that on the one hand this was an application by the appellant for execution under Article 182 (5) of the Indian Limitation Act, and that on the other hand, the appellant had not in so doing instituted proceedings for execution within section 29E of the Gujarat Talukdars' Act. "Institution," he said, did not begin till the application was admitted under Order XXI, rule 17 (4). The ordinary meaning, however, of "institute" is to begin or to commence. Accordingly, I think that execution proceedings were instituted, *i. e.*, begun or commenced when the Darkhast of 1st April 1915 was presented to the Court. This is in accordance with the explanation to section 3 of the Indian Limitation Act which states that a suit is instituted in ordinary cases when the plaint is *presented* to the proper officer. But this institution of execution proceedings was contrary to the express provisions of section 29 E for no certificate had been obtained or even applied for. I do not think those provisions are directory merely, or that we can read "instituted" as meaning proceeded with. I think, therefore, the application was not in accordance with law.

Further, I doubt whether the application was "to the proper Court" for execution within the meaning of Article 182 (5). Explanation II says that the 'proper Court' means the Court whose duty it is to execute the decree or order." At the date of this Darkhast, it was the duty of no Court to execute the decree or order for there was no certificate from the managing officer; and in fact the Darkhast was dismissed for want of such a certificate. The contention of the appellant really amounts to this that this utterly irregular application of his prevented time running. I do not think this is the case. Nor do I think it correct to say that provided the application fulfilled the formal requirements of the Civil Procedure Code, it did not matter that it was contrary to the Gujarat Talukdars' Act.

Certain authorities were cited to us but I do not propose to discuss them as they were on other Acts and depended on different expressions *e. g.*, "entertain." "Institute" is, I think, a stronger and more definite word than "entertain." I may refer to section 18 of the Religious Endowments Act, 1863, as an instance of both words being used in the same section.

It was argued that hardship might result if the period of limitation expired during the month after the application for a certificate. However, on my construction of section 29E, this would be extremely unlikely to happen. Even if it did, I see no particular hardship in giving a creditor a delay of say two years and eleven months instead of three years.

On the points, therefore, argued before the lower Court I agree with the findings of the learned Judges in the Courts below. On the new point taken before us the appellant succeeds. On the other hand, he did not take this point in the Courts below. I think, therefore, on the whole that in allowing the appeal we should direct that the costs throughout up to

date of both parties should be costs in the Darkhast of 1916. The actual order of this Court will be as indicated by my learned brother.

Appeal allowed

MADRAS HIGH COURT.
CIVIL APPEAL No. 282 OF 1916.
February 18, 1918.
Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Spencer.
THE MIDNAPORE ZEMINDARI COMPANY, LIMITED—DEFENDANT No. 1—APPELLANT
versus
MALAYANDI APPAYASAMI NAICKER AND ANOTHER—PLAINTIFF No. 1 AND DEFENDANT No. 2—RESPONDENTS.

Service tenure, palayams *held under—Grant for Military and Police services—Alienation by* zemindar *—Abolition of services before alienation, effect of—Liability of* palayam *for* poligar's *debts—Omission to issue permanent* sanad, *effect of—Regulation XXV of* 1802, *Regulation VI of* 1831 *and Madras Act III of* 1895, *scope and effect of—*Spes successionis, *mortgage and sale of, effect of, on transferor's title—Mortgage decree—Personal liability clause, sale on foot of—Vendee, adverse possession of, whether bars successors of mortgagor—Limitation, commencement of—Limitation Act (IX of* 1908), *Sch. I, Arts.* 120, 142, 144.

In India, apart from Statute, lands held on service tenure are inalienable beyond the lifetime of the holder. [p. 736, col. 2.]

Muppidi Papaya v. *Ramana*, 7 M. 85; 7 Ind. Jur. 595; 2 Ind. Dec (N. S.) 644 and *Pakkiam Pillay* v. *Seetharama Vadhyar*, 14 M. L. J. 134, followed.

The subsequent enfranchisement of the lands from service will not validate alienations previously made. [p. 736, col. 2.]

Vaddadi Sannamma v. *Koduganti Radhabhayi*, 43 Ind. Cas. 935; 34 M. L. J. 17; 22 M. L. T. 532; (1918) M. W. N. 23; 7 L. W. 237; 41 M. 418 (F. B.) and *Padapa* v. *Swamirao Shrinivas*, 24 B. 556; 2 Bom. L. R. 548; 4 C. W. N. 517; 27 I. A. 86; 7 Sar. P. C. J. 710; 12 Ind. Dec. (N. S.) 901 (P. C.), followed.

Lands originally held on service tenure and which, on that ground, are inalienable, become alienable on the abolition of the services. They become subject to the ordinary laws of descent and disposal as in the case of ordinary property. [p. 736, col. 2; p. 737, col. 1.]

Ravlojirav v. *Balvantrav Venkatesh*, 5 B. 437; 3 Ind. Dec. (N. S.) 288 and *Musammat Kustoora Koomaree* v. *Monohur Deo*, (1864) W. R. 39, followed.

Section 8 of Regulation XXV of 1802 recognises and gives effect to the above principle. [p. 737, col. 1.]

The omission to issue or the delay in issuing a *sanad* under Regulation XXV of 1802 finally settling the *peishcush* payable by the holder, will not affect the alienability of such lands after the abolition of the services. [p. 743, col. 2; p. 744, col. 2.]

The effect of section 5 of the Regulation was to release the lands forthwith from the condition of rendering Police service or at any rate that was the policy of the Government and there is nothing in the Regulation to prevent effect being given to that intention without the grant of a permanent *sanad*. The prohibition against alienation of the lands on the grounds of public policy definitely ceased after the passing of Madras Act III of 1895 which has repealed Regulation VI of 1831 except to a limited extent [p. 742, cols. 1 & 2.]

A mere transfer of a *spes successionis* in property does not operate on the transferor's interest when he gets possession of the property. [p. 745, col. 1.]

Ramasami Naik v. *Ramasami Chetti*, 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201, followed.

Obiter—Where a *poligar* or *zemindar* who ordinarily represents the estate is dispossessed and fails to sue for possession, the person dispossessing him gets an indefeasible title after 12 years and the successor of the dispossessed *zemindar* cannot claim a fresh starting point from the date of his succession unless he shows that the previous holder had effectually debarred himself from suing and there was no one who could have sued successfully. [p. 745, cols. 1 & 2.]

Appeal against the decree of the District Court, Madura, in Original Suit No. 5 of 1915.

FACTS appear from the judgment.

Mr. *Eardley Norton* (with him Messrs. *T. R. Venkatrama Sastriar* and *S. Varadachariar*), for the Appellant.—The plaintiff having abandoned his contention that the Paliayam was inalienable by the custom of the family, the only question is, whether it was alienable by reason of its having been impressed with Military and Police services. Even if such conditions existed originally, the services were abolished by Regulation XXV of 1802 and by the disarmament proclamations, Exhibits XXVI and XXVI (*a*) in the case. The Peishcush was settled in 1804 on the basis of the Permanent Settlement. The *sanad*, however, was not issued, but that is not conclusive of the retention of the services. It is only evidence of enfranchisement which was effected virtually by the Regulation.

Though it is an unsettled Palayam till the issue of a *sanad*, the estate is liable for the debts of the holder. In *Arbuthnott* v. *Oolaguppa Chetty* (1) an unsettled Palayam was held liable for debts contracted by a Poligar in the hands of his successor. It

(1) 5 M. H. C. R. 303.

follows, therefore, that an unsettled Paliayam is alienable.

No appreciable services of a Military nature were rendered by the Kannivadi Zamindar after the establishment of British rule, especially after the Permanent Settlement Regulation. The Police services had become obsolete. Fifth Report, pages 101 and 102, Regulation XI of 1816, sections 38 and 39 and Madras Act III of 1905.

There was no differentiating feature in regard to services rendered by the Zemindar. They do not relate to the land and only pertain to the duties of citizens generally under the Criminal Law.

In 1905 the *sanad* was issued under Regulation XXV of 1802 by which the services were abolished. Plaintiff's claim, therefore, to sue as an office-holder, is not maintainable. *Radhabai* v. *Anantrav Bhagvant* (2).

A holder of an office has a qualified power of alienation. The reported decisions do not go beyond that. The alienations by the father are in the nature of antecedent debts and are binding on the son.

The suit is barred. Plaintiff's father was dispossessed in 1900 and the suit should have been brought within 12 years of that date. Assuming that the mortgagor was a life-tenant, still he represented the estate. He was certainly entitled to impeach the transaction as his interest was only *spes successionis*. *Ramasami Naik* v. *Ramasamy Chetti* (3), *Sham Sundar Lal* v. *Achhan Kunwar* (4) and *Kunjaru Venkatramanayya* v. *Dejappa Konde* (5).

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Advocate General, (with him Mr. *A. Krishnaswami Aiyar*), for the Respondents.—Military and Police services were attached to the grant of this Palayam. Being a service tenure, the estate could not be alienated beyond the lifetime of the holder. That is an incident irrespective of Statute. That is the common law of India. The Military services continued to be rendered even after the Permanent Settlement. Apart from Statute, Military service imports impartibility and inalienability except for the holder's lifetime. The cessation of service or the enhancement of the Peishcush does not affect these incidents. The effect of the disarming proclamation was only to suspend the service, but the services were not released except by the issue of a *sanad*. The *sanad* fixes the Peishcush payable finally and, till that is done, the old tenure continues, *Kachi Yuva Ringappa Kalakka Thola Udayar* v. *Kachi Kalyana Ringappa Kalakka Thola Udayar* (6). The estate continues to be inalienable till the tenure is formally commuted. Exhibit 3 by which the Peishcush was fixed, was only a temporary arrangement. Nelson's Madura Manual, Part IV, pages 20, 21.

Military service imports inalienability. All service tenures import the same. *Minakshisundaram Pillai* v. *Chockalinga Royer* (7), *Muppidi Papaya* v. *Ramana* (8), *Pakkiam Pillay* v. *Seetharama Vadhyar* (9), *Vusa Chandrakantam* v. *Vusa Subbarayudu* (10), *Kamara Peda Subbayya* v. *Kakerla Chennappa* (11), *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (12), *Rani Keshabati Koeri* v. *Mohor Chandra Mondal* (13), *Ram Surohee Singh* v. *Kashee Roy* (14), *Sartaj Kuari* v. *Deorai Kuari* (15), *Rama Krishna Rao* v. *Court of Wards* (16) *Nilmoni Singh Deo* v. *Bakranath Singh* (17), *Durga Prashad Singh* v. *Brojo Nath Bose* (18),

(2) 9 B. 198 at p. 212; 5 Ind. Dec. (N. S.) 133 (F. B.).

(3) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.

(4) 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755.

(5) 42 Ind. Cas. 540; (1917) M. W. N. 679 at p. 680; 22 M. L. T. 233; 6 L. W. 630; 34 M. L. J. 319.

(6) 24 M. 562 at pp. 598, 604; 11 M. L. J. 191.

(7) 15 M. L. J. 10.

(8) 7 M. 85; 7 Ind. Jur. 595; 2 Ind. Dec. (N. S.) 644.

(9) 14 M. L. J. 134.

(10) 25 Ind. Cas. 685; (1914) M. W. N. 745; 1 L. W. 827; 16 M. L. T. 347; 27 M. L. J. 745.

(11) 28 Ind. Cas. 842; 28 M. L. J. 303.

(12) 6 M. I. A. 101 at p. 125; 4 W. R. P. C. 77; 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 E. R 38.

(13) 14 Ind. Cas. 227; 16 C. W. N. 892; 39 C. 1010.

(14) 6 W. R. 176.

(15) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.).

(16) 22 M. 383; 1 Bom. L. R 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.).

(17) 9 C. 187; 9 I. A. 104; 5 Shome L. R 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.).

(18) 15 Ind. Cas. 219; 39 C. 696; 23 M. L. J. 25; 16 C. W. N. 482; (1912) M. W. N. 435; 11 M. L. T. 337; 9 A. L. J. 482; 15 C. L. J. 461; 14 Bom. L. R. 445; 39 I. A. 133 (P. C.).

Bukronath Singh v. *Nilmoni Singh* (19) and *Beresford* v. *Ramasubba* (20).

An unsettled Palayam, though hereditary, is not alienable beyond the holder's lifetime. In *Radhabai* v. *Anantrav Bhagvant* (2), West, J., observed that the tenure continues even if the services had become obsolete.

Regulation XXV of 1802 applies to proprietors who had obtained a *sanad* by virtue of the Regulation. The Regulation is applicable only to such cases. Where the *sanad* was not issued, Police services continued to exist. *Narayana* v. *Chengalamma* (21), *Secretary of State* v. *Rajah of Venkatagiri* (22), *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (23). In *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (24), all that the Privy Council laid down was that proprietary right, *i.e.*, ownership might exist even where no *sanad* was granted.

The enhancement of Peishcush has nothing to do with the nature of the tenure. An alienation void in its inception, cannot be validated by a subsequent *sanad*. *Radhabai* v. *Anantrav Bhagvant* (2) was wrongly decided. *Padapa* v. *Swamirao Shrinivas* (25), *Kalu Narayan Kulkarni* v. *Hanmapa* (26), *Gangabai* v. *Basvant Ballappa* (27) and *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (28).

No question of limitation arises. Plaintiff's father was personally liable under the mortgage decree. He did not oppose the application for a decree absolute. He could not have sued for possession. The plaintiff could sue at any time within 12 years of his succession.

This appeal coming on for hearing on the 16th, 17th, 18th, 21st and 22nd of January 1918, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—This is an appeal from the decree of the District Judge of Madura in a suit brought by the plaintiff as heir of the late Zemindar of Kannivadi to recover the Zemindari from the 1st defendant, the Midnapore Zemindari Company, and the 2nd defendant claiming under it. The defendant Company, acquired the Zemindari for more than thirteen lakhs of rupees from the Liquidator of the Commercial Bank of India, which in December 1895 had advanced money on a mortgage to which the plaintiff's grandfather the then Zemindar and his son the plaintiff's father were parties, and had subsequently obtained a consent decree for sale, and brought the Zemindari to sale and purchased it after the death of the plaintiff's grandfather and the succession of his father to the estate. At the date of the Court sale in 1900 the Zemindari was an unsettled Palayam, but in 1905 the Bank succeeded in obtaining a permanent *sanad* under Regulation XXV of 1802 at the same Peishcush as had been paid without alteration for more than a hundred years.

The ground on which the plaintiff has succeeded in the lower Court in recovering the Zemindari from the transferees of the auction-purchaser, is that at the dates of the mortgage and the mortgage decree and of the sale thereunder, which were prior to the issue of the permanent *sanad* of 1905, the Zemindari was held on the tenure of rendering Military and Police service as well as of paying the Peishcush demanded; and that in these circumstances it was inalienable by the plaintiff's grandfather and his father after him for more than the terms of their respective lives. These contentions the District Judge has accepted. At the hearing of the appeal the learned Advocate General raised the further contention that the Zemindari was made inalienable by the provisions of Regulation VI of 1831.

The appellants did not admit that such services, if they existed, would render the Zemindari inalienable, and contended that even if this were so, this defect in the Bank's title was cured by the grant of the *sanad* to them in 1905 which admittedly put an end to such services if they were then in

(19) 5 C. 389 at p. 408; 4 C. L. R. 583; 2 Ind. Dec. (N. S.) 858.

(20) 13 M. 197 at p. 205; 4 Ind. Dec. (N. S.) 850.

(21) 10 M. 1; 3 Ind. Dec. (N. S.) 751.

(22) 35 Ind. Cas. 266; 31 M. L. J. 97; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 234.

(23) 3 M. 290 at p. 307; 8 I. A. 99; 4 Sar. P. C. J. 239; 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757.

(24) 1 I. A. 268 & 282; 21 W. R. 358; 14 B. L. R. 115; 3 Sar. P. C. J. 318; 7 Mad. Jur. 190 (P. C.).

(25) 24 B. 556; 2 Bom. L. R. 548; 4 C. W. N. 517; 27 I. A. 86; 7 Sar. P. C. J. 710; 12 Ind. Dec. (N. S.) 901 (P. C.).

(26) 5 B. 435; 3 Ind. Dec. (N. S.) 287.

(27) 5 Ind. Cas. 863; 34 B. 175; 12 Bom. L. R. 143.

(28) 43 Ind. Cas. 935; 34 M. L. J. 17; 22 M. L. T. 532; (1918) M. W. N. 23; 7 L. W. 237; 41 M. 418 (F. B.).

existence, and rendered the Zemindari freely alienable. Their main case, however, was that in 1895 the date of the mortgage to the Bank and afterwards the Zemindari was not held on any conditions of Military or Police service. As regards Military service they contended that, when after the cession of Dindigal to the Company by Tippoo in 1792, the then Poligar who had been expelled by Tippoo for failure to pay the Peishcush imposed upon him, was restored by the Company, the incident of Military service was suppressed by the Company in accordance with its settled policy as a necessary preliminary to the introduction of settled Government. As regards the Police or Kaval duties, they admitted that such duties were at first required of the Palayagar by the annual *sanads* issued to him by the Collector of Dindigal of which several from 1796 to 1804 have been exhibited, but they contended that in accordance with the provisions of section 5 of Regulation XXV of 1802 and the policy declared therein, this Police or Kaval service was abolished before 1812 and referred to the Fifth Report and Regulation XI of 1816. They contended that the Peishcush was permanently settled at the beginning of the last century, and that the delay in issuing permanent *sanads* in the case of this and some other Palayams was due to other causes and without any idea of claiming Military and Police services from them. As regards the alienability of such unsettled Palayams, they relied upon the decision of the Judicial Committee, in the *Gundamanaikanoor's case* [*Oolagappa Chetty* v. *Arbuthnot* and *Collector of Trichinopoly* v. *Lekkamani* (24)], not only that such Palayams were hereditary but that debts incurred by the holder for the time being, were binding on the Palayam in the hands of his successors, which could not be the case if they were inalienable except for the lifetime of the holder for the time being. The present contention they contended, was an afterthought. The Zemindari after being held under Government management was restored to the Zemindar in 1843 on payment of a sum of money for arrears which he had to borrow. To discharge this and other indebtedness of his predecessors one of the Zemindars in 1861 granted a thirty years' lease of the Zemindari which was in the nature of a usufructuary mortgage. His successor obtained from this Court a decree in the nature of a redemption decree, and recovered the Zemindari by paying off the sum payable to the lessees under the decree in respect of advances made by him to discharge the indebtedness of the estate. The mortgage to the Commercial Bank in 1895 was in respect of the indebtedness incurred by the Zemindar in redeeming the Zemindari. That it was regarded as binding on the Zemindari was shown from the fact that the next heir, the plaintiff's father, joined in the mortgage and consented to the decree for sale.

As regards the inalienability of lands held on service tenure, it is held in India that, even apart from Statute, they are inalienable beyond the lifetime of the holder, Mayne, section 338, *Muppidi Papaya* v. *Ramana* (8), *Pakkiam Pillay* v. *Seetharama Vadhyar* (9) and we must so hold. The learned Advocate-General also relied upon the statutory prohibition against the alienation of service lands contained in Regulation VI of 1831, but as will be pointed out later, the general statutory prohibition was repealed before the date of the alienations now in question by Madras Act III of 1895, and the limited prohibition contained in that enactment does not affect the present case. The further contention that the subsequent enfranchisement of the land from service, as by the issue of the *sanad* of 1905 in this case, would validate alienations previously made, is supported by certain observations of West, J., which appear to have been made *obiter*, in *Radhabai* v. *Anantrav Bhagvant* (2) but is opposed to the recent decision of a Full Bench of this Court in *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (28) by which we are bound, and also to an express decision of the Privy Council in *Padapa* v. *Swamirao* (25) to which our attention was drawn by the learned Advocate-General. This contention of the appellant must, therefore, be rejected.

The further contention that, assuming the Zemindari to have been held at first under the Company on service tenure, the abolition of these services would render it alienable, is supported by the judgment of West, J., in the case already referred to in which Sargent, C. J., and two other learned Judges of the Bombay Court concurred. The learned Judge observed in *Radhabai* v. *Anantrav*

Bhagvant (2): "So long as lands are assigned by the sovereign to the support of a public office, or the land tax payable on lands is remitted in consideration of services to be performed by a particular family or line of holders, the lands are according to the principles of the Hindu Law and the customary law of the country, incapable of an alienation or disposal, such as to divert them or the proceeds of them, from the intended purpose— *Ravlojirav* v. *Baliantrav Venkatesh* (29). This principle has been recognized in many decisions— *Musammat Kustoora Koomaree* v. *Monohur Deo* (30). * * * * When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate, intact and unencumbered, necessarily fails. There is not in the lands themselves, according to Hindu Law, any inherent quality limiting them to special kinds of ownership and devolution. They become subject to the ordinary laws of descent and disposal, just as where a particular custom concerning them has been abandoned; or they have passed into a family not subject to the custom."

It has been held in some later cases that in this case the learned Judges were under a misapprehension as to the service in question in that case having been abolished, but the principle laid down in the above passage was not questioned in any of these cases, nor were we referred to any authority the other way. We entirely agree with the decision of the Bombay Court on this point and have decided to follow it. It is, moreover, the principle to which the Legislature has given effect in section 8 of Regulation XXV of 1802.

In the *Narsgunty case* [*Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (31)], the Judicial Committee accepted the description of Palayagars in Wilson's Glossary as having been originally petty chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount power, but seldom paying either, and more or less independent; but as having, at present, since the subjugation of the country, by the East India Company, subsided into peaceable land-holders. There can be no doubt that Kannivadi was a Palayam of this nature. Dindigal, in which it is situated, had formed part of the dominions of Hyder and Tippoo for sometime when it was ceded to the Company by the Treaty of Seringapatam in 1792. At that time the Palayagar was not in possession, having been expelled by Tippoo for failure to pay the revenue demanded from him The Company restored the Palayam to him; and the first question for consideration, is on what terms this was done. The report of the Board of Revenue, D16, of January 1795 shows that the precise terms on which the restored Dindigal Palayagars were to hold their Palayams, had not then been settled, and that it was proposed to exact certain Kaval or Police services from them which were then necessary for the preservation of order. The Board transmitted a draft *sanad* defining the position of the restored Palayagars. The annual *sanads* subsequently issued for some years no doubt follow this draft *sanad* Exhibit E for 1796, E2 for 1797, E1 for 1800, E4 the corresponding Muchilika for 1801, and E3, the Muchilika for 1803. There can scarcely be any doubt that a similar *sanad* was issued for 1795 and the intervening years for which no *sanad* is forthcoming, and these *sanads* may be taken as containing the conditions which the restored Palayagars were required to observe. Paragraphs 1 to 5 deal with the payment of tribute, and the rendering of Kaval services. Paragraph 6 is important as showing that the Government was already impressed with the necessity of suppressing the Military service of the Palayagars as a first condition of the introduction of orderly Government. It provides that the Palayagar is to render an account of the number of armed men in the Palayam and to abide by the orders of the Government as regards the dismissal of such of them as may appear unnecessary for the performance of the duties of the Palayam, and proceeds: "Since it is the duty of the Circar to protect the country from foreign enemies, you are only to take a few of the inhabitants of the Palayam into your service." We have revised the translation as the result of the discussion during the

(29) 5 B. 437; 3 Ind. Dec. (N. S.) 288.
(30) (1864) W. R. 39.
(31) 9 M. I. A. 66; 1 W. R. P. C. 30; 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 826; 19 E. R. 666.

argument. The Palayagar was again enjoined not to take up arms "because the Company's troops have been specifically appointed for that purpose." Any breach of the conditions was to involve forfeiture. Except as to the amount of the Peishcush, the terms continued the same down to 1803 (Exhibit E3) after which there is no evidence of any exchange of *sanads* and Muchilikas.

Exhibit XXVI of 2nd of October 1799 is a proclamation by Major Bannerman, addressed to the inhabitants of the Tinnevelley Palayams after the rebellion of the Tinnevelly Palayagars, ordering the surrender of arms and threatening these who retained them, with death. In their Revenue Letter to Fort Saint George of 11th February 1881 (Fifth Report, page 51, Edition of Higginbotham) the Court of Directors sanctioned the gradual introduction of the Permanent Settlement into Madras, but laid down, page 53, that it was of first importance that "all subordinate Military establishments should be annihilated within the limits, subject to the dominion of the Company," and observed that this was so incontrovertible as to preclude all expectations to be derived from an attempt to introduce a permanent system of land revenue or the exercise of a regular judicial authority till this essential preliminary was secured. In conformity with these instructions, Lord Clive on 1st December 1801 issued a proclamation addressed to the Palayagars, Sherogars and inhabitants of the Southern Provinces announcing the determination of the Government to suppress the use and exercise of all weapons of offence without the authority of the British Government. The proclamation went on: "The Military service heretofore rendered by the Palayagars and Sherogars having been suppressed, and the Company having in consequence charged itself with the protection and defence of the Palayagar countries, the possession of fire arms and weapons of offence has manifestly become unnecessary to the safety of the people." General disarmament was, therefore, enjoined, but the Palayagars and Zemindars were permitted "to retain a certain number of persons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the Palayagars," but the number was to be fixed and the pikes issued to them stamped and registered. The proclamation concluded by announcing to the Palayagars, "the intention to establish a permanent assessment of revenue on the lands of the Palayams upon the principles of Zemindari tenure, which assessment being once fixed, shall be liable to no change in any time to come, that the Palayagars becoming by these means Zemindars of their hereditary estates will be exempted from all Military service, and that the possessions of their ancestors will be secured to them under the operation of limited and defined laws, etc." The District Judge has read the concluding paragraph, which was merely an announcement of the policy declared in the despatch from the Court of Directors, as limiting the announcement earlier in the proclamation that the Military service hitherto rendered by the Palayagars and Sherogars had been suppressed, and he has held that the intention of the proclamation as a whole was that their Military service was to continue until the issue to them of permanent *sanads*. Reading the proclamation as a whole and in the light of the despatch from the Court of Directors, we think it is clear that the suppression of Military service was intended to be unconditional.

It has, however, been contended that Military service was exacted from the Zemindar even after the proclamation, and as much importance was attached by the District Judge to the documents exhibited by the plaintiffs to show this, Exhibits D, E, F, G series, it is necessary to refer to them in some details. Exhibits D to D3 (*b*) are extracts from the Dindigal Diary kept by the successive Collectors. The other Exhibits of importance in this connection are letters written by or to this Palayagar of Kannivadi relating to the events mentioned in the Diary. The District Judge relies on these to show that after the British occupation, Military services were being rendered. Most of these Exhibits relate to the period anterior to 1801, and in many cases relate only to Police duties. Among the latter duties may be instanced the attempts made to seize an outlaw, named Tombu Gour for whose arrest a reward had been offered, referred to in Exhibit D3 (*a*) under dates September 25th, December 16th, 1796 and January 10th, 1797; and the

Collector's warning on June 10th, 1795 to the Palayagar in Exhibit D, which the Palayagar acknowledged in D4 on July 4th, 1795, against harbouring a rebel, named Gopaya Naick; and the Assistant Collector's *inayatnamah*, Exhibit D 3, dated July 25th, 1799, to the Palayagar directing him to seize some marauders, named Pujari Naick and Alwar Pillay whom the Tahsildar had been endeavouring to capture by placing a guard of peons at the entrance of the Kannivadi District, as appears from the entry of January 18th, 1799, in Exhibit D2. The Assistant Collectors's order of July 25th was acknowleged next day by the Palayagar in Exhibit D7, in which he repudiates the idea that he has been friendly with these marauders, and on January 19th in Exhibit D2 he promises the Collector not to assist them.

The Collector's directions to make good property stolen by thieves belonging to his estate in the entries in Exhibit D3 (*a*) of November 4th, 1796, of March 4th and 7th, April 16th, and September 6th, 1797, and in Exhibit D3 (*b*) under dates August 29th, September 18th and October 30th, 1797, and in Exhibit D1 under date of June 27th, 1796, merely indicate that the Kaval system, according to which Kavalgars or watchmen are held responsible for tracing the whereabouts of stolen jewels, etc., and, if they fail, are themselves required to make good the value of such articles, existed in those early times. In those days it appears from the entries of April 4th and 5th, 1797 of Exhibit D3 (*a*), from the entry of July 21st, 1798, of Exhibit D3, and from D16 that there was a Kaval fund for remunerating Kavalgars. This fund is stated in Exhibit D3 (*a*) to be quite unconnected with the Peishcush or tribute payable in 'Kists' (or instalments) by the Palayagar for his Palayam and it appears from Exhibit D16 that it was a fund raised by contributions of 'watching fees' paid by the subjects of the Crown into the hands of the Palayagars who were held responsible for its administration. This resembles the present day system under which village Kavalagars or watchmen are appointed by the villagers to watch their crops and other property, and every *ryot* contributes at the time of harvest a few measures of grain from his stock at the threshing floor for the remuneration of the Kavalgars for the current year. If the Zemindar held any lands on condition of rendering Kaval service, they must have been resumed before 1812, as will be shown later.

Again we find the Collector in Exhibit D2 on January 9th, 1799, instructing the Palayagar to arrest any Europeans (presumably deserters from the East India Company's British troops) found straying more than two miles from camp without a passport. Again in Exhibit D17 in October 1797 the Palayagar of Kannivadi is stated to have promised his assistance to the Collector against the Palayagar of Komaravadi, a deposed Palayagar who had escaped from confinement at Vellore. The nature of the assistance to be rendered is not mentioned in this Exhibit, but from Exhibit D3 (*b*) it appears that he and four or five other Palayagars were to come with their respective men and act as an escort of "Old Lucki Lakshmana Naick" in conducting him from Komaravadi as soon as the arrest of this escaped prisoner was effected.

So much for the records relating to the period before the formal abolition of Military duty.

The District Judge has concluded from certain Exhibits of a later date than 1801 that Military assistance was rendered by this Palayagar during the fighting by the Company's army against Virupakshi Naick, and against the dumb boy called Panchalakurichi Oomayana who led an insurrection against Government, and also in the rebellion of Lakshmana Naicken, in the time of Collectors Hurdis and Parish in 1803 and 1804.

An account of the part played by the Kannivadi Palayagar in connection with the fighting that took place on those occasions, is given in Exhibits F and G. Both of these records proceed from interested sources. Exhibit F is a petition signed by the Zemindar of Kannivadi in 1837 and presented to the Board of Revenue, in which he appealed for the restoration of his Palayam which had been kept under the management of Government and Exhibit G is a genealogical history of the family written by another member of the family. It was to the interest of the writers of these documents to magnify the meritorious services rendered by various

Palayagars of Kannivadi to Government from time to time. G1, G2, G4, G5, G6, G7, and G8 are records similar to G.

Exhibits G and G7 mention the fact that the Palayagar's men were then in 1804 without arms (no doubt in pursuance of Government's declared policy), and thus when they accompanied the Company's sepoys in pursuit of Lakshmana Naicken, it was necessary for Mr. Parish to arm 20 of them before they could be of any assistance to him. At the same time the work that they were expected to perform, seems to have been that of guarding roads . . . . and passes, acting as spies of the enemies' movements and as guides to the British troops through the forest tracks and hill passes. They could not fight because they had no arms. A more reliable account of what happened, is to be found in the contemporary document, Exhibit E5, of July 1st, 1804, in which it is stated that 15 men from the Kannivadi Palayagar people were sent as guides to "Captain Hamilton's army because they knew the different routes." In Exhibit D13 the Palayagar of Kannivadi reports in June 1804 to Mr. Parish that he had despatched a spy to bring intelligence regarding the rebels. It would be absurd to treat this Palayam, as a feudal fief held on condition of rendering Military service simply because the holder on one or two occassions assisted the intelligence branch of the Company's regular army.

The allusions in Exhibits D11 and D12 to "our troops" and "our detachment" in the account of the engagement with Lakshmana Naicken only show in our opinion that the Kannivadi men identified their cause with the cause of the Government, and we think that the description of fighting refers to the doings of the Company's soldiers, and does not mean that any Military establishments of the Palayagar were employed in the actual fighting.

Exhibits D10, E7, E8, E13, refer to the supply of bamboos to be paid, for the use of the British troops (evidently in order to provide them and their officers with quarters). Exhibit E6 relates to the supply of cattle (probably for feeling the troops). It was regarded as the duty of the whole population to furnish the necessary supplies against payment to the officers of Government and still more to its armed forces in the field. The practice of making such requisitions for the supply of touring officers, is not yet altogether obsolete. The fact that in the years 1803 and 1804 such requisitions were made and complied with in a few instances, does not, in our opinion, show that the Palayam continued to be held on condition of rendering Military service and still less that it was so held at the time of the alienations now in question nearly a hundred years later.

We have next to deal with the well-known Regulation XXV of 1802 on which the Permanent Settlement rests in this Presidency so far as it affects the present case. It was held by the Judicial Committee in *Collector of Trichinopoly* v. *Lekkamani and Oolagappa Chetty* v. *Arbuthnot* (24) to be clear "that the affirmative words of the second section 'that in consequence of the assessment, the proprietary right of the soil shall become vested in the Zemindars,' etc., did not either give to, or take away from, the former owners of lands not permanently assessed, any right which they then had. It merely vested in all Zemindars an hereditary right at a fixed revenue upon the conclusion of the Permanent Settlement with them. It is a maxim that affirmative words in a Statute without any negative expressed or implied, do not take away an existing right". This interpretation is strongly supported by the title of the Regulation which is "For *declaring* the proprietary right of lands to be vested in individual persons, and for defining the rights of such persons, under a permanent assessment of the land revenue". As regards the somewhat ambiguous preamble, their Lordships observed that it did not assert a right, on the part of Government to deprive or dispossess Zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue. They then proceeded to explain the sweeping statement in the preamble to Regulation XXXI of 1802 that the ruling power had in conformity to the ancient usage of the country constantly reserved to itself and had exercised the actual proprietary right of lands of every description, and that consistently

with this principle, all alienations of land, except by the consent of the ruling power, are violations of that right, and observed that "the words 'alienations of land' referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue". Finally their Lordships observed: "There is no difference in this respect (its hereditary character) between a Playam and an ordinary Zemindari. The only difference between a Palayam or Zemindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter, the Government may or may not have that power. "The latter words appear to mean that Government may in a particular case have precluded itself from raising the revenue, even though it has not issued a permanent *sanad*.

Applying these principles, their Lordships proceeded to deal with the connected case of *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (24). The judgment is appended to the judgment in *Marungapuri case* which follows *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (24). In the former case, a Razinamah was entered into in the time of the late Zemindar making the Zemindari liable for debts incurred by him. It having been held that the Razinamah could not be enforced except by suit, a suit was instituted but discontinued on the death of the Zemindar by order of the Court which directed a fresh suit to be brought against the heir when nominated. A suit was accordingly brought against the minor Zemindar in which it was claimed that the revenues and corpus were equally answerable (page 270*). The Civil Judge held the debt binding on the revenues of the Zemindari in the hands of the successors and decreed the claim to that extent. The High Court reversed this decision, and held that, as the Palayam in question was only held on life-tenure, it could not be made liable in the hands of the son for the debts incurred by the father. The Judicial Committee held that *prima facie* the Palayam was hereditary, and that being so, apparently as a matter of course, they held it liable in the hands of the son for the father's debts. If the revenues are liable in the hands of succeeding Zemindars, that is equivalent to saying that the corpus is liable and the decision would be conclusive of the present case, but for the fact that the point that the Palayam was inalienable by reason of its owing Military and Police service, was not raised. It is, however, very significant that it was not raised in that case though the defendant on the record was Mr. Arbuthnot, the Collector of Madura who represented the minor Zemindar as agent of the Court of Wards and would have been likely to know if the holders of unsettled Palayams were liable to render any services such as to render their estates inalienable and an exception to the general rule as to the "free liberty" of proprietors of land to make alienations which is conferred by section 8 of the Regulation. This contention has not been raised in any other case before the present, and this consideration adds to the already heavy burden on the plaintiff of showing the existence of the bar to alienation on which he relies.

The question of the continuing liability of the Palayagar for Police service may now be dealt with in connection with the provisions of section 5 of the Regulation. These provisions show a general intention to release land-holders from the performance of Police services except in special cases to be dealt with in the permanent *sanad* when issued and to resume all lands and *rusums* granted for Police service. The first part of section 5 provides as follows: "The Government having charged itself generally with the maintenance and support of such establishments as may be requisite in the several provinces, cities and towns for the better keeping of the Police, no lands shall be considered, as heretofore, to be holden on the condition of performing Police duties, unless the same shall be specially provided for in the *sanad-i-milkiyat i-istimrar*." With this must be read section 15, which provides that Zemindars shall aid and assist the officers of Government in apprehending and securing offenders of all descriptions, and they shall inquire and give notice to the Magistrates of robbers or other disturbers of the public peace who may be found, or who may seek refuge in their Zemindaris, an obligation which was not regarded as incompatible with the power of alienation, and is very similar to that imposed on people generally and land-owners in particular by

*Page of I I. A.—*Ed.*

Chapter IV of the Code of Criminal Procedure. Read literally section 5 operated to release all lands forthwith from the condition of rendering Police service. If this be too strict a construction, it at least shows that it was the policy of the Government to release them, and there is nothing in the Regulation to prevent effect being given to that intention without the grant of a permanent *sanad*. Police services had been required in this case by the annual *sanads* of which E3 for Fasli 1213, 1803-4 is the last. The issue of these *sanads* appears to have been discontinued and there is no evidence of any Police service being demanded after 1804. Admittedly Police service was as a rule abolished in all the Palayams and Zemindaris that received permanent *sanads*; and as will be seen, the fact that no permamens *sanad* was issued in the case, had nothing to do with the question of Police service It appears from the Fifth Report that the Kaval lands or lands granted for the discharge of Kaval duties which were quite different from those which the officers of an organized Police force are expected to perform, had been resumed before 1812, but as regards Madras, the Report does not deal with the question of Police. A Police force under officers called Darogas had been introduced but did not work well, and, in accordance with the recommendations of Sir Thomas Munro, the Court of Directors issued instructions which were embodied in Regulation XI of 1816. By this measure recourse was had to the indigenous Police system of the country. Under that system, Police as well as revenue duties had been imposed on the village headman, who was responsible as to both to the Zemindar or Palayagar where there was one. By the Regulation, the headman as regards Police duties, was made responsible to the Tahsildar or Indian Magistrate of the locality, and Zemindars were deprived of all Police powers except in so far as any of the duties of the Tahsildar might be conferred upon particular Zemindars by the Government under section 39. This the Court of Directors considered should only be done in particular cases of approved respectability and willingness to cooperate in promoting the views of the Government. Section 39 was repealed by Act XVII of 1862 as having become obsolete and thus vanished the last trace of the Police powers formerly vested in the Zamindar as head of his district. The Police Act XXIV of 1859, which took away the control of the Police from the Tahsildars and created a separate Police Department, defined Police, in section 1 as including 'general' and village Police, Cuttoobadies, Kavalgars, and all other persons who exercise any Police functions throughout the Madras Presidency. This was before the repeal of section 39 of Regulation XI of 1816, and there is no suggestion that the Kannivadi Zemindars were ever regarded as coming within this definition of Police. Be this as it may, this definition of Police was repealed by section 2 (2) of Madras Act III of 1895, which substituted the following definition. "The word Police shall include all persons appointed under this Act," thus excluding Cuttoobadies Kavalgars, etc., whose Police functions had become obsolete. The same enactment also repealed Regulation VI of 1831 which made lands held on service tenure, inalienable, and only reenacted the provision against the alienation as regards village officers, except in the Scheduled Districts. In the Scheduled Districts the prohibition against alienation was continued, not only as regards the emoluments of village officers, but also as regards "other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order." In the rest of the Presidency, the Legislature evidently thought that village offices were the only offices the emoluments of which required to be protected from alienation. This enactment, which came into force before the alienation now in question, goes far to show that at the date of that alienation, the services formerly required of the Palayagars and others had become entirely obsolete and that there was no longer any sufficient reason for prohibiting the alienation of their lands on the grounds of public policy.

It is not questioned that the issue of permanent *sanads* under Regulation XV in the terms in which they were issued, released the grantees from conditions of Police service and there is no reason to suppose that the delay in issuing the *sanads* in this and other cases, was due to any design of

retaining the right to Police services which were regarded as a thing to be got rid of as quickly as possible. In this connection an observation in *Chauki Gounden* v. *Venkataramanier* (32) which was referred to with approval by Scotland, C.J., in *Lekkamani* v. *Srimat Ranga Kristna Muttu Vira Puchaya Naikar* (33) may be cited again, and with greater force now that the assumption that Palayagars had only life-estates, has been displaced. "The Palayagar of an unsettled Palayam may, according to the generally received theory as to his rights, have only an estate for life in his Palayam; but for such an estate as he has, his relation to the Government on the one side and to the occupiers of lands within his Palayam on the other side, resembles that of a Zemindar." There is really no reason now why an unsettled Palayam should be inalienable any more than a settled one.

As regards the revenue history of this particular Palayam, in 1796, a commission reported that these Poligars should be allowed personally to retain one-third of the computed value of their land. Mr. Hurdis, who was Collector from September 1796 to December 1803, was directed to carry out a field survey and to present to the Board of Revenue a detailed report such as would enable them to arrange a Permanent Settlement (Nelson Manual Part 4, page 31). Unfortunately, as Mr. Nelson observes, he overestimated the capabilities of the District and the Permanent Settlement of Dindigal introduced on the basis of this survey had to be abandoned. Exhibit XXVI 1 (*b*) shows the total *beriz* of the Kannivadi Palayam as estimated by Mr. Hurdis. Of this the Palayagar was allowed as before provisionally to retain 30 per cent. leaving a Peishcush of Pagodas 10,897 or Rs. 38, 39 14-2 payable to Government. This Peishcush did not represent 30 per cent. of the real income, or anything like it, and owing to the defective nature of Mr. Hurdis's assessment and possibly other reasons, a permanent *sanad* was not issued to this and other Palayagars on the basis of his assessment. From 1816 to 1843 in consequence of the Palayagar's inability to pay the Peishcush, Government took the Palayam under its own management and allowed him the 10 per cent. on the net collections. In 1843 the Palayam was restored to the Palayagar. Exhibit XXVI (*c*). This Muchilika which was then taken from him, appears to proceed upon the footing that all he was liable to do, was to pay the Peishcush demanded of him and that in default of payment the Palayam was liable to be sold. It certainly goes to show that no condition of Military or Police service was recognised as existing at that time. Exhibits XXII*g* and XXII*h*, dated 9th July 1843 are mortgages of the Zemindari to pay previous debts and save the Zemindari from annexation by Government. Exhibit XXIII is a lease for 30 years, dated 20th July 1861 in discharge of debts which are stated to have been contracted by the Zemindar himself, his father and his ancestors. Exhibit H series show that negotiations went on for some years after this as to the grant of a permanent *sanad* and that Government were prepared to grant a permanent *sanad* without increasing the Peishcush, but that this intention was not carried into effect in the supposed interest of the Zemindar himself. Exhibit H5. Nothing is to be found about any Military or Police service in this correspondence. In 1881 on the death of the Zemindar Bangaru, who had executed the lease of 1861, his brother who succeeded, brought a suit to recover the Zemindari from the lessee. In his plaint he raised the contention that the alienations of his predecessors were not binding on the estate in his hands, and this was the subject of the fourth issue. It was not, however, suggested that the inalienability depended in any way on the duty of rendering Military and Police service. The District Judge held that the lease was not binding on the plaintiff as a lease but was binding on him as a mortgage, and gave a decree for redemption. Before the High Court, the Zemindar does not seem to have pressed the appeal on the ground that the alienations by his predecessors were not binding upon him. Probably the decision of the Privy Council in *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (24) was held conclusive on this question. In the High Court the controversy

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(32) 5 M. H. R. 208.
(33) 6 M. H. C. R. 208.

appears to have been as to the amount of the mortgage debt. In connection with this litigation and the subsequent redemption, the Zemindar contracted usufructuary mortgages, Exhibits 7, 3, 5, 9, 6, 7*a*, 4, 22 series 8 and 10, and lastly a consolidating mortgage Exhibit 2 on 14th December 1895 and a supplementary mortgage Exhibit 18, dated 10th February 1898. Exhibit 2, to which the then Zemindar and his son the father of the present plaintiff were parties, was for upwards of ten lakhs of rupees.

The Bank brought Original Suit No. 23 of 1897 on this mortgage and obtained a consent decree for sale against the Zemindar and his son on 16th August 1898, Exhibit XV*d*, by which the defendants were to pay Rs. 13,15,000 on or before 15th August 1900 and the estate was to be sold in default. The plaintiff's grandfather died on 16th July 1899. On 14th March 1900, the Bank applied for an order absolute for sale under section 89 of the Transfer of Property Act, and on 21st March 1900 the Court made the order as follows: "Defendant by Mr. Subramania Aiyar does not put forward any objection. Decree made absolute". The estate was subsequently sold and purchased by the Bank, who obtained a *sanad* in 1905, and then sold it to the present 1st defendant. The plaintiff's father died on 24th May 1911, and it was in the present suit instituted on 23rd July 1914, that the contention that the Zemindari was inalienable on account of the Zemindar's liability to render Military and Police services, was raised for the first time.

In our opinion this contention is only an ingenious afterthought. The liability of these unsettled Palayams for ancestral debts was treated by the Privy Council in *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (24) as necessarily following from the establishment of the hereditary nature of the estate. There are now no Police or Military services to be rendered. In this particular estate there have been continued alienations by way of mortgage which have been treated as binding by succeeding Zemindars. Though the contention that they were not binding, was raised in the litigation of 1881, this was not on the ground of any Military or Police service, and the contention was not pressed in the High Court. Lastly, the fact that the plaintiff's father was a party to the mortgage of 1895 and to the consent decree and did not object to the sale, shows that the alienable character of the Zemindari was fully recognised.

The learned Advocate-General has relied on certain decisions such as *Narayana* v. *Chengalamma* (21) and *Udayarpalayam case* [*Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar* (6)] and *Ramnad case* (34) in which it was held that certain Zemindaris restored by British Government to the heirs of the former Zemindars were restored with the incident of impartibility which had originally attached to them in their character of petty chieftains rendering service to the paramount power, but these cases did not decide or proceed on the footing that any such services were still to be rendered; and, as those were cases in which a permanent *sanad* had been issued, it is clear that there were no such services in existence at the date of suit. He also relied on certain decisions as to Ghatwal tenures in Northern India, but in these cases the succession is not purely hereditary, and Government by the exercise of the right to choose the successor from and among the heirs, manifests its continued recognition of the office of Ghatwal even though the duties have become nominal. On a full consideration of the whole question, we are unable to agree with the District Judge, and have come to the conclusion that the Military and Police services for which the Zemindar was at one time liable, had been abolished long before the alienations in question, even though Government for quite other reasons had delayed the issue of a *sanad* under Regulation XXV of 1802 by which the Peishcush payable by him as a peaceable land-owner exempt from such services, would have been finally settled.

The only remaining question is whether the suit is barred on the ground that, when the suit was instituted, more than twelve years had elapsed from the time when the 1st defendant's vendor got into possession under their purchase at the Court auction. There can be no

(34) 24 M. 613.

doubt that, assuming the estate of the Zemindar to be for life only as contended by the plaintiff, the Zemindar for the time being would ordinarily represent the estate as held in *Radhabai* v. *Anantrav Bhagvant* (2) and numerous other cases, and that, therefore, time would have begun to run against the plaintiff's father from the date when the Bank got possession and the suit would be barred as more than twelve years had elapsed before it was instituted. The question, however, arises whether the plaintiff's father had not debarred himself from suing to recover possession and whether time did not begin to run only from the date of his death and plaintiff's succession. As has been already stated, the plaintiff's father joined in the mortgages of 1895 and consented to the decree being passed against him for the sale of the Zemindari and personally for the mortgage debt and did not object to the order for sale. At the date of the mortgage and the consent decree, he was only a reversioner with a *spes successionis* and had no power to alienate his interest in the Zemindari either by executing the mortgage or consenting to the decree, and these alienations did not take effect against him when he succeeded, as held in *Ramasami Naik* v. *Ramasami Chetti* (3), which is in accordance with a very recent decision of the Judicial Committee not yet reported*. At the date, however, of the application for the order for sale, which he did not oppose, the plaintiff's father had succeeded to the estate, and his life-interest in the Zemindari was liable to be attached and sold in execution of the consent decree in so far as it made him personally liable. If the consent decree had been for sale only, it may be that the sale would not have passed his life-interest even though he did not oppose the order for sale, but he was also personally liable on the decree and at the date of the application for the order for sale, he had no answer to an application for the attachment and sale of his life-interest in execution of the decree against him personally. In these circumstances, it may be that the sale was binding on his life-interest; and, if so, it is argued he was not in a position to sue for possession and that his successor had a fresh starting point. The starting point under Article 142 is the date of the dispossession or discontinuance. To avoid the bar, it would apparently be necessary to hold that the fact that the plaintiff's father had debarred himself from suing for possession, took the case, not only out of Article 142 but also out of Article 144, as the present plaintiff's father would appear to come within the word 'plaintiff' as used in that Article, and to make Article 120 applicable to the case. The starting point in that Article is, when the right to sue accrues, and there would be no difficulty in holding that the right to sue does not accrue until there is some one who can sue successfully. See *Murray* v. *East India Company* (35), *Musurus Bey* v. *Gadban* (36), and the recent decision of the Privy Council in *Soona Mayana Kena Roona Meyappa Chetty* v. *Soona Navena Suppramanian Chetty* (37) in the view we take of the other question, it is unnecessary to discuss or decide the point. In the result the appeal must be allowed and the suit dismissed with costs throughout.

M. C. P.

Appeal allowed.

(35) 5 B. & Ald 204; 106 E. R. 1167; 24 R R. 325.

(36) (1894) 2 Q. B 352; 63 L. J. Q. B. 621; 9 B. 519; 71 L. T 51; 42 W. R. 545.

(37) 35 Ind. Cas. 323; 43 I A. 113 at p 120; 20 C W. N. 833; (1916) 1 M. W. N. 455; 18 Bom. L. R. 642; 85 L. J. P. C. 179 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 905 OF 1915.

April 5, 1918.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice and Mr. Justice Marten.

DADOO BHAOO AND OTHERS—DEFENDANTS —APPELLANTS

versus

DINKAR VISHNU APHALE—PLAINTIFF —RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), ss. 3 (20), 217—"Alienated village," what is—Village in which the entire property in the soil has been granted, whether alienated.

In the definition of the word "alienated" in section 3 (20) of the Bombay Land Revenue Code the words "transferred in so far as the rights of Government to payment of the rent or land revenue are concerned,"

*Since reported as *Amrit Narayan Singh* v *Ganga Singh*, 44 Ind. Cas. 408; 7 L. W. 581; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 20 Bom. L. R. 546; 45 C. 599.—*Ed.*

prescribe a certain minimum requirement, and where that minimum requirement is satisfied, the definition also is satisfied, notwithstanding that the transfer may cover certain other interests over and above those contained in the minimum requirement. [p. 746, col. 2; p. 747, col. 1.]

Where the Government has transferred to the grantee of a village not merely its own rights to receive the land revenue but the entire property in the soil, the village is an "alienated" one within the meaning of section 3 (20) of the Bombay Land Revenue Code and section 217 of the Code is applicable to it. [p. 747, col. 1.]

Second appeal from the decision of the First Class Subordinate Judge, with Appellate powers at Satara, in Appeal No. 122 of 1913, reversing the decree passed by Second Class Subordinate Judge at Karad, in Civil Suit No. 1513 of 1910

Mr. *Coyajee* (with him Mr. *S. S. Patkar*), for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

BATCHELOR, ACTING C. J.—The suit out of which this appeal arises, was filed by an Inamdar to eject the defendants. One of his pleas was that the defendants Nos. 1 to 3 were his yearly tenants. The plaintiff's position as an Inamdar was conceded, but his claim to own the Mirasi or occupancy rights in these lands, was denied by the defendants, and the only question which we have to decide, is whether the plaintiff's claim to these Mirasi rights should be allowed.

The first Court held against the plaintiff upon this point, but that decree was reversed on appeal, and the present appeal is brought by the defendants Nos. 2 to 5. It seems clear that prior to 1880, the plaintiff's position as Inamdar was accepted, and gave rise to no disputes. But in 1880 the Survey Settlement was introduced into this village, and in the Settlement Register the present appellants were entered as the Khatedars. Since 1880 admittedly they have been cultivating the lands, paying only a sum equivalent to the annual assessment.

The contention for the defendants is that, by virtue of the provision of section 217 of the Bombay Land Revenue Code, the effect of the introduction of the Survey Settlement in 1880, was that thereafter the defendants had the same rights in respect of these lands in their occupation, as holders of land in unalienated villages had, and have, under the provisions of the Bombay Land Revenue Code.

It is not denied by Mr. Rao on behalf of the respondents that if section 217 is to be applied to the facts of this case, then the defendants' contention must prevail. But Mr. Rao urges that section 217 is not applicable to the present facts, because the village in question is not an alienated village within the meaning of that expression as it is defined in clause (20) of section 3 of the Bombay Land Revenue Code.

The sole question, therefore, for our determination in this appeal is whether the village is or is not an alienated village within the definition. The definition runs in these words: "alienated" means "transferred in so far as the rights of Government to payment of the rent or land revenue are concerned, wholly or partially to the ownership of any person." Now the fact which we have found for us here is that, by the grant of this village to the plaintiff's predecessor-in-title, there were transferred to him not merely the Government's rights to receive the land revenue, but the entire property in the soil. That being so, the learned Pleader for the respondents contends that the transfer was not such a transfer as is referred to in the definition, but was a transfer in excess of the definition.

The actual point before us was considered by my learned brother Beaman in *Pandu* v. *Ramchandra Ganesh* (1). The decision there being the decision of a single Judge is of course not binding upon us, but equally of course it is entitled to careful consideration at our hands. In that judgment my learned brother referred to the argument that in the definition of "alienated," the greater must include the less, and I must confess that I have never been able to escape from the weight of this argument. It appears to me that the words "transferred in so far as the rights of Government to payment of the rent or land revenue are concerned," prescribe a certain minimum requirement, and where that minimum requirement is satisfied, the definition also is satisfied, notwithstanding that the transfer may

(1) 43 Ind. Cas. 738; 42 B. 112; 20 Bom. L. R. 16.

cover certain other interests over and above those contained in the minimum requirement.

Adapting the words of the definition to the facts of our present case, it seems to me strictly true to say that in the case of this village there were transferred to the plaintiff's predecessor the rights of Government to payment of the rent of land revenue. And I am myself unable to see how that statement becomes less true because over and above those rights, other interests were also conveyed. I cannot but think that if the object of the draftsman had been to exclude all those cases where the transfer involved other interests than those which I have described as the minimum requirement, he would have altered the phraseology of the clause, as, for instance, by the insertion of the word "only" after the words "in so far," or, better, by the addition of clear words expressly excluding the case where other and larger interests were transferred. It appears to me, therefore, on the best consideration that I can give to the actual words of the clause, that those words are in favour of the defendants' argument.

It may also be observed that the Land Revenue Code appears to recognise only two clauses of property of this description, namely, "alienated" and "unalienated." Unquestionably the village in this case is not an unalienated village. I think, therefore, that within the meaning of the Land Revenue Code it must be regarded as an alienated village. That that was the view of the Government itself, seems to be beyond all doubt, for, in 1880, as I have said, the Survey Settlement was introduced into this village under the provisions of section 216 of the Bombay Land Revenue Code as into an alienated village. It has not been suggested to us in argument that Government would have had any title or pretext for introducing the Survey Settlement into this village, except on the footing that the village was an alienated village within the definition in the Land Revenue Code. And though I feel the force of my brother Beaman's argument as to the scope and character of the Land Revenue Code, it may, I think, be fairly stated that the Code, whatever may have been its original intention, is not now confined to a scheme for regulating the rights of Government as against the agricultural payers of assessment. There are many sections of the Code which indicate a somewhat larger object, and among them I may notice sections 83, 86 and 88.

On these grounds, it appears to me that the weight of the argument is in favour of the view that this is an alienated village, notwithstanding that the whole property in the soil was granted by Government to the plaintiff's predecessor. If that is so, then admittedly section 217 applies to the case, and the decree under appeal must be reversed. I would, therefore, reverse that decree and restore the decree of the trial Judge with costs throughout.

MARTEN, J.—I agree. The question in this case is whether the suit lands are in an alienated village within the meaning of the Land Revenue Code. That in its turn depends on the definition of "alienated" in section 3, sub-section (20) of the Code which runs as follows: 'Alienated' means transferred in so far as the rights of Government to payment of the rent or land revenue, are concerned, wholly or partially to the ownership of any person."

Now in fact in the present case the rights of Government to payment of land revenue have been transferred to the ownership of a person. Therefore, the definition has been satisfied in the present case, if one regards it as imposing a minimum requirement for "alienation" within the meaning of the Code.

But the rights of Government to the rent or to the soil itself have also been transferred. It is, accordingly, said by the respondents that the above is not the correct view of the definition, and that the intention of the Legislature is to impose not a minimum, but an absolute, requirement. The alienation must be of the land revenue neither more nor less. Consequently the definition must be read just as if the word "only" had been introduced into it so that it would run "in so far *only* as the rights of Government to payment, etc., are concerned." In my opinion, this view of the respond-

ents as to the meaning of the definition is not correct. I think the definition in its ordinary language merely imposes a minimum requirement, and as that minimum requirement has been satisfied in the present case, it is immaterial that further rights in addition to the mere land-revenue rights were also granted.

It is, however, said that this is contrary to what the Government or the Legislature must be presumed to have intended. I think the best way of gathering those intentions, is to pay close attention to the exact language which is used. But supposing one goes outside the language of the Code, and sees what view Government has taken in practice, one finds that so far from Government thinking that it had no further interest in lands where it had granted the land revenue rights as well as the rights to the soil and that consequently the Code was not to apply to such lands, Government introduced in 1881 at the request of the Inamdar the Settlement Survey under the Code into this very village. Therefore, so far as the intention of Government (if not of the Legislature) can be ascertained, one sees in their acts that they applied, and thought they were entitled to apply, this Code to this particular village, and I think it is an obvious inference that they thought that this particular village was an alienated village within the meaning of the Code.

I think there is also some substance in what Mr. Coyajee has urged before us as to the use of the word "rent" or "land revenue." But I do not base my judgment on that. I rely, so far as the words of the Code are concerned, on the Code itself.

I think it is also noticeable that the plaintiff himself has acted as if the Code applied to this land, for he has put in force certain powers under the Code, or has applied to the Collector to put in force certain powers under the Code, which, as I understand the facts, could not be done unless the village was an alienated village whithin the meaning of the Code.

One may also observe that, as my Lord the Chief Justice has pointed out, one cannot say that the Code is merely confined to Government lands. At any rate, as a result of later amendments, we have the Record of Rights which applies to all lands. Possibly that point does not apply here, because the material date here is, I suppose, 1881. But as pointed out by Mr. Coyajee, there are certain other sections in the Act which would still apply to land in which the Government would not necessarily retain any rights.

As regards the case of *Pandu* v. *Ramchandra Ganesh* (1), I have given it my best consideration, but I think the learned Judge really took the same view, at any rate in the first instance, as we take of the words of the Act. As I read his judgment, he was only perhaps over-persuaded by the possible results that might follow from adopting what is, I think the literal interpretation of the Act. Personally I think it is safer to adopt a literal interpretation of the Act. And if we are really erring in thus ascertaining the intention of the Legislature, then it will be for the Legislature to make an appropriate amendment. If any such amendment is made, or even, if no such amendment is made, I hope the authorities may at some comparatively early date, see their way to have a re-enacting Code which collects in one single Act of the Legislature all those various amendments which have been made since 1879. It is now extremely embarrassing for the ordinary practitioner to try and find his way through these various Acts and amending Acts that have taken place over all these years. And one is almost bound to rely on some text-book which has done this work, which, in my opinion, is more properly done by a consolidating and amending Act. This is, I think, nonetheless necessary, because the Act seems to me to be a particularly difficult one to construe, at any rate, as regards some of its provisions.

I agree that this appeal must be allowed, and that the order of the trial Judge must be restored with costs throughout.

Appeal allowed;
Decree reversed.

SEETHARAMA AYYAR *v.* NARAYANASWAMI PILLAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 128 OF 1917.

March 8, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

SEETHARAMA AYYAR AND ANOTHER—DEFENDANTS NOS. 1 and 2—APPELLANTS

versus

NARAYANASWAMI PILLAI AND ANOTHER—PAINTIFF AND DEFENDANT NO. 3—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 130—'Actionable claim,' assignment of—Assignment effected by entry in accounts, validity of 'Instrument in writing,' meaning of—Novation, absence of, whether material—Contract Act (IX of 1872, s. 62, scope of.

The words 'instrument in writing,' in section 130 of the Transfer of Property Act, do not mean a document couched in technical language or in any particular form. What is intended is that the transfer should be made in writing and it is sufficient if the intention of the creditor to transfer the debt due to him to the transferee, can be gathered from the writing. [p. 749, col 2, p. 750, col. 1.]

After the date of the transfer, the transferee is the only person entitled to sue for the debt. [p. 750, col. 1.]

An assignment made in a statement of accounts by way of an entry is an assignment within the section [p. 750, col. 1.]

An assignment does not become invalid for want of consent of the original debtor or by reason of the absence of a novation of contract. [p. 750, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam dated the 31st of August 1916, in Appeal Suit No. 5 of 1916, preferred against the decree of the Court of the District Munsif of Tiruvalur, in Original Suit No. 275 of 1914.

FACTS appear from the judgment.

Mr. *T. R. Ramachendra Aiyar* (with him Mr. *T. R. Krishnasami Aiyar*), for the Appellants.—The transfer of the debt is contained in a mere entry in an account. The assignment of an actionable claim must be in a formal document signed by the transferor or his agent. A mere entry in an account book is not an instrument in writing.

In this case, the original debtor was not a party to the transfer. There is no novation or substitution of contract as contemplated by section 62 of the Contract Act.

Mr. *T. V. Gopalaswami Mudaliar*, for the Respondents.—The entry in the account book fulfils all the requirements of section 130 of the Transfer of Property Act. The assignment is in writing, the intention to transfer is clearly expressed and it is signed by the assignor. These are the only requisites for transfer of actionable claims. No particular form of transfer is prescribed by the section.

Section 130 of the Transfer of Property Act is not controlled by section 62 of the Contract Act. This is not a case in which a debtor substitutes a new contract for the old one. Section 130 deals with cases of transfer by the creditor to which the debtor need not be a party.

The second appeal coming on for hearing, the Court delivered the following

JUDGMENT.—There was a settlement of accounts between the plaintiff and the guardians of the defendants Nos. 1 and 2 and in that settlement a sum of Rs. 600 due from one Sambamoorthia Pillai, husband of the 3rd defendant, is alleged to have been assigned to the plaintiff by the guardians of defendants Nos. 1 and 2. The first question that arises, is whether there was such an assignment as is contemplated by section 130 of the Transfer of Property Act. There is no question but that the sum of Rs. 600 was in fact due from the 3rd defendant's husband to defendants Nos. 1 and 2. Section 130 (1), Transfer of Property Act says "The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent and shall be complete and effectual upon the execution of such instrument and thereupon all the rights and remedies of the tranferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not." The instrument in writing which is put forward as an assignment in this case is in these words 'By way of direction given to receive the principal of Rs. 600 and interest due by Kathoor Sambamoorathia Pillai Rs. 600." It is an entry signed by the guardians of defendants Nos. 1 and 2 in a statement of accounts, and it is argued that this is not an instrument in writing within the meaning of section 130, Transfer of Property Act. The learned Pleader for the 1st respondent has not cited to us any authority in support of the contention. The words "instrument in writing" do not seem to us to mean a document couched in technical language or in any particular form. All that is ap-

parently intended is that the transfer should be made in writing. It is well established law that assignment of a chose in action does not require any particular form of conveyance or words of transfer. It is sufficient if the intention of the creditor to transfer the debt due to him to the transferee, can be gathered from the writing. The fact that the assignment is made in a statement of accounts by way of an entry, would not make any difference and, in the absence of authority, we are not prepared to uphold the contention of the Pleader for the 1st respondent on this point. There being an assignment within the meaning of section 130, Transfer of Property Act, the debt vested in the plaintiff from the the date of the assignment and he would, therefore, be entitled to sue for it. The section itself expressly says that all the rights and remedies of the transferor shall vest in the transferee even without any notice of the transfer being given to the debtor though, if no notice has been given and the debtor pays the debt to his original creditor, he will be absolved from liability to the transferee of the debt. This is made clear in a decision of this Court in *Gopalakrishna* v. *Gopalakrishna* (1). It was also ruled by a Full Bench of this Court in *Muthukrishna Aiyar* v. *Vera Raghava Aiyar* (2) that "the rights of the transferor being vested in the transferee by the express words of the section, the transferee is the only party entitled to sue". In laying down this proposition, the learned Judge followed the ruling of the Privy Council in *Shyam Kumari* v. *Rameswar Singh* (3). We cannot, therefore, agree with the lower Appellate Court in holding that defendants Nos. 1 and 2 are solely entitled to sue the husband of the 3rd defendant for the amount due to them; on the contrary they have no interest on which they can sue.

The Subordinate Judge argues that, as there was no novation of the contract in the case inasmuch as the 3rd defendant's husband was not a party to the arrangement between the plaintiffs and the guardians of the defendants Nos. 1 and 2, there is no substitution of the original contract by any new contract. But section 62 of the Indian Contract Act which deals with the effect of novation, is a general provision of law relating to substitution of the contract by another. To such a substitution, all the persons concerned must be parties. But section 130, Transfer of Property Act, providing for transfer of claims is a specific provision which cannot be affected by the general rule relating to novation of contracts as enacted in section 62, Indian Contract Act.

Section 62, Indian Contract Act, covers cases in which the liability of a debtor to pay to his original creditor is extinguished because of a new contract by which he has made himself liable to a third person. But section 130, Transfer of Property Act, provides for transfer of choses in action by the person to whom the amount is due to a third person. It does not deal with cases of transfer of the liability of a debtor to somebody else. The debtor, it is well established, cannot transfer his liability without the consent of his creditor. We are, therefore, of opinion that the Subordinate Judge's judgment is wrong and liable to be set aside as it proceeds upon an erroneous view of the law.

We set aside the judgment of the Subordinate Judge and restore the decree of the District Munsif with costs here and in the Court below.

M C.P.

Appeal allowed.

(1) 4 Ind. Cas 420; 33 M. 123 at p. 129; 7 M. L. T. 97.

(2) 21 Ind. Cas 316; 38 M 297; 25 M. L. J. 356; (1913) M W. N. 839; 14 M. L. T. 411.

(3) 32 C 27; 31 I. A. 176; 8 C. W. N. 786, 6 Bom. L. R. 754; 8 Sar. P. C. J. 688 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 14 OF 1915.

November 9, 19 7.

Present:—Mr. Crouch A. J. C. and Mr. Hayward, A. J. C.

NOTANDAS—APPELLANT

versus

KISHNIBAI—RESPONDENT.

Probate and Administration Act (V of 1881), ss. 76, 98—Orders for exhibiting accounts, scope of.

NIJALINGAPPA NIJAPPA HALAGATTI *v.* CHANABASAWA SATAVIRAPPA NESARI.

Sections 76 and 98 of the Probate and Administration Act contemplate orders merely directing the exhibiting of accounts in Court. Orders purporting to fix the capital of the trusts and giving directions for their administration are entirely outside the scope of these sections.

Appeal against the order of the Joint Judge, Sukkur.

Mr. *Isardas Oodharam*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for the Respondent.

JUDGMENT.—This is an appeal against two account orders passed by the joint Judge of Sukkur-Larkana purporting to be under the Probate and Administration Act.

It appears that the appellant Notandas is a trustee under the Will of one Doulumal, who died in 1913, leaving his property in trust for the provision of a small monthly pension to his widow Kishnibai, and for the distribution of the remainder in charity. The appellant obtained Probate of the Will in Certificate Case No. 37 of 1903 in the District Court of Sukkur-Larkana, and that Probate order was confirmed in May 1906, by the Sadar Court of Sind. The respondent Kishnibai subsequently filed a suit against the trustee claiming the whole of the estate on the ground that the Will was void for uncertainty. That suit was dismissed and the dismissal confirmed on appeal in 1909 by this Court.

The appellant appears, after obtaining Probate, to have submitted accounts from time to time, though the actual accounts have not been placed before us. But such documents as have been included in the paper-book, show that such accounts were filed and examined by the officers of the District Court, Sukkur-Larkana. It is said that these accounts were finally passed on the 2nd December 1911. The respondent Kishnibai will not admit that, though she is not prepared to deny that the accounts were submitted and passed. It is difficult to believe that those accounts were not finally passed in the course of the eight years which elapsed between the death of the testator and the alleged final order of 1911 of the District Court. But, however that may be, it seems to us quite clear that the orders now in question dated the 9th April 1915 and 19th May 1915 were not orders merely exhibiting the accounts in Court as contemplated by sections 76 and 98 of the Probate and Administration Act. These orders purport to fix the present capital of the trust at some Rs. 30,000 *i. e*, the capital as it stood some 12 years after the death of the testator. They further go on to provide for the future administration of the trust making directions for the manner in which the pensions should be paid out of the trust funds and the repairs effected out of the trust property and finally ordering that further accounts should be submitted half-yearly to the Court. We agree with the decision of the learned Judicial Commissioner in the case of *Hemandas Ramrakhiomal* v. *Chellaram Dhalloomal* (1) that such orders are entirely outside the scope of sections 76 and 98 of the Probate and Administration Act.

We, therefore, set aside these orders and allow this appeal with costs.

Orders set aside; *Appeal allowed.*

(1) 32 Ind. Cas. 554; 9 S. L. R. 134.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 44 OF 1917.

March 22, 1918.

Present:—Sir Stanley Batchelor. KT., Acting Chief Justice, and Mr. Justice Marten.

NIJALINGAPPA NIJAPPA HALAGATTI—DEFENDANT NO. 1—APPELLANT

versus

CHANABASAWA SATAVIRAPPA NESARI—PLAINTIFF—RESPONDENT.

Mortgage—Mortgagee in possession—Redemption—Improvements, cost of, whether must be paid—Transfer of Property Act (IV of 1882), ss. 63, 72, 76.

The Transfer of Property Act is silent upon the question of a mortgagee's right to recover from his mortgagor the reasonable and proper costs of lasting improvements effected by him on the mortgaged property This, however, does not mean that the intention of the Legislature was that this right should never be recognised. In a proper case, therefore, a mortgagee should be allowed the benefit of money

laid out by him on lasting improvements, so far as it has enhanced the value of the mortgaged property. [p. 752, col. 2; p. 753, col. 1.]

Per *Marten, J.*—In allowing costs of improvement the Court should be on its guard against extravagant or unfounded claims, it should enquire strictly into the *bona fides* and fairness of the claim in each particular case. [p. 753, col. 1.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 3 of 1916.

Mr. *H. C. Coyajee* (with him Mr. *A. G. Desai*), for the Appellant.

Mr. *Dhirajlal K. Thakore*, (with him Mr. *K. H. Kelkar*), for the Respondent.

JUDGMENT.

BATCHELOR, ACTING C. J.—This was a suit to redeem a mortgage. The mortgagee, who had gone into possession, claimed to be entitled to recover upon redemption the costs of a certain lasting improvement which, as he alleged, he had made in the property. The property mortgaged was agricultural land, and the lasting improvement claimed by the mortgagee was the sinking of a well in this land. Admittedly the well was sunk, and though the exact effect of the sinking of it on the character of the land, has not been determined, it appears from the judgment of the trial Court that there is good reason to suppose that the profits of the land were increased by reason of the sinking of the well. The mortgagee's claim on this head has been disallowed by both the lower Courts and this appeal is consequently brought by the mortgagee, who contends that, on the facts found, he ought to be held entitled to cast upon the mortgagor the reasonable costs incurred by him in the digging of the well.

The point is not perfectly clear by reason of the silence of the Transfer of Property Act upon the question of the mortgagee's rights to recover from his mortgagor the reasonable and proper costs of lasting improvements. It is consequently contended on behalf of the respondents that a mortgagee in India is not entitled to make any such claim. In support of that argument Counsel cited the decision of the Madras High Court in *Arunachella Chetti* v. *Sithayi Ammal* (1). No doubt if reference be made to the phraseology of section 72 of the Transfer of Property Act, there is room for the contention that the mortgagee is not entitled to improve the property, though he may spend money in preserving it, and in managing it, as a person of ordinary prudence would manage it, as he is required to do under section 76. I am also bound to admit that I do not think that the case before us can fairly be brought within the purview of section 63 of the Act, which makes provision for accessions to mortgaged property.

I think we are confronted with the plain question whether the silence of the Transfer of Property Act upon this point should lead the Court to decide that a mortgagee in India is never entitled to recover from his mortgagor the reasonable costs incurred in lasting improvements. In my opinion this question should be answered in favour of the mortgagee. If the Indian Statute had expressly deprived the mortgagee of this right, there would of course be an end of the matter. But the Statute has not done so, and from its mere silence, I am not prepared to infer that the intention of the Legislature was that this right should never be recognised. The right was considered by the Privy Council in *Henderson* v. *Astwood* (2), where Lord Macnaghten, in delivering the judgment of the Board, in speaking of the then mortgagee, one Davies, says: "It would be contrary to common justice to deprive Davies of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of the premises". Then reference was made by his Lordship to *Shepard* v. *Jones* (3), where the whole law on this subject, as it prevails in England, is expounded by the Court of Appeal. It seems to me probable that the silence of the Indian Legislature upon this point is to be ascribed rather to a desire to confine the codified law to broad general provisions than to a deliberate design to deprive the mortgagee in suitable cases of that which their Lordships of the Privy Council regard as common justice.

I think, therefore, that the lower Appellate Court's decree must be reversed, and there must be a remand of the case to

(1) 19 M. 327; 6 Ind. Dec. (N.S.) 933.

(2) (1894) A. C. 150 at p. 163; 6 R. 450.

(3) (1882) 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308.

the District Court in order that all the requisite questions may be considered and decided. These questions of fact will be : (1) What sum of money was spent by the mortgagee on the digging of the well ? (2) Was that a reasonable and proper sum for a mortgagee to spend, having regard to the total value of the property mortgaged ? And (3) Was the well a lasting or permanent improvement enhancing the value of the property ? If all these questions are answered in the mortgagee's favour, then, in my opinion, he is entitled to recover the fair amount of his expenditure from the mortgagor in so far as it has enhanced the value of the property, in addition to Rs. 600 found due at the foot of the mortgage. Costs costs in the suit.

MARTEN, J.—I agree. As regards the point under the Transfer of Property Act, I think that the silence of the Act does not prevent us from doing what is spoken of by their Lordships of the Privy Council in *Henderson* v. *Astwood* (2) as common justice, namely, in a proper case to allow a mortgagee the benefit of money laid out by him, so far as it has enhanced the value of the mortgaged property.

As regards the merits of the case, so far as we have them before us, I may repeat what Sir George Jessel said in *Shepard* v. *Jones* (3) : "All I can say is, that there being in my opinon a *prima facie* case that the property was increased in value, it is fair that there should be an inquiry to ascertain whether it was so increased. Of course that inquiry will be whether any and what sum ought to be allowed in taking the accounts of the defendant by reason of lasting improvements, and that will leave the whole case open." I, therefore, agree with the inquiries which my Lord the Chief Justice has directed to bring out these points.

I will only add that in allowing costs of improvements the Court must naturally be on its guard against extravagant or unfounded claims. It was said in argument that if we were to allow a mortgagee to charge for improvements, the Courts might be exposed to all sorts of extravagant demands on the part of mortgagees. The answer is that the Court should inquire strictly into the *bona fides* and fairness of the claim in each particular case.

Decree reversed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3246 OF 1915.

April 26, 1918.

Present:—Justice Sir John Woodroffe, KT., and Mr Justice Smither

NAGENDRABALA DASSY—DEFENDANT—APPELLANT

versus

AMRITA LALL CHATTOPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Darputni *lease*—*Sum payable by* darputnidar *to superior landlord, whether rent*—*Revenue and cesses paid by* darputnidar, *whether can be deducted.*

Under the terms of a *darputni* lease out of Rs. 142 fixed as the *darputni* rent, the *darputnidar* had to pay Rs. 112 to the superior landlord of the *putnidar* and the balance Rs 30 to his landlord, the *putnidar*:

Held, (1) that the sum of Rs 112 payable to the superior landlord of the *putnidar* was rent; [p. 754, col. 1.]

(2) that the sum of money which the *durputnidar* paid into the Collectorate as revenue and cesses on behalf of the superior landlord by his direction could not be disallowed as a voluntary payment, and that the *darputnidar* should get credit for the same in respect of the rent payable by him. [p. 754, col. 1.]

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 26th of November 1915, reversing the decree of the Munsif, Lalbagh, dated the 24th of May 1915.

Babu *Tarak Chandra Chakrabarty*, for the Appellant.

Babu *Tarakeswar Pal Chowdhury*, for the Respondents.

JUDGMENT.—The plaintiff is the Putnidar. The defendant is Darputnidar. Under the terms of the document under which the defendant Darputnidar holds, Rs. 142 was fixed, to use the language of the document as the annual rent. The meaning, therefore, of this description of annual rent is that this money is primarily payable by the Darputnidar to his superior landlord, the Putnidar. But in conformity with a common arrangement entered into, to provide for cases in which the Putni is sold and

the Darputnidar's interest thereby is in danger, it was arranged that of the sum of Rs. 142 payable to the plaintiffs Rs. 112 should be paid by the Darputnidar to the superior landlord and the balance Rs. 30 should be paid by the Darputnidar to his landlord, the Putnidar.

Now, the defendant expressly covenanted to pay this sum, and that sum has not been paid. The effect of the document is that the defendant must pay Rs. 112 to the plaintiff unless the defendant can produce a receipt from the landlord for that amount.

It was argued that the sum of Rs. 112 was not rent, because it was assigned to the landlord. There is nothing here which establishes the fact that the landlord released the Putnidar from his liability to pay rent. In the result the first ground upon which the appeal is based, fails.

The second ground, I think, has been made out. It is that the lower Appellate Court is wrong in not giving credit to the defendant for the amounts paid as revenue and cesses on behalf of the Zemindar. The lower Appellate Court rejected the defendant's claim to deduct the sum of Rs. 164-10-4½ on the ground that it was a voluntary payment. This money was, it is said, paid into the Collectorate by the direction of the superior landlord of the plaintiffs. There is a clear finding that the defendant paid altogether Rs. 164-10 4½ into the Collectorate as revenue and cesses due by Biseswari Dasi, the superior landlord of the plaintiffs. Looking at this matter substantially the money was paid to the plaintiffs, for the money was payable in the first instance, as I have already held, to the plaintiffs under the document, though by an arrangement between the Putnidar and the Darputnidar there was a direction that Rs. 112 of this money should be paid to the landlord. In this particular instance this was done, for what was done with the money subsequently and under the orders of the landlord, is immaterial. I hold, therefore, that this was not a case of voluntary payment, and I now proceed to deal with the other objections which have been raised.

It is said that the sum which I have mentioned was the sum due in respect of the 8 annas and not the whole 10 annas. But this argument appears to me to be disposed of by the finding of the learned Subordinate Judge to which I have referred. It has also been said that there is a difficulty in the way of our giving effect to this set-off, because, the *kabuliat* stipulated that no payments to the superior landlord of the plaintiffs should be recognised unless *dakhilas* were granted by the landlord; and it is said that there are no such *dakhilas* in the present case. In this particular case the fact of payment has been otherwise proved and it is found in the judgment that this took place and under the circumstances I do not see that I can or should ignore that fact.

The result is that the appeal is decreed to this extent, that appellant is entitled to a set-off of the sum of Rs. 164-10-4½ against the amount of rent claimed. The decree of the lower Appellate Court will be altered accordingly; in all other respects it will stand.

As regards costs the parties will be entitled to their costs in all the Courts up to the High Court according to the degree of their success in this Court.

SMITHER, J.—I agree.

Decree altered.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 361 AND 362 OF 1917.

April 30, 1918.

Present:—Mr. Lindsay, J. C.

RAM RUP SINGH—PLAINTIFF—APPELLANT

versus

DEBI PERSHAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue papers, entries in, value of—Under-proprietary right, claim for.

Where a person is entered in the revenue papers as an under-proprietor, but it appears from other evidence that he does not hold such a status, the entry in the revenue papers is of no avail to him for the purpose of establishing his title as an under-proprietor. [p. 757, col. 1.]

Appeals from the decrees of the District Judge, Fyzabad, dated the 28th May 1917, reversing the order of the Subordinate Judge, Fyzabad, dated the 29th November 1916.

Mr. *A. P. Sen*, for the Appellant.

Pandit *Harkaran Nath Misra*, for the Respondents.

JUDGMENT.—These two appeals have arisen out of a suit for declaration brought by the plaintiff-appellant, Ram Rup Singh,

The suit related to a number of plots of land situated in the village of Mathani, the area of which is 18 *bighas* odd. The case for the plaintiff, as set out in his plaint, was that he is the owner of the lands in question. The suit was brought in consequence of a case instituted by the defendants against the plaintiff in a Revenue Court. In these proceedings the defendants succeeded in getting an order from the Revenue Court for resumption of the lands in suit on the ground that they were held as *muafi*. The Revenue Court assessed rent upon the lands and made it payable to the present defendants.

The defendants denied that the plaintiff was the proprietor of the area in question and a number of technical pleas were raised by way of defence. The first Court held that the plaintiff had failed to show that he had any proprietary title to the lands. The Subordinate Judge, however, was of opinion that the plaintiff had proved himself to be an under-proprietor and he gave him a declaration accordingly.

Both parties appealed to the District Judge, the plaintiff contending that he ought to have been declared the proprietor of the lands in question. On the other hand the defendants maintained that the first Court was wrong in holding that the plaintiff was an under-proprietor.

The result was that the District Judge dismissed the appeal of the plaintiff and allowed the appeal of the defendants, so that the plaintiff's suit was dismissed entirely.

He now has brought these two appeals against the decrees of the learned District Judge and as they both deal with the same matter, so they may be disposed of together. I may say at once that after hearing Counsel in the case, I am satisfied that both appeals must fail.

The whole case of the plaintiff rests upon certain proceedings which were taken in a Settlement Court in the year 1873. At that time one Sarnet Singh who was the plaintiff's grandfather was alive. It is admitted that Sarnet Singh had shares in a number of villages including this village of Mathani. Exhibit 3 is a copy of the application which was made by the plaintiff Ram Rup Singh to the Settlement Court, in which he stated the nature of his claim. He said in that application or plaint that he was entitled to an area of 22 *bighas* 11 *biswas* on the basis of Zemindari rights and also on the basis of an occupancy right by which he held the lands free of rent. He stated that the lands were recorded in his name in the settlement papers and he wanted a declaration of his right from the Settlement Officer. It is proved that the dispute between the plaintiff and his grandfather was disposed of by a compromise. A *sulahnama* was put in, in which it was stated that Sarnet Singh had given the lands in dispute to the plaintiff: the plaintiff informed the Court that he had received full satisfaction of his claim. As a result of this compromise, the Court passed an order consigning the case to records. No formal decree was drawn up nor was any definite declaration of Ram Rup's right given by the Settlement Officer. In short he seems to have treated the case as if the plaintiff had withdrawn it. It is to be observed that the Subordinate Judge who dealt with the present case had the record of the settlement litigation before him. It is apparent from the notes made by the Subordinate Judge that the Settlement Officer who was dealing with Ram Rup Singh's claim in the year 1873 mentioned in the record that the nature of the claim which Ram Rup Singh was making was not very clear. We find that in the year 1876 the share of Sarnet Singh in this village of Mathani was brought to sale in execution of a decree and was purchased by the predecessors-in-interest of the present defendants. Previous to this sale a statement was drawn up and sent for sanction to the Chief Commissioner. Exhibit 4 is a copy of this sale statement, and in it we have particulars of the share of Sarnet Singh which was being offered for sale. It is described as comprising 74 *bighas* odd of cultivated land. Out of this area 53 *bighas* odd were said to be in the cultivation of tenants and to yield an annual rent of Rs. 130 odd. It was further stated that the rest of the cultivated area, that is to say 22 *bighas* odd, was held rent-free by Ram Rup Singh under the decree of the Settlement Court.

It may also be mentioned that in the year 1882 this village was divided by partition, and it is proved by Exhibit

A-12 that while partition was going on the plaintiff Ram Rup Singh applied to the Court, saying that he was in possession of 22 *bighas* odd of *sir* which he held rent-free as "*zemindari maurusi*." He asked the Court to arrange that his possession over these lands should not be disturbed in the course of the partition proceedings.

From the documentary evidence on record it is established that for a long series of years Ram Rup Singh has been recorded as an under-proprietor of the lands now in dispute, and it further seems that in the Revenue Court from time to time Ram Rup Singh has been treated as a person holding a privileged tenure by reason of the order of the Settlement Court which was passed in the year 1873.

The learned District Judge was of opinion that the plaintiff could not claim to be proprietor of these lands on the strength of the *sulahnama*, because this deed was not registered and was not embodied in any decree made by the Settlement Court. He further held that as the plaintiff set up the case that he was the full proprietor of these lands the Court of first instance ought not to have given him a declaration that he was an under-proprietor. Further the learned District Judge was of opinion that the Court of first instance was wrong in holding that Ram Rup Singh had acquired an under proprietary title in these lands by more than 12 years' adverse possession. It is argued here that the District Judge was wrong in saying that the *sulahnama* did not operate to confer a proprietary title. It is argued that on the terms of this document it should be held that a proprietary right was granted to the plaintiff. It is further argued that although there was no formal order or decree of the Settlement Court, nevertheless it should be held that the order passed by the Settlement Officer amounted to a recognition and declaration of Ram Rup Singh's right as a proprietor. In any case it is urged that the District Judge should have allowed the declaration of the first Court to stand, if it was shown that the plaintiff had made out a case of under-proprietary right.

It is not necessary for me to discuss the technical points which were raised in the judgment of the Court below. The learned Counsel for the respondents has argued the case on the merits and his position is that even if full effect be allowed to the language of the *sulahnama*, no case either of proprietary or under-proprietary right is made out. It seems to me that this contention must be upheld.

In the first place, we have the oral evidence of Ram Rup Singh who was examined as a witness on his own behalf. His story is certainly a very confusing one, and it is very difficult to understand in what way he is trying to make out that he is the proprietor of the lands in dispute. He says that he got these lands in a partition effected between himself and his grandfather, Sarnet Singh. He was unable to explain how if a partition was made he failed to get any share of the property which was held in 28 other villages. Again it is not at all easy to understand in what way this partition was made. At one place Ram Rup Singh says that his father was dead at the time the partition was made and that his father had separated from Sarnet Singh before his death. At another place he says that his father died some 7 or 8 years after the partition took place. He admits that his father's name was never entered in the *khewat*, and he also says that even after the partition Sarnet Singh used to make all the collections till the time of his death. It is also significant that the plaintiff admits that there was no entry in his favour in the *khewat* up till the time of Sarnet Singh's death. Altogether this story of the partition is a peculiar one and it is by no means established that the proprietary title which the plaintiff is now asserting regarding these lands was derived by any partition between himself and his grandfather. One statement made by the plaintiff seems to me to be conclusive against his assertion that he is the proprietor of the lands now in question. He states distinctly that he has never at any time paid Government revenue for these lands or paid any rent to the defendants who now represent Sarnet Singh. It is impossible to suppose that if the plaintiff was the owner of these lands he could have escaped the liability of paying the Government revenue for them. It is equally difficult to conceive how he can be an under-proprietor if he has never paid any under-proprietary rent.

Further, the claim for proprietary rights seems to be unmaintainable in view of the admitted fact that when the village was being partitioned in the year 1882, the plaintiff never put forward his proprietary title, so as to have his share in the village divided off. On the contrary after a perusal of all the documents in the case the proper conclusion seems to be that in some way or other the plaintiff in the year 1873 got a grant of a rent free tenure from his grandfather Sarnet Singh. More than this is not established and I am satisfied that the evidence falls far short of showing that the plaintiff has acquired any under-proprietary title.

On the contrary all the entries seem to me to be consistent with the view that the plaintiff was merely the holder of a rent-free tenure. He certainly was treated on no other footing when the share of Sarnet Singh was sold by public auction in the year 1876 and in spite of the entries in the revenue papers which are in his favour, I think it has been properly contended that his status is not that of an under-proprietor. In the year 1884 when the predecessor-in-interest of the defendants tried to recover arrears of rent from Ram Rup Singh, the claim was dismissed in appeal by the Deputy Commissioner on the ground that Ram Rup Singh was the holder of a rent-free tenure (compare Exhibit No. 31) and the status of the plaintiff has, I think, been correctly described in the order of the Deputy Commissioner of Fyzabad, dated the 17th June 1914. This order, I may state, was restored in appeal by order of the Board of Revenue. The Deputy Commissioner points out in his order that there is no judicial decision according to which the land now in question could be deemed to be held in under-proprietary right. In my opinion the Deputy Commissioner was right in holding that Ram Rup Singh could show at most that he was the holder of a rent-free tenure.

In these circumstances I am satisfied that on the merits of his case, apart from all technicalities, the plaintiff was not entitled to a declaration that he is either the proprietor or the under-proprietor of the disputed land. The result is that both appeals fail and are dismissed with costs.

Appeals dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 58 OF 1917.

June 25, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

VATSALABAI VISHNU SUKHTANKAR AND ANOTHER—APPLICANTS

versus

SAMBHAJI PANDURANG NABAR—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 5—Death of one of several plaintiffs—Legal representative brought on record—Subsequent dispute—Court, duty of—Procedure.

One of several plaintiffs having died one *G.* was brought on the record as her legal representative, it being alleged that he was the adopted son of the deceased. Subsequently the daughters of the deceased applied that *G*'s name should be deleted from the record and that they should be substituted as the legal representatives of their mother. The Court held that it could not alter its previous order as rule 3 of Order XXII of the Civil Procedure Code provided that after the record had been amended by adding the representative of the deceased plaintiff as a party the Court shall proceed with the suit:

Held, that a question having arisen as to whether *G.* was or was not the legal representative of the deceased plaintiff, the Court was bound to determine it under rule 5 of Order XXII of the Civil Procedure Code. [p. 758, cols. 1 & 2.]

Application against an order passed by the Subordinate Judge at Malvan, in Suit No. 205 of 1914.

Mr. *A. G. Desai*, for the Applicants.

Mr. *S. Y. Abhyankar*, for Opponent No. 4.

JUDGMENT.

SCOTT, C. J.—The question for decision arises with reference to the constitution of a suit No. 205 of 1914 filed by five persons, the fourth of whom was Radhabai. She died after the suit had been filed on the 10th of March 1916 and on the 18th of April, an application was made on behalf of the minor Govind Sambhaji, son of the 1st plaintiff, that he should be brought on the record as heir and legal representative of the deceased Radhabai, relying upon an alleged adoption. The learned Judge acceded and the record was amended by the substitution of Govind Sambhaji's name for that of Radhabai. The petitioners having learnt of the application applied on the 26th of July that Govind's name should be deleted and that the minor daughters of Radhabai should be brought upon the record in his place. The learned

Judge, however, after hearing the evidence adduced by the disputing parties, held that he could not alter his previous order, as rule 3 of Order XXII provides that after the record has been amended by adding the representative of the deceased plaintiff as a party the Court shall proceed with the suit.

It appears to us that this is taking too narrow a view of the provisions of Order XXII. Rule 5 provides that where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff or the deceased defendant, such question shall be determined by the Court. The learned Judge, however, has held that he cannot determine the question.

Now let us consider what injustice that might work in the case of a deceased defendant. There might be a suit filed by the plaintiff against several defendants, and on the death of one of these defendants the plaintiff might apply to have some one substituted as representative who was not really the legal representative and could be relied upon not to put forward any defence on behalf of the deceased defendant's estate. This obviously might lead to grave miscarriage of justice and yet if the learned Judge's view is correct, an order once having been made for adding a bogus representative of a deceased defendant the suit must be proceeded with without any real representative of the estate being brought in, even though the Court is aware that the defendant's interests would not be defended by the bogus representative. In the case of plaintiffs the danger is not so great, for plaintiffs cannot sever in their attack and all are represented by the same legal advisers, and, therefore, one plaintiff can generally be relied upon to protect the interests of all the plaintiffs, even though some have died and are represented by persons who take no interest in the proceedings. Tested, however, from the point of view which I have suggested, it is clear that it would be a very unfortunate reading of rule 3 if we held ourselves bound to accede to the view of the learned Judge and held that once an order, though obviously a mistaken order, has been made, it is not in the power of the Court to correct it notwithstanding the provisions of rule 5. We cannot take that view of the case.

A question has arisen as to whether Govind is the legal representative of the deceased Radhabai, and such question has to be determined by the Court. We, therefore, set aside the order of the lower Court and direct it to determine the issue left undetermined upon the application of the petitioners. Costs costs in the cause.

Application accepted.

MADRAS HIGH COURT.

APPEAL SUIT NO. 321 OF 1916.

November 2, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

KOMANDUR SRINIVASA SESHACHARLU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOMANDUR SESHAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Gift by implication—English rules, applicability of, to Hindu Wills—Bequest by Hindu to his daughter—Absolute estate, grant of, presumption as to—Devise to two daughters, one with and the other without offspring—Direction that offspring to be born to daughter having no issue should take like offspring of other daughter—Express words of gift to latter, absence of, effect of.

The general principles of construction governing English Wills are applicable also to Hindu Wills, *e.g.*, where there are no express words of gift but the gift can be implied from the language used in the Will, the Courts should have regard to the dominating intention of the testator and effectuate that intention by ascertaining it from the entire scheme of the Will. [p. 761, cols. 1 & 2.]

Seale v. *Rawlins*, (1892) A. C. 342; 61 L. J. Ch. 421; 66 L. T. 542, explained.

There is no positive presumption of Hindu Law that a gift by a person to his daughter is of an absolute estate. [p. 762, col. 1.]

A Hindu testator devised his property to his two daughters, *S.* and *A.* *A* had issue at the time of the death of the testator while *S* had none. The Will recited that as *A* was attending to the testator's comforts and had male offspring who would perform *karmams* (ceremonies after death) to him, he gave her two out of three shares and he gave *S.* who had no issue, the remaining one share. The Will further recited that any person adopted by *S.*, should not get her share, but that if any male child was born to

her he should, like the children of *A.*, enjoy his mother's share from generation to generation:

Held, that there was no gift of an absolute estate to *A.* and that though there were no express words of gift to her children, they took the reversion after *A.*'s death. [p. 760, col. 2.]

Appeal against the decree of the District Court, Nellore, in Original Suit No. 43 of 1914.

Mr. *A. Krishnaswami Aiyar* (with him Messrs. *K. Bhashyam* and *K. Krishnaswami Aiyar*), for the Appellants.

Mr. *K. V. Krishnaswami Aiyar* for Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.—The point involved in this appeal relates to the construction of a Will executed by a Hindu. The document is marked as Exhibit A in the case. The construction of the document is by no means free from difficulty. But once the rules of construction applicable to such cases are borne in mind, we think that we have enough in this Will from which we can gather the intention of the testator in the events that have happened. He had two daughters, one called Seshamma and the other Andalammal, the younger daughter. Seshamma had no child, but Andalammal had two sons. The question we have to consider is, whether there was any gift to Andalammal's children or whether the gift was to Andalammal of an absolute estate or of a daughter's estate according to the Hindu Law.

The Will starts with saying that the property should be divided into shares; one share should be given to Seshamma and the other two to Andalammal, it having been already recited that the testator's two daughters were alive as his heirs and that, of these daughters, Andalammal had male offspring. The testator says: "Therefore, the remaining half should be divided from the said Varada Reddi and, as out of my above said two daughters, Andalammal has been attending to all my comforts and as her male Santhathi (translated as offspring) are entitled to perform Karmams to me, she should enjoy two-thirds—two of the three shares, and Seshamma should enjoy the third share." Then the testator provides that his daughters should divide and enjoy in three shares in the above-said manner above 60 Ankanams of site. "After her death (meaning the death of his sister-in-law B. Seshamma in whose favour he was making the bequest), "my daughters should enjoy the said land in the proportion of the above three shares." Now we come to the more important clause in the Will: "In enjoying in the above manner as my elder daughter Seshamma has no male issue, she should be enjoying the third share that comes to her without contracting debts and after her death, the said third share should go to my second daughter Andalammal and to her Santhathi (offspring). But if she adopts a son, this property should not go to the adopted son. If a male issue is hereafter born to my daughter, that is, Seshamma, that grandson should, like the Santhathi (offspring) of my younger daughter, enjoy her (elder daughter's) third share, having power of gift and sale from son to grandson and so on from generation to generation." There is only one other sentence to which reference need be made, where the testator provides that the younger daughter alone shall have the right of collecting the said debts and of causing the said Karmams or obsequies to be performed.

The learned District Judge has held that though it was the intention of the testator to make a gift to the children of Andalammal, he omitted to do so and, therefore, the Court cannot carry out what might have been the intention of the testator but which he failed to carry out in the Will. If the District Judge is right in his reading of the Will, no doubt the decree passed by him would be correct. It may at once be said that there is no gift to the children in express and clear terms. The learned Pleader for the appellant, Mr. A. Krishnaswami Aiyar, however, argues that taking the whole Will into consideration, three things are clear:—(1) that it was the intention of the testator to make a gift to the children of Andalammal; (2) that that intention can be gathered as a matter of construction, especially from the words "should, like the Santhathi of my younger daughter, enjoy her third share, having powers of gift and sale from son to grandson and so on from generation to generation;" and (3) at any rate that this is a case of an implied grant. Nothing can be clearer from the reading of the Will than that the testator was extremely

anxious that his property should go to his daughters and their natural children. This is to be gathered especially from the fact that in the contingency of Seshamma not bearing a son, the property should not go to any adopted son of hers. It is not suggested that he had any other relatives or kinsmen besides those mentioned in the Will on whom he would like the property to devolve. He starts by saying that he is making provision in respect of all his property moveable and immoveable. The District Judge, however, thinks that what the testator intended was to make a gift to his two daughters of estates corresponding to a Hindu daughter's estate and that he assumed that Andalammal who was the younger daughter would survive Seshammal and himself. That being so, the contingency that actually happened, namely, the death of Andalammal before the death of the testator, was not within his contemplation and he failed to provide for it. All this depends upon what construction is to be placed upon the Will. The learned District Judge does not take all the provisions together in order to arrive at the mind of the testator. He first of all takes into consideration the words in the earlier part of the Will, that is to say, where the testator mentions the disposition into shares —1/3rd in favour of Seshamma and 2/3rds in favour of Andalammal, and infers that they are given estates such as a Hindu daughter would take by inheritance under the general Hindu Law. Proceeding upon that basis he construes the other clauses of the Will, and that is exactly the nature of the argument which has been addressed to us by the learned Vakil for the respondents. Now take the case of Seshamma. The testator in the earlier part of the Will contents himself merely with saying that she is to take 1/3rd of the properties, but he goes on afterwards to lay down what is to happen in case Seshamma should die without issue and in case she was to have an issue or she was to adopt a son. All these provisions clearly indicate that so far as Seshamma was concerned, she was intended to take only a life-estate and if she left no issue, her share was to go over to Andalammal and to her children. If she were to have male issue, the son or sons were to take directly under the Will on the death of Seshamma. If that was the testator's intention with regard to Seshamma's male issue, it seems to us to be quite clear that similar was his intention with respect to Andalammal's sons. He gives 2/3rds to Andalammal as her sons are entitled to perform his Karmams. The scheme of the Will was not to give anything less to Andalammal and her children than what was given to Seshamma and her sons, but to treat the former on the same footing as the latter. Then we have this clause:— "If a male issue is hereafter born to my elder daughter, the grandson should, like the Santhathi of my younger daughter, enjoy her third share.....". "Should like the Santhathi of my younger" can have no other meaning than that it was the intention of the testator that they should take the property given to Andalammal after her death. No doubt this is a case of inartistic careless drafting, but we do not see what other meaning can be given to these words than what we have stated. The learned Pleader for the respondents suggests to us that by these words all that the testator meant to convey was that he expected that his younger daughter's children would, in the ordinary course of Hindu Law, enjoy the property which he was giving to that daughter. But that is not a possible construction, having regard to the fact that the gift over after the life-estate of Seshamma is to her male issue and so it can hardly be contended that in her case the testator did not dispose of the reversion. The reversion in both the cases was intended to be placed on the same footing that is to say, in the case of each daughter, it is to go to her children. Numerous cases have been cited to us, but so far as the construction of this document is concerned, little help is to be derived from the provisions of other Wills. But there are certain general rules of construction which are applicable to this case. They are clearly laid down in the well-known judgment of Right Hon'ble Pemberton Leigh in *Towns* v. *Wentworth* (1), extracts from which

(1) (1858) 11 Moore P. C. 526; 6 W. R. 397; 14 E. R. 794; 117 R. R. 81.

have been quoted in more than one case as laying down the proper rules for the construction of Wills like this, which do not contain express words of gift but where the gift is to be implied no doubt from the language used, but having regard to the dominating intention of the testator to be ascertained from the entire scheme of the Will. In *Sweeting* v. *Prideaux* (2), Hall, V. C., upheld a gift which could only be implied from the general tenor of the entire Will. He cites with approval the proposition laid down by Lord Justice Knight Bruce, in the case of *Key* v. *Key* (3), in these words:—"In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly." Then he quotes the passage above alluded to from Right Hon'ble Pemberton Leigh's judgment"..... and, on the other hand, if the Will shows that the testator must necessarily have intended an interest to be given which there are no words in the Will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which, it is of opinion, that the testator has on the whole Will sufficiently declared." These rules of construction relating to Wills have not, so far as we are aware, ever been doubted either in England or here. It will not serve any useful purpose to go through the different cases to see how far the Courts have gone to effectuate the intention of the testator in particular cases provided that intention is to be gathered from the entire Will, although the gift is expressed in defective or elliptical form of language. But one of the strongest cases seems to us to be *Redfern, In re*; *Redfern* v. *Bryning* (4). There Bacon, V. C., relied mainly on the scheme of the Will as showing that the testator intended to make an equal division of all his estate among his children and though there was an omission with respect to one of the children, he felt himself justified in supplying that omission, being clear as to the intention of the testator. He says: "I think upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the Will." On behalf of the respondents we have been referred to the case of *Scale* v. *Rawlins* (5). But all that is laid down there is that the Court is not at liberty to speculate upon the intention of the testator if there is no language in the Will by which that intention is expressed. It does not, in any way, throw doubt upon the other rule to which we have referred.

Mr. K. V. Krishnaswami Aiyar has asked us to say that the general principles of construction such as we have mentioned are not applicable to Hindu Wills. The argument is that under the Hindu Law or under the rules of construction of Hindu Wills, a presumption against partial intestacy has no room and, therefore, the English Law has gone much further than we should be justified in going towards carrying out the intention of the testator. But we do not find that this is borne out by authority. On the other hand there are a number of cases which have laid down that the rule in question applies to Hindu Wills as well [*Ellokassee Dossee* v. *Durponarain Bysack* (6), *Cheda Lal* v. *Gobind Ram* (7) and *Seshayya* v. *Narasamma* (8)]. The learned

(2) (1876) 2 Ch. D. 413; 45 L. J. Ch. 378; 34 L. T. 240; 24 W. R. 776.

(3) (1853) 4 De G. M. & G. 73 at p. 84; 1 Eq. Rep. 82; 22 L. J. Ch. 641; 17 Jur. 769; 22 L. T. (o. s) 67; 43 E. R. 435; 102 R. R. 28.

(4) (1877) 6 Ch. D. 133; 47 L. J. Ch. 17; 37 L. T. 241; 25 W. R. 902.

(5) (1892) A. C. 342; 61 L. J. Ch. 421; 66 L. T. 542.

(6) 5 C. 59 at p. 63; 2 Ind. Dec. (N. S.) 649.

(7) 30 A. 455 at p. 458; A. W. N. (1908) 205; 5 A. L. J. 519.

(8) 22 M. 357; 8 Ind. Dec. (N. S.) 255.

Pleader for the respondents also enunciated a proposition that in cases of bequest to a Hindu daughter she takes an absolute estate. There again he is unsupported by any authority. On the other hand, the decided cases and certainly the later decisions lay down the contrary proposition. No doubt there are some recent decisions which say that there is no presumption that the gift to a Hindu daughter is only of a life-estate or of an estate which the daughter takes under the Hindu Law of intestate succession. But there is no authority for saying that there is any positive presumption that such a gift is of an absolute estate. We may also mention that it was attempted to be argued that the mention of the 'offspring' of Andalammal was only by way of limitation, indicative of a gift of inheritance. But that does not seem to us to be the proper construction having regard to the entire scheme of the Will. By Santhathi, the testator apparently meant her children or perhaps her sons, because in the Will sometimes the word Santhathi is used by itself, and sometimes the phrase the *male santhathi* is used. No such question was raised at the trial and there can be no doubt that what the testator meant was the children of Andalammal as the direct objects of bequest.

We allow the appeal and reverse the judgment of the District Judge. There will be a declaration that the plaintiffs are entitled to 2/3rds of the properties claimed in the plaint and Seshammal to 1/3rd for her life. There will be a preliminary decree for partition and there will be an enquiry into the mesne profits to which the plaintiffs are entitled as claimed in the plaint. The appellants are entitled to their costs from the respondents here and in the Court below. Out of the costs payable by the respondents, the Court fees payable by the appellants will be realised.

Appeal allowed.

M. C P.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No 20 OF 1917.

December 3, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr Justice Batchelor.

LAXMIBAI—PLAINTIFF—APPELLANT

versus

RADHABAI—DEFENDANT—RESPONDENT.

Costs—Successful party, whether can be deprived of costs—Practice—Discretion of Court—Appellate Court, interference by.

Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs. [p. 763, col. 2.]

Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all. [p. 763, col. 2.]

Mr. *Kanga* (with him Mr. *Munshi*), for the Appellant.

Mr. *Mirza*, for the Respondent.

JUDGMENT.—This suit was filed by the widow of Dhaku Sakharam against the defendant claiming to be entitled to sole possession and enjoyment of the estate of the deceased during her lifetime, subject only to a right of maintenance of the defendant. It was alleged by the plaintiff that the defendant was a woman living with the deceased who was not entitled to the rights of a Hindu wife, and that on the death of the deceased she was only entitled to maintenance out of the property until she formed some other connection. The prayer was that it might be declared that according to the custom of the community the defendant was only entitled to provision being made for her maintenance out of the estate of the deceased; that the plaintiff was solely entitled as a Hindu widow; that the defendant might be ordered to discover and hand over to the plaintiff the property now in her possession or power belonging to the estate of the deceased, including the title-deeds of the Panvel property; and that it might be declared that the ornaments did not form part of the estate of the deceased, but formed part of the *stridhan* property of the plaintiff. Then there was a prayer for injunction and Receiver.

The defendant put in a written state-

ment claiming to be a co-widow of Dhaku Sakharam, and joint owner of his estate with the plaintiff. An application was made by the plaintiff for a Receiver to take charge of the property in the possession of the defendant and belonging to the estate of the deceased, and it was admitted that the defendant was in possession of certain outstandings recoverable on account of the estate of the deceased. On that application by consent the parties deposited with their respective Solicitors property in their possession pending the hearing and no further order, therefore, was made.

At the hearing the issue was in substance whether the defendant was, as she claimed to be, co-widow of the deceased, and that issue was decided against her.

A reference was then made to the Commissioner to take an account of the estate of the deceased, and an enquiry as to the proper amount to be allowed to the defendant for maintenance. Before the Commissioner by consent it was agreed that Rs. 7-8 0 should be allowed to the defendant for maintenance and the defendant put in a claim for certain ornaments, five in number, as to which evidence was led before the Commissioner, but the claim was disallowed, and the Commissioner certified and reported that the immoveable properties belonging to the estate of the deceased were as shown in the schedule to his report and that the title-deeds were in the possession of Dubash and Co., Attorneys for the defendant.

The matter then came up as to further directions and costs before Mr. Justice Beaman, who was not the trial Judge. It was represented to him on behalf of the defendant that the issue of marriage had only occupied a short time; that a suit was necessary and that costs should come out of the estate. On behalf of the plaintiff it was stated that the estate was small, the defendant had never any case, and had lost all along the line, but they did not ask for costs against the defendant, because they could get nothing. The learned Judge, however, thought that it was the plaintiff's Attorneys' suit. He characterised the suit in very strong terms, and thought that the plaintiff was more in fault than the defendant.

We have been taken through the whole of the proceedings up to the final decree which are printed in the appeal paper-book, and we have also been taken through various documents printed at the instance of one side or other very unnecessarily at the end of the book; and we have come to the conclusion that the plaintiff's Counsel was right in contending before the learned Judge that the defendant had never any case at all and had lost all along the line. Under these circumstances we have to consider whether the order as to costs out of the estate which belongs exclusively to the plaintiff for her life should stand. In *Cooper* v. *Whittingham* (1) Sir George Jessel observed: "Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs." "It is no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right and to say 'if I had known of your right I should not have infringed it.'" These principles were given effect to in *Kuppuswami Chetty* v. *Zamindar of Kalahasti* (2). In *Ranchordas Vithaldas* v. *Bai Kasi* (3) an Appellate Bench of this Court laid down that "the principle to be deduced from these decisions is that Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all." It appears that this is a case in which there has been a misapprehension of facts on the part of the learned Judge who made the order of costs and a violation of established principle by throwing upon the plaintiff the costs of the unsuccessful defendant, where the plaintiff has been guilty of no misconduct. The plaintiff did not ask for costs against the defendant, because she would get nothing. That was what was stated by her Counsel in the lower Court, and we do not make

(1) (1880) 15 Ch. D. 501 at p. 504; 49 L. J. Ch. 752; 43 L. T. 16; 28 W. R. 720.

(2) 27 M. 341.

(3) 16 B. 676 at p. 682; 8 Ind. Dec. (N. S.) 929.

an order against the defendant for the same reason now. But the order as to costs out of the estate must be deleted, for we do not think it is right in principle that the defendant should, under the circumstances of this case, have her costs out of the estate.

It remains to consider the costs occasioned by the unnecessary printing of the affidavit of Laxmibai and certain correspondence printed, it is said, at the instance of the defendant's Attorneys. We think that those costs must be paid by the Attorneys personally and not be allowed to fall upon their clients.

Another matter is the Judge's o der obtained for the amendment of the memorandum of appeal by the addition at the instance of the Attorney for the plaintiff of a very unnecessary paragraph, asking for relief in respect of a matter in respect of which relief had already twice been asked for in the unamended memorandum. Costs of the Judge's order must not be costs in the cause, but must be paid by the plaintiff's Attorneys personally. No order as to costs of this appeal. There was a consent order that all the property in the possession of both parties should be deposited with their respective Solicitors. The property in the possession of the defendant's Solicitors will not be subject to their lien for costs. They must, therefore, hand the property over to the plaintiff's Attorneys for and on account of the plaintiff.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 824 OF 1917.

March 22, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

CHOKKALINGAM CHETTIAR—PLAINTIFF—APPELLANT

versus

KURUNTHAPPAN CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 21—Jurisdiction, objection to, omission to raise in Trial Court—Appellate Court, power of, to record finding on question of jurisdiction.

Where an objection to the jurisdiction of a Court to try a suit is not taken in that Court at the proper time, the Appellate Court should not allow such objection to be raised before it and record a finding thereon.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramanad at Madura, in Appeal Suit No. 109 of 1916, preferred against the decree of the Additional District Munsif, Srivilliputhur, in Original Suit No. 335 of 1915.

Mr. *M. D Devadoss*, for the Appellant.

Messrs. *K. S. Ramabadhra Iyer* and *T. A. Anantha Iyer*, for the Respondents.

JUDGMENT.—Objection is taken to the dismissal of plaintiff's suit on the ground that the Subordinate Judge, having found that the Sattur District Munsif had no jurisdiction, was bound to return the plaint to be presented in the proper Court and had no power to decide the case on the merits. Section 21 of the Code of Civil Procedure, however, says that no Appellate Court shall allow an objection to the place of suing to be taken unless it was taken before the settlement of issues and unless there has been a consequent failure of justice. These conditions were not present, and so the Subordinate Judge should not have allowed the objection to be taken. We must, therefore, set aside his finding as to jurisdiction and on the finding as to consideration the second appeal fails. As respondents Nos. 1 to 3 took the objection as to jurisdiction in the lower Appellate Court we disallow their costs here. Second and 6th defendants not having appealed against the decree to the lower Appellate Court and here and not pleaded want of consideration, we are not prepared to interfere on their behalf. The second appeal is dismissed.

Appeal dismissed.

M.C.P.

BIPRODAS PAL CHOWDHURY *v.* KEDAR NATH ROY.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 114 OF 1912 AND 409 OF 1911.

June 21, 1918.

Present :—Mr. Justice N. R. Chatterjea and Mr. Justice Greaves.

IN No. 114 OF 1912

BIPRODAS PAL CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KEDAR NATH ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 409 OF 1911

KEDAR NATH ROY—DEFENDANT—APPELLANT

versus

BIPRODAS PAL CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 103B, 161, 167—Patni, *sale of—Rent-free lands within* patni, *whether incumbrance—Record of Rights, entry in—Presumption—Burden of proof.*

Within a *patni taluk* created in 1807 which was purchased by the plaintiff in execution of a rent-decree, there were certain lands in the possession of the defendant which were recorded in the settlement records as rent-free lands. The plaintiff sued to recover possession of those lands by ejecting the defendant on the allegation that the defendant's interest was an incumbrance within the meaning of section 161 of the Bengal Tenancy Act:

Held, (1) that the defendant's interest could not be deemed to be an incumbrance unless it was shown that the *zemindar* was in possession of those lands at the time when the *patni* was granted; [p. 769, col. 2; p. 770, col. 1.]

(2) that having regard to the provisions of section 103B of the Bengal Tenancy Act and the pleadings of the plaintiff and to the facts that there was no evidence to show that any rent had ever been realised in respect of those lands and that the defendant and his predecessor-in-title had been in possession for a long period without payment of rent, it was incumbent upon the plaintiff to show that the *zemindar* was in possession of the lands in dispute at the date of the creation of the *patni* and that the incumbrance of the defendant came into existence after that date. [p. 770, col. 1.]

Appeals against the decrees of the Subordinate Judge, Nadia, dated the 3rd of August 1911.

IN No. 409 OF 1911

Babus *D. N. Chakerbutty, Kali K. Chukerbutty, Sarat K. Ghose*, for the Appellants.

Babus *Mohendra N. Roy* and *Amarendra N. Bose*, for the Respondents.

Babu *Sib Ch. Palit*, for the Deputy Registrar.

IN No. 114 OF 1912

Babus *Mohendra N. Roy* and *Amarendra N. Bose*, for the Appellant.

Babu *Rupendra K. Mitra*, for the Respondents.

JUDGMENT.

N. R. CHATTERJEA, J.—These two appeals arise out of a suit for possession of 289 *bighas* and 7 *cottas* of land situated in Mouza Phulia appertaining to Taraf Santipur.

It appears that Mouza Phulia and 37 other Mouzas constituting Taraf Santipur originally belonged to the Maharaja of Nadia. Before the Permanent Settlement the Raja's successor declined to take settlement of the Taraf and it was, accordingly, let out in temporary *ijara* by the Government to different persons from time to time. Maharaja Tej Chandra Bahadur of Burdwan purchased the right of the last *ijaradar*. Ultimately it was permanently settled with the Maharaja about the year 1800 and the latter granted a Patni of the Taraf to one Ramesh Chandra Mukerjee in 1807. The Zemindari interest passed to certain persons who may be conveniently referred to as the Tagores. The Zemindar in execution of three decrees for arrears of rent against the Patnidar put up the Patni to sale and it was purchased by the plaintiff on the 2nd of October 1899 and the sale was confirmed on the 28th November 1900. On the 10th September 1901 the plaintiff applied for settlement and Record of Rights under Chapter X of the Bengal Tenancy Act. In these proceedings the lands were entered as "rent-free." Objections were raised by the plaintiff to the entry: but they were decided against him by the Settlement Officer on the 25th May 1909. On the 27th June 1909 the plaintiff took steps for service of notice under section 167 of the Bengal Tenancy Act for annulment of the incumbrance of the defendants. On the 21st July 1909 the present suit was brought on the allegation that the lands formed part of the Mal lands of the Patni which was granted in 1807. The defence was that the lands were revenue-free Lakhraj, that the defendants' predecessors had purchased them from the representatives of one Mr. Broderick, that they and their predecessors had been in possession of the lands without payment of any rent from before the creation of the Patni, and even

from before the Permanent Settlement and that the suit was barred by limitation. Several other pleas were taken which will be referred to later.

The defendant No. 1 claimed the lands as Lakhrajdar and defendants Nos. 2 to 5 claimed as Mourasidars under the defendant No. 1. The Court below held that no notice under section 167 of the Bengal Tenancy Act had been served upon defendants Nos. 2 to 5 and accordingly dismissed the suit as against them. As against the defendant No. 1, it held that notice had been served, that the suit was not barred by limitation, that the defendant had failed to prove that the lands were held by them from before 1790 and accordingly decreed the suit against her. The defendant No. 1 has preferred Appeal No. 409 of 1911 and the plaintiff has preferred Appeal No. 114 of 1912.

The grounds taken on behalf of the defendant-appellant are, *first*, that the sale of the Patni having taken place, in execution of three rent decrees, was not a sale under which the plaintiff could annul incumbrances.

Secondly, that the notice which was served upon the defendants, not having been signed by the Collector, was not a legal notice as contemplated by section 167 of the Bengal Tenancy Act.

Thirdly, that the finding of the Subordinate Judge that the plaintiff became aware of the encumbrance of the defendant within one year of the institution of the suit is erroneous.

Fourthly, that the Court below has wrongly placed the onus upon the defendant of proving (*a*) that the lands in suit were held as valid Lakhraj from before 1790; and (*b*) that the possession of the defendants commenced from before the creation of the Patni in 1807, and *lastly* that the question of limitation has been wrongly decided.

In order to show that the lands in dispute formed part of the Mal lands of the estate, the plaintiff produced various documents for showing that there were no Lakhraj lands (except a few *bighas*) in the Mouza. The quinquennial register mentions the name of Jaga Mohon Roy as the proprietor of Taraf Santipur. That Register, which was for a period of 5 years commencing from 1202 (1795), shows that the area of Mouza Phulia was 1739 *bighas*, the *jama* assessed being Rs. 246. Next there is a Dowl of *ijara*, dated 20th April 1799, in the name of Maharaja Tej Chandra of Burdwan in respect of Taraf Santipur for one year which, however, does not give the area. The evidence does not show exactly when the Permanent Settlement was made, but it appears that it was after 1206 and before 1212. The plaintiff's case is that Taraf Santipur was permanently settled with Maharaja Tej Chandra in 1207 (1800). There is no evidence to show the area which was actually settled at the time of the Permanent Settlement as the papers relating to the Permanent Settlement have not been produced. The plaintiff, however, has produced certain other papers to show the area of the Mal lands of the Mouza. The Mahalwar Register gives the area of the Mal lands of the Mouza as 577 acres odd (about 1,748 *bighas*) and the Land Registration Act Registers show that the area of the Mouza was 588 acres (Mal lands 577 acres and resumed Lakhraj lands 11 acres). The Revenue Survey Map gives the total area as 655 acres, which includes the 577 acres Mal and the resumed and released Lakhraj land. These documents would go to show the area of Mal lands to be 577 acres, *i.e.*, about 1,739 *bighas*. In the recent Settlement proceedings the total area of the Mouza is shown as 1,726 *bighas*, out of which 655 *bighas* are recorded as Mal, and the rest as Lakhraj. The learned Subordinate Judge was of opinion that the area as given in the Settlement proceedings cannot be correct, and the lands claimed as Lakhraj in those proceedings "must be due to encroachment as otherwise the quantities recorded as Mal in the registers cannot be explained."

Some other registers were produced on behalf of the plaintiff. The Pargana Register kept under Regulation VIII of 1800 does not mention any Lakhraj land in the Mouza and the Kanongoe Register shows only 28 *bighas* as Lakhraj in the names of certain persons under whom the defendant does not claim. The Thak Map shows only 3 acres odd as Lakhraj, and the Thak statement does not mention any Lakhraj lands in the Mouza. The learned Subordinate Judge held upon these documents that the plaintiff had given sufficient *prima facie* evidence to show that the disputed 289 *bighas* cannot

be Lakhraj lands of the Mouza, and that the onus had been shifted on the defendants to show that the Lakhraj existed before December 1790. He has found from certain old documents that 85 *bighas* were purchased as Lakhraj by the Brodericks (the predecessors of the defendants) from time to time, but with respect to 65 *bighas* (out of the 85 *bighas*) there was no old document to show that they were Lakhraj before 1790. As regards the remaining 20 *bighas* there is a Taidad of a date prior to 1790, but there is nothing to connect the names of the persons mentioned in it with the persons who executed the conveyance (Exhibit Q-5) in favour of the Brodericks. There are no old documents with respect to the remaining lands, and the Court below accordingly held that the defendants had failed to show that any of the lands in suit were held in Lakhraj right from before the 1st December 1790, and that, therefore, the lands in suit are Mal lands.

As already stated, there is no direct evidence to show the area of the lands which was permanently settled. But the quinquennial register shows the area of the Mauzas to be 1,739 *bighas*, which is nearly the same as the area which appears from the recent Settlement proceedings. The quinquennial register was for a period immediately preceding the Permanent Settlement; ordinarily, therefore, and in the absence of anything to show that there was any change between the date of the register and the Permanent Settlement, the Court would be justified in holding that that was the area which was permanently settled with the Zemindar in 1800, and having regard to the evidence, the finding of the Court below that the lands were assessed as revenue-paying lands at the time of the Permanent Settlement may be accepted.

The Patni was granted by the Zemindar in 1807. The Patni *kabuliyat* shows that all the rights (excepting certain rights with which we are not concerned in this case) which the Zemindar had in Taraf Santipur were settled in Patni with the Patnidar. It is contended, however, on behalf of the appellant that the plaintiff must not only show that these lands were included in the area which was permanently settled with the Zemindar, but also that he was in possession thereof at the date of the Patni grant, and that the Patnidar lost possession after the commencement of the Patni, in other words, that the incumbrance of the defendants came into existence after the date of the Patni.

The respondent on the other hand contends that if the lands were included in the Permanent Settlement, it is for the defendants to show that the possession of their predecessors-in-title commenced before the date of the Patni, and that the Zemindar lost possession between the date of the Permanent Settlement and the date of the Patni grant. The documents produced by the plaintiff mentioned above with the exception of the extract from the quinquennial register and the *ijara* Dowls are all subsequent to thedate of the Patni grant.

The defendants' predecessor Swarnamoyi purchased the lands from the Brodericks in 1274 (1868), and the oral evidence adduced on behalf of the defendants shows possession for over 60 years; one of the witnesses Chandra Kant Banerjee (83 years old) speaks to the possession of the Saheb from before the Thak survey and Swarnamoyi's possession for the last 40 or 45 years. The Kanongoe Register and the Pargana Register are of the years 1825 and 1843 respectively, but in the case of *Bipradas Pal* v. *Monorama Debi* (1) the probative value of these registers was considered and it was held that they were of no evidentiary value. However that may be, they do not prove actual possession of the disputed lands by the Patnidar. The registers under the Land Registration Act would not mention Lakhraj lands which were not valid revenue-free lands, and they and the Thak Map date from periods subsequent to the date from which the defendant has proved the possession of his predecessors-in-title, and all the documents with the exception of the quinquennial register and the Dowls referred to above are subsequent to the date of the Patni grant. These documents, therefore, do not show whether these lands were in the possession of the Zemindar at the date of the creation of the Patni.

We have been referred to three decisions of this Court in which some of the questions raised in this case were considered. They arose out of suits for possession of

(1) 47 Ind. Cas. 49; 22 C. W. N. 396; 45 C. 574.

lands situated in the very same Patni Taluk *viz.*, Taraf Santipur, which were claimed by various persons as Lakhraj. In two of them Biprodas Pal Chowdhury was the plaintiff, and in the third he was the defendant. All the cases were decided against Biprodas Pal Chowdhury. In the first case, *Kalikananda Mukherjee* v. *Bipro Das Pal Choudhuri* (2), it was laid down that it was for the purchaser of the Patni to show that the possession of the defendants commenced after the creation of the Patni, or that the proprietor of the estate was in possession at the time when the Patni was granted; and that unless he could show that, the interest acquired by the defendant could not be deemed to be an incumbrance which he could annul. It was further held that the doctrine that possession follows title has no application to a case like the present, where the plaintiff has to establish possession at a particular point of time, and that the mere production of the *kabuliyat* by which the Zemindar purported to let out in the Patni the whole estate (though an ancient document) is not evidence that the Zemindar was in possession of the entire land of the estate, unless there was an assertion in the *kabuliyat* that the grantor of the Patni at the time was in possession of every parcel of land comprised within the boundaries of the Patni, or an allegation in the document that the grantee of the Patni obtained actual possession of every piece of land within the tenure granted to him. In the second case (Second Appeal No. 2700 of 1915 and analogous cases decided by Fletcher and Newbould, JJ., on the 29th May 1917, unreported) in which the executors of Biprodas Pal Chowdhury were the appellants, the learned Judges held that it was clearly covered by the decision in *Kalikananda Mukherjee* v. *Bipro Das Pal Choudhuri* (2) and followed the principles laid down in that case. In the third case, *Bipradas Pal* v. *Monorama Debi* (1), the probative value of some of the registers produced in this case was considered as stated above.

The cases referred to above, however, related to lands in Mouzas other than Fulia, and the evidence is not the same in all the cases, (in particular it may be noted that the quinquennial register was not produced in those cases) though the right of the plaintiff and some of the questions of law raised are common to all the cases.

The case of *Kalikananda Mukherjee* v. *Bipro Das Pal Choudhuri* (2) was sought to be distinguished on the ground that in that case there was evidence to show that the defendants had been in possession before the date of Patni, but the decision was based not upon that ground, but upon the ground that it was for the purchaser of the Patni to show that the possession of the defendant commenced after the creation of the Patni and other grounds mentioned above. The correctness of some of the propositions laid down in that case has also been challenged, but it is unnecessary to consider in the present case the correctness of the principles laid down in that case as applicable to all cases of this description generally. In the present case the lands were entered in the Record of Rights as "rent-free", and lands though they are not held revenue-free from before the Permanent Settlement, but are held without payment of rent from a period subsequent to the Permanent Settlement and before the creation of the Patni, would come under that description. Under section 103 (B) of the Bengal Tenancy Act the entry in the Record of Rights shall be presumed to be correct. The onus is, therefore, upon the plaintiff to prove by evidence that the entry is incorrect. The plaintiff himself alleged in his plaint that during the period "the Government was realizing revenue by *khas ijara* settlement, the *ijaradars* in collusion, with the view of reducing the revenue, caused the creation of Sanads of imaginary revenue-free rights", though he added that "at the time of the inquiry by the Government, the grantees of the Taidads had no possession at all in the lands mentioned in them and they were not registered." Although, therefore, there is no admission that such persons had any possession of the lands, it shows that there had been assertions of hostile title at that time. It is further alleged in the plaint that "until the Thak and Revenue Surveys of 1852 the quantity of the Mal lands was not at all ascertained", that they were

(2) 26 Ind. Cas. 436; 19 C. W. N. 18; 21 C. L. J. 265.

ascertained at the time of those surveys, and that the defendants were not in possession of the lands in suit at that time. It is also alleged that Maharaja Tej Chandra Bahadur had *khas* possession of Taraf Santipur for a short time only. The defendant has produced copies of the quinquennial Terij (Exhibits J1 and J2 of the land and Jama of Mouza Fullia of the years 1207 and 1212). Exhibit J2 was of the year 1207, and it was a return submitted by the Talukdar Maharaja Tej Chandra and while it showed that the total *jama* of the Mouza was Rs. 298-11-2 the area in possession was only 1,157 *bighas*. Exhibit J1 was for the year 1212. This also showed the area to be 1,157 *bighas* and *jama* as Rs. 298-11-2, and was submitted by Ram Narain Chatterjee as "*ijaradar*" (under) "Zemindari of Maharaja Tej Chandra Bahadur". The learned Subordinate Judge observes: "the quinquennial register (produced by the plaintiff) was kept under Regulation XLVIII of 1793, while the Terij Exhibits J1 and J2 were only returns to be submitted under the Regulation; that it is not impossible, though it is difficult to be positive about it at this distance of time, that the returns embodied in the Terij might have been submitted with some motive; with regard to Exhibit 41 which is an extract from an authorized register no such suspicion can arise, and as such Exhibit 41 appears to be more reliable than the Terij Exhibits J1 and J2". It is also pointed out on behalf of the respondents in this Court that under section 12 of Regulation VIII of 1800, the quinquennial register was not to show the area of Mouzas, so that in 1212 (1805) when Exhibit J was filed it was no longer necessary to show the area. But no objection was taken to the admissibility of the documents Exhibits J1 and J2, and the Court below considered their comparative value. Although it might have been unnecessary for insertion in the register, they appear to have been submitted to, and accepted by the authorities, and in any case the statements made more than a century ago by persons who are dead are admissible in evidence. If Exhibits J1 and J2 are not returns, but entries in the register, they would be evidence as being entries in a public record made by a public servant in the discharge of his official duty. (Section 35 of the Evidence Act, first portion.) The area (1,157 *bighas*) given in Exhibit J1 is the same as that given in Exhibit J2 which was filed in 1207 (1800), *i.e.*, in the very year in which the Permanent Settlement of the Taraf is alleged by the plaintiff to have been concluded with the Maharaja; and this return (Exhibit J2) was submitted by the Maharaja and not by an *ijaradar*. The Maharaja is described in Exhibit J2 as 'Talukdar', which indicates that it was before the Permanent Settlement. It appears, therefore, that the same area (1,157 *bighas*) which was shown as the area of the Mouza by the Maharaja in 1207, continued to be in the possession of the Maharaja in 1212 when Exhibit J2 was filed by his *ijaradar* after the Permanent Settlement. The learned Subordinate Judge was of opinion that the quinquennial register Exhibit 41 is more reliable than the returns Exhibits J1, J2; but they refer to two different periods; the register Exhibit 41 was for a period of 5 years commencing from 1202 (1795) which preceded the Permanent Settlement of the Taraf, whereas the Terij Exhibits J1 and J2 were for the years 1207 (1800) and 1212 (1805) respectively, and the latter Exhibit J1 was for a period subsequent to the Permanent Settlement. Exhibit J1 might possibly have been submitted by the *ijaradar* in order to help persons who were in possession under invalid Lakhraj right. However that may be, the fact remains that in 1805 the return submitted by the *ijaradar* under the Maharaja showed only 1,157 *bighas* as in his possession and there is no suggestion in the evidence that there was any other *ijaradar*. This was 2 years before the Patni was created, and is some evidence to show that a large quantity of land in the Mouza was in the possession of persons other than the Zemindar or the *ijaradar* under him.

Having regard to the fact that under section 103B of the Bengal Tenancy Act the onus is upon the plaintiff to prove that the entry in the Record of Rights is incorrect, to the facts admitted in the plaint, *viz.*, that "imaginary" Lakhraj rights were set up even before the Permanent Settlement, that Maharaja Tej Chandra Bahadur was in *khas* possession only for a short

period before granting the Patni, that until the Thak and Survey of 1852 the quantity of Mal lands had not been at all ascertained; and also to the facts that there is no evidence to show that any rent had ever been realized in respect of these lands, that the return Exhibit J1 showed only a small quantity of land in the possession of the Maharaja's *ijaradar* in 1212 (1805) and that the defendant and his predecessor-in-title have been in possession for a very long period without payment of rent, we think it was incumbent upon the plaintiff to show that the Zemindar was in possession of the lands in dispute at the date of the creation of the Patni, and that the incumbrance (the adverse possession) of the defendants came into existence after the date of the Patni. This the plaintiff has failed to show, because the quinquennial register is of a period prior to the Permanent Settlement, and there is no evidence going back to 1807 when the Patni was granted.

But even assuming that the Zemindar was in possession of the lands in dispute at the date of the grant of the Patni, and that the incumbrance of the defendant came into existence after the grant of the Patni, the plaintiff cannot succeed unless the incumbrance of the defendant has been annulled within one year from the date of the sale, or the date on which he first had notice of the incumbrance as prescribed by section 167 of the Bengal Tenancy Act. The sale at which the plaintiff purchased the Patni became final on the 28th November 1900. The notice under section 167 was served upon the defendant No. 1 on the 27th June 1909; the plaintiff, therefore, must show that he had first had notice of the incumbrance within one year prior to the 27th June 1909. The learned Subordinate Judge observes :—"There is no direct evidence adduced on the plaintiff's side, but the circumstances proved would go to show that plaintiff could have no knowledge of the alleged Lakhraj claim before the defendant No. 1 set up that claim during the attestation proceedings. There is no evidence on the defendants' side also to show that at any time before the attestation proceedings, the plaintiff had any occasion to be apprised that the lands were claimed by defendant No. 1 as Lakhraj. I accordingly hold that the suit is not barred by one year's limitation as regards defendant No. 1, the notice having been served within one year from September 1908."

It appears, however, from the evidence of plaintiff's own witness Mangal Sardar, who is the plaintiff's *halsana* for 11 years, that when the plaintiff attempted to measure the lands of Mouza Fullia in 1307 (1900) the defendants stopped the measurement. This witness was formerly in the service of the Pal Chowdhurys of Baira (the co-sharers of the defendants Nos. 2 to 5) and he speaks to the possession of the said defendants for 40 years, and of the Broderick Saheb prior to that period. In the plaint itself it is stated that "on the plaintiff attempting to measure amicably those Mouzas and by appointing an Amin to determine the areas of lands in the possession of tenants and different persons and to measure the same for the purpose of ascertaining other particulars, the said Dar patnidar, the tenants, and other persons conspired and put obstacles to the measurement. So the plaintiff could not at all ascertain the Mal lands and could not get possession of the lands in claim." This attempt to measure the land as stated by the plaintiff's witness Mangal Sardar took place immediately after the plaintiff's purchase, *i.e.*, in the year 1900. No steps were taken for the service of the notice under section 167 until 1909, although for about 9 years after the plaintiff's purchase, he had been kept out of the lands. The plaintiff, therefore, undoubtedly had notice of the possession of the defendants. It is contended on behalf of the plaintiff that possession for a period less than 12 years is not an incumbrance. But as pointed out in *Kalikananda Mukherjee* v. *Bipro Das Pal Choudhuri* (2), "the slightest enquiry such as a prudent owner would in ordinary course have made, would have disclosed that the occupants of the land claimed to hold them without payment of rent to the proprietor or his representatives." The plaintiff himself alleges in the plaint that imaginary revenue-free rights had been set up in collusion with *ijaradars* from before the Permanent Settlement. He admit that about 9 years before the suit he ha been prevented from measuring the land He has not examined himself to show whe

he became aware of the incumbrance. Having regard to all the circumstances it is impossible to hold that the plaintiff became aware of the incumbrance of the defendants for the first time within one year before the 27th June 1909. We are accordingly of opinion that the suit is barred by reason of the fact that the incumbrance was not annulled within the time prescribed by section 167 of the Bengal Tenancy Act. It is unnecessary, therefore, to consider the question raised in Appeal No. 114 of 1912, *viz*, whether the right of defendants Nos. 2 to 5 is an incumbrance, whether any notice is required to be served upon those defendants and was as a matter of fact served upon them.

In the view we have taken, it is also unnecessary to consider the other contentions raised in the defendant's appeal.

The result is that Appeal No. 409 of 1911 is allowed and Appeal No. 114 of 1912 is dismissed and the suit dismissed with costs. In Appeal No. 409, the appellant will be entitled to half the costs of this Court including the costs of the supplementary paper-book which will be taxed.

GREAVES, J.—I agree.

Appeal No. 409 *of* 1911 *allowed;*
Appeal No. 114 *of* 1912 *dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1915.

October 16, 1917.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

JIVANJI MAMOOJI—PLAINTIFF—APPELLANT

versus

GHULAM HUSSAIN SHEIKH TAYAB—DEFENDANT—RESPONDENT.

Provincial Insolvency Act (III of 1907*)*, *s.* 16—*"Pending", meaning of—Leave to commence suit, when to be obtained—Court, inherent authority of, to terminable proceedings in insolvency—Interpretation of Statutes—Words and phrases having technical meaning, interpretation of.*

The first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their technical meaning if they have acquired one. [p. 772, col. 1.]

A legal proceeding is said to be "pending," as soon as commenced, and until it is concluded, that is, so long as the Court having original cognizance of it, can make an order on the matters in issue, or to be dealt with therein. [p. 772, col. 1.]

Firm of Gopaldas v. *Pahlumal Hemanmal*, 30 Ind. Cas 37; 9 S L. R. 34, overruled.

A Court has no inherent authority to terminate the proceedings in an insolvency and deny to creditors and debtors, the exercise of rights clearly conferred by Statute. [p. 772, col. 2.]

Insolvency proceedings would be considered as still 'pending' within the meaning of section 16 of the Provincial Insolvency Act where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge. [p. 772, col. 2.]

The 'leave' to commence a suit, referred to in section 16 (2) of the Provincial Insolvency Act should be obtained before the institution of the suit, and cannot be obtained subsequently to its institution. [p. 773, col. 1.]

First appeal against the order of Mr. Fawcett, A. J. C., Sind.

Mr. *Dipchand Chandumal*, for the Appellant.

Mr. *Kalumal Pahlumal*, for the Respondent.

JUDGMENT.

CROUCH, A. J. C.—This is an appeal against an order of Fawcett, A. J. C., dismissing a suit of the appellant on the ground that no leave to commence the suit had been granted by the Court exercising jurisdiction under the Provincial Insolvency Act.

Ghulam Hussain Sheikh Tayab had been adjudicated an insolvent in Insolvency Proceeding No. 1 of 1911. The insolvent had absconded and the matter proceeded in his absence. Such assets as could be discovered were realized, and a final dividend was declared and paid. On the matter being called up on the 6th August 1913 the insolvent was still absconding, and it was suggested that the matter should be put on the dormant file. The Court (Hayward, A. J. C.) passed the following order: "The insolvent has not appeared to claim discharge. The proceedings should, therefore, be struck off the file and sent to the Record Room."

The present suit was filed on the 23rd September 1913, in respect of a debt which was proveable in the insolvency proceedings. The plaintiff had not obtained leave under section 16 of the Provinicial Insolvency Act to file the suit, and a preliminary issue—"Is the suit maintainable because of the pendency of the insolvency proceedings against the defendant ?" was

decided in the negative and the suit was dismissed.

In his judgment the learned Judge held on the authority of *Hawes, In re, Jeffery, Ex parte* (1) and *McHenry, Ex parte, McHenry, In re* (2) that, as the Receiver had not been discharged, the proceedings were still pending, and that the leave mentioned in section 16 of the Act must be obtained previous to the institution of the suit.

Mr. Dipchand Chandumal, who appears for the appellant, has argued, *firstly*, that the proceedings were not pending, and, *secondly*, that in any case the proper order should have been not of dismissal, but of stay of the suit until the necessary leave had been obtained.

Now, the first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their technical meaning if they have acquired one. When the Provincial Insolvency Act was drafted "pending", as applied to a legal proceeding, had been the subject of definition in several cases, and there was then no longer any doubt as to the meaning which Courts attached to it. Stroud, in the edition of 1890, refers to the cases decided up to that date, and states, "A legal proceedings is 'pending' as soon as commenced, and until it is concluded, that is, so long as the Court having original cognizance of it, can make an order on the matters in issue, or to be dealt with, therein." This definition was put in rather more emphatic terms by Jessel, M. R., in *Clagett's Estate, In re, Fordham* v. *Clagett* (3) and its correctness has not been impugned. As pointed out in the judgment of the lower Court, there were several orders which the Court could have made in the insolvency proceedings, in particular, the debtor could, at any time, have applied under section 44 for an order of discharge, and the Court could have passed an order granting or refusing it.

I accept Mr. Dipchand's contention that the two cases relied on by the lower Court constitute no safe guide to the construction of section 16, for, there is no provision in the Provincial Insolvency Act for the discharge of a Receiver.

It is clear from the judgment of the learned Judicial Commissioner in the case of *Firm of Gopaldas* v. *Pahlumal Hemanmal* (4), on which special reliance is placed by appellant, that it had not been brought to his notice that there was direct authority for construing the word "pending."

Mr. Dipchand urges that a Court has an inherent right to terminate any proceedings before it, and did so in intention and effect when it passed the order of 6th August 1913. He has, however, quite failed to convince me that the Court can arbitrarily terminate the proceedings in an insolvency and so debar the insolvent from obtaining his discharge, an unscheduled creditor from proving his debt, and the Receiver from getting in and distributing property of which he becomes aware at a late stage. He has nothing to appeal to beyond the vague and dangerous phrase "inherent authority", but no Court can have inherent authority to deny to creditors and debtors the exercise of rights clearly conferred by Statute. Nor did the Court in this case purport to finally bar all the rights of creditors or of the insolvent. The effect of the order was merely to strike off the matter from the list of those cases which it was the duty of the office to bring up before the Court from time to time for orders, and to place the record in the place appropriate to files which are not required for reference within any defined time. I would hold that the insolvency proceedings were still pending when the suit was commenced.

If the insolvency proceedings were pending, then section 16, *prima facie*, constituted a clear bar to the filing of the suit. If the full facts had been disclosed in the plaint itself, it would have been the duty of the Court to reject it under Order VII, rule 11, Civil Procedure Code, and if the plaint was liable to rejection it would seem to follow that the only course open to the Court on being informed of the bar was to dismiss the suit.

If we look exclusively to the clear words of the section, there can be no doubt what-

(1) (1874) 9 Ch. 144; 43 L. J. Bk. 27.
(2) (1883) 24 Ch. D. 35; 53 L. J. Ch. 27; 48 L. T. 921; 31 W. R. 873.
(3) (1882) 20 Ch. D. 637 at p. 653.
(4) 30 Ind. Cas. 37; 9 S. L. R. 34.

ever that in the absence of leave a creditor has no right of suit. This was the view taken by Davar, J., in *In re Dwarkadas Tejbhandas* (5). As soon as the defendant has brought to the notice of the Court that the insolvency proceedings are still pending against him, the statement by plaintiff that he has "the leave of the Court" becomes a material proposition of fact which he must allege in order to show that he has a right to sue, and as soon as the Court realises that the plaint discloses no complete cause of action, dismissal is the only course, for, had the plaint frankly stated the full facts, it would have been rejected *in limine*, and no plaintiff can obtain a right of suit by deceiving the Court.

Again as pointed out in the judgment in *Baloo Piroo* v. *Aladin Mitha* (6), the Court exercising jurisdiction under the Insolvency Act can give leave only to "commence a suit"; it cannot give leave to continue a suit which has been instituted contrary to a rule of law. The Official Receiver and the debtor are, otherwise, amply protected against the final result of any suit; the provision that no creditor shall commence a suit without leave gives protection against a particular form of interference with the winding up of the estate. Under the Act no creditor is bound to prove in the insolvency, and the order of discharge does not release the insolvent from an unscheduled debt. Hence any unscheduled creditor who can obtain a decree can put pressure on the insolvent for the rest of his life, and, where the disclosed assets are insignificant, it may be more profitable to a creditor to institute a suit than to file a claim. But the winding up of the estate would be almost impracticable if a large number of creditors were to institute proceedings. The mere cost of ensuring that the estate was adequately protected in all the suits would waste a considerable portion of the assets, the books of accounts would have to be taken from Court to Court and the Official Receiver might in several cases have to appear in person. Hence if the trying Court condones the unlawful institution and merely stays the suit, while leave is being sought from the Court exercising insolvency jurisdiction, the Official Receiver can fairly claim that he has not received that special form of protection from proceedings in the ordinary Civil Courts to which he is clearly entitled.

The decisions cited by Mr. Dipchand, based as they are on Statutes with provisions essentially different from those of the Provincial Insolvency Act, afford little assistance in solving the problem before us. In *Brownscombe* v. *Fair* (7) the defendant against whom bankruptcy proceedings were pending applied that a suit instituted against him might be stayed under section 10 of the Bankruptcy Act, 1883, and it was held that the plaintiff should not be allowed to continue the action. There was no request that the suit should be dismissed, but the stay order was unconditional. The Provincial Insolvency Act contains no provisions similar to those of section 10 of the English Act and the only procedure by which relief similar to that conferred by an unconditional stay order can be given is dismissal. The decision in *Firm of Gopaldas* v. *Pahlumal Hemanmal* (4) followed that of the Privy Council in *Mahammad Azmat Ali* v. *Lalli Bagum* (8). That was a case under sections 4 and 6 of the Pensions Act, 1871, and it was held that the provision in section 6 that "A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector" justified a Court in proceeding to hear a suit even though the plaintiff had not filed his certificate until some time after institution. "Cognizance" is defined by Webster as (1) "jurisdiction or the power given by law to hear and decide controversies; (2) the hearing of a matter judicially". Hence, the section was clearly open to the construction that a Court might proceed with the hearing on receiving a certificate

Similarly, the word "entertain", which according to Webster means "(1) give reception to; (2) receive and take into consideration," was construed in *Rendall* v.

(5) 31 Ind. Cas. 48; 40 B. 235; 17 Bom. L. R. 925.
(6) O.S No. 299 of 1911.

(7) (1883) 58 L. T. 85.
(8) 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind. Dec. (N. S.) 269 (P. C.).

Blair (9) as equivalent to "proceed with the hearing." And this construction was adopted in *Bando Subrao* v. *Jambu Tavnappa* (10) when section 47 of the Deccan Agriculturists' Relief Act was in question. *Fernandez* v. *Rodrigues* (11) was a case under section 30, Civil Procedure Code (Act XIV of 1882), and it was held that the words "One or more of such parties may with the permission of the Court sue or be sued" enabled a plaintiff to obtain the permission after institution. This has been laid down in *Srinivasa Chariar* v. *Raghava Chariar* (12), *Chennu Menon* v. *Krishnan* (13) and *Baldeo Bharthi* v. *Bir Gir* (14).

"To sue" is to proceed with an action and to follow it up to its proper termination (Webster) and, is obviously, not the same as "to commence an action."

But the Courts have not hesitated to dismiss any suit that has been instituted in clear breach of a rule of law. Thus, when a suit was brought in defiance of the provision in the Court of Wards Act (Bengal Act IX of 1879, section 55) that "no suit shall be brought on behalf of any ward...unless the same be authorized by some order of the Court", it was dismissed, *Dinesh Chunder Roy* v. *Golam Mastapha* (15). So also the terms of section 433, Civil Procedure Code, 1882, were strictly enforced in *Chandulal Khushalji* v. *Awad* (16).

I would hold, therefore, that the lower Court had no alternative but to pass the order complained against and would dismiss the appeal with costs.

PRATT, J. C.—I concur and resile from my judgment in *Firm of Gopaldas* v. *Pahlumal Hemanmal* (4). The word "pending" should be construed not as I there construed it, but in the sense that it was still possible to the Court to make an interlocutory order in the proceedings. This construction does not involve hardship for, in the circumstances of the present case, leave would have been given as a matter of course. I also agree that the suit could not have been stayed in order to enable the plaintiff to obtain leave. The Privy Council case under the Pensions Act is distinguishable for the reasons given in *Chandulal Khushalji* v. *Awad* (16).

The plaintiff should have obtained leave to withdraw from the suit with liberty to file a fresh suit when the bar of section 16 of the Provincial Insolvency Act was discovered. But this procedure cannot be adopted in appeal, *Eknath Ranoji* v. *Ranoji Bavaji* (17).

The order made by the lower Court was, therefore, correct.

Appeal dismissed.

(9) (1890) 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689.
(10) 7 Ind. Cas. 986; 12 Bom. L. R. 801.
(11) 21 B. 784; 11 Ind. Dec. (N. S.) 528 (F. B.).
(12) 23 M. 28; 7 M. L. J. 251; 8 Ind. Dec. (N. S.) 414.
(13) 25 M. 399.
(14) 22 A. 269; A. W. N. (1900) 69; 9 Ind. Dec. (N. S.) 1211.
(15) 16 C. 89; 8 Ind. Dec. (N. S.) 59.
(16) 21 B. 351; 11 Ind. Dec. (N. S.) 237.
(17) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 111 OF 1917.

May 6, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.

THE BANK OF BENGAL, AKYAB—PLAINTIFF—APPELLANT

versus

AUNG THA HLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Priority—Registered and equitable mortgages—Negligence—Notice—Search in registration office, absence of.

A subsequent mortgagee who has wilfully abstained from the obvious course of searching in the registration office cannot obtain priority over an earlier registered mortgage merely on the ground that the latter did not call for the title-deeds and retain them in his control. [p. 777, col. 2.]

(Case-law considered.)

Appeal against the decree of the District Court, Akyab, in Civil Suit No. 276 of 1916.

Mr. *Giles*, for the Appellant.

Mr. *N. M. Cowasjee* (with him Mr. *Lambert*), for Respondent No. 3.

JUDGMENT.—In July 1910 the defendant-respondent Mg Tha Baw deposited the title-deeds of certain agricultural lands with the Bank of Bengal, Akyab, as security

for advances made to him by the Bank from time to time. His indebtedness to the Bank fluctuated from month to month. On April 29th, 1914, he cleared his account with the Bank by two payments of Rs. 5,000 each but he allowed his title-deeds to remain in the possession of the Bank and on May 23rd, 1914, he took a fresh advance of Rs. 10,000. From that time onward his indebtedness to the Bank continued up to the date of the suit, the amount fluctuating between Rs. 10,000 and Rs. 62,500. The Bank admittedly during the whole period of their dealings with Mg. Tha Baw up to May 1916 made no enquiries as to the freedom of the property from encumbrances either at the Akyab Registration Office or at the Sub-Registration Office of the sub-district in which the lands were situated. It, therefore, entirely escaped the notice of the Bank that on the 21st May 1914, *i.e.*, during the period when he was temporarily free from debt to the Bank, Mg. Tha Baw executed jointly with his wife a mortgage of certain of his lands to Rai Gyaw Thu and Co., a firm of money-lenders at Akyab, and that this mortgage was duly registered at the Sub-Registration Office at Myohoung where Tha Baw lives. This registered mortgage included some of the lands of which the title-deeds were with the Bank. The principal money secured by this registered mortgage was Rs. 30,000 but of this amount only Rs. 4,000 or Rs. 5,000—consisted of new money, the remainder representing sums due on a previous mortgage of 1911 to Rai Gyaw Thu & Co. and on certain promissory notes. When taking this mortgage the Company did not call for the title deeds of the lands but were satisfied with the production of some tax receipts and with the mortgagor's assurance that the property mortgaged by him was free from encumbrances, as in truth it was.

The Bank sued Tha Baw in this suit, No. 276 of 1916, for Rs. 20,557 due on two promissory notes, and in the four connected suits Nos. 277, 278, 279 and 281 they sued him for various sums due on other promissory notes; and in each of these five cases the Bank prayed for a mortgage decree against the property of which they hold the title-deeds. Rai Gyaw Thu & Co. as subsequent mortgagees were joined as co-defendants in all these suits. Mortgage decrees have been granted in favour of the Bank, but the District Court has ordered in each case that as regards the property mortgagod to the Bank on 21st May 1914 the mortgage of the Bank shall rank after the registered mortgage. The Bank appeals on the question of priority.

The District Court after referring to the authorities has held on the one hand that the registration of the Company's mortgage was not tantamount to notice to the Bank of the Company's mortgage, but the Court decided on the other hand that the Company had failed to do all that a reasonable and prudent man would have done in omitting to call for the title-deeds. But the Court also decided that the Bank had been wanting in prudence in abstaining from enquiry as to encumbrances before starting the fresh series of advances to Tha Baw, *i.e.*, on May 23rd 1914 And the learned Judge's conclusion is that "as neither of the two creditors can be said to have done all that a reasonable and prudent man would have done to secure his position things must lie as they fall, and as regards the items of lands in dispute between the Bank and the Company the Company has priority."

The learned Counsel for the appellant supports the District Court's decision that registration is not tantamount to notice, but argues that the latter part of the judgment is in the nature of *non sequitur* for it imputes blame to the Bank for omitting to do what the earlier part of the judgment shows to be unnecessary. We are asked to hold also that Rai Gyaw Thu and Co. were guilty of gross neglect within the meaning of section 78 of the Transfer of Property Act in not demanding and looking after the title-deeds, as their omission to do so left the mortgagor in a position to hold himself out as unencumbered owner of the property.

Mr. Cowasjee for the respondent Company contends that section 78 of the Transfer of Property Act does not apply and that the Court should be guided only by the provisions of sections 79 and 80. Section 80 prevents the Bank from acquiring priority in respect of advances except in the case provided for in section 79, and that the section is clearly inapplicable because

no maximum was expressed to be secured by Tha Baw's mortgage by deposit of the title deeds with the Bank. But section 80 does not override section 78. Section 80 merely prevents the Bank from getting priority by tacking its subsequent advances to any prior advance. It does not prevent the Bank from getting priority for its subsequent advances by showing that it was induced to make such subsequent advances through the fraud, misrepresentation or gross neglect of the prior registered mortgagee. No question of fraud or misrepresentation has been raised in this case. The question to be decided is whether in the circumstances described above the Court should impute gross neglect to Rai Gyaw Thu & Co. and whether such neglect on their part was a proximate cause of the Bank's action in advancing money to Tha Baw from May 23rd, 1914, onwards.

In England in former times a mortgagee who left the title-deeds with the mortgagor was liable to forfeit his priority even if there was no imputation of negligence. But this is not the present state of the law. In *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1), a much less rigorous rule is laid down. According to that case the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner. Lord Justice Fry remarked that the omission to use ordinary care in enquiring after or keeping title-deeds may be, and in some cases has been, held to be sufficient evidence that the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate. But it appears that the English Law now imposes no duty to be careful as between an earlier and a later mortgagee and that the priority of the former can be displaced only where he has assisted in or connived at the fraud committed on the latter. It is obvious that in a country where compulsory registration of assurances is universal, the possession of title-deeds is of less importance as a badge of title than in England where registration is enforced only in certain limited areas. It would be unreasonable, therefore, to construe section 78 of the Transfer of Property Act as involving a more stringent rule than that now enforced in England. Moreover, what may in England amount to gross neglect sufficient to render the first mortgagee responsible for the fraud committed on the second mortgagee, should not necessarily be regarded in the same light where the first mortgage is registered under a system of compulsory public registration. Mortgages are frequently effected in this country without production of title-deeds, the mortgagees depending on the words of their mortgagors as to freedom from previous encumbrances and trusting to registration of their mortgages to protect them as regards future encumbrances.

The Bank in this case acted as if there was no Registration Act in force in this country and as if the mere possession of the title-deeds conferred an impregnable title on the Bank. The Bank continued to advance large sums of money month after month to Tha Baw without ever attempting to ascertain whether any encumbrance on the property was registered.

On the question whether registration of a mortgage is notice thereof to the whole world the Indian High Courts are not unanimous. The Bombay High Court has held that registration is notice.* The Allahabad High Court in *Churaman* v. *Balli* (2) held that where a deed of sale had been registered, a subsequent mortgagee who failed to search the register was guilty of gross negligence in not so doing and could not be treated as a *bona fide* mortgagee without notice. The Madras High Court until recently held that registration was not notice. *Vide Damodara* v. *Somasundara* (3), *Shan Maun Mull* v. *Madras Building Co.* (4) and *Madras Building Co.* v. *Rowlandson* (5), but the later judgment in *Rangasami* v. *Annamalai* (6) shows a marked change of

(1) (1884) 26 Ch. D. 482; 53 L. J. Ch. 629; 51 L. T. 806; 32 W. R. 626.

(2) 9 A. 591; A. W. N. (1887) 121; 5 Ind Dec. (N. S.) 831.

(3) 12 M. 429; 4 Ind. Dec. (N. S.) 648.

(4) 15 M. 268; 2 M. L. J. 95; 5 Ind. Dec. (N. S.) 538.

(5) 13 M. 383; 4 Ind. Dec. (N. S.) 979.

(6) 31 M. 7; 17 M L. J 499; 3 M. L. T. 87.

*See *Balmakundas* v. *Moti*, 18 B. 444; 9 Ind. Dec. (N. S.) 805.

opinion on the subject. It was held in that case that the failure of a prior mortgagee to obtain the title-deeds from his mortgagor did not in the circumstances of the case amount to gross negligence within the meaning of section 78 of the Transfer of Property Act, and that in considering what amounts to gross negligence on the part of the prior mortgagee one of the circumstances to be taken into account in this country is that a universal system of registration is established by law. The decision of Mr. Justice Jenkins in the Calcutta case of *Monindra Chandra Nandy* v. *Troyluckho Nath Burat* (7) contains an expression of opinion showing that the learned Judge was in favour of the Bombay practice, by which registration is regarded as notice. He said: "The existence of gross negligence must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration here is the fact that in this country a universal system of registration exists. Registration is prescribed by Statute, and he, who registers his deed promptly, reaps the reward of his care and diligence in the security and priority he thereby gains." He also cited the remarks of Lord Cairns in *Agra Bank Ltd.* v. *Barry* (8) beginning with the words, "Has it ever been decided with regard to a Registration Act such as that prevailing in Ireland that negligence in not asking for the title-deeds or not taking up the title-deeds shall postpone...security ?" Mr. Justice Jenkins said that though the circumstances of that case differed from those with which he had to deal, the Lord Chancellor was enunciating a general principle which furnished a useful guide on the point which called for his decision. It was a case in which, as in the present case, the subsequent mortgagee had neglected to search for prior encumbrances in the Registration Office. This case has not been followed by the Calcutta High Court in the later case of *Nanda Lal Roy* v. *Abdul Aziz* (9), in which that Court re-affirmed the rule which had hitherto been followed in the Calcutta High Court that registration is not *per se* notice. It is clear, however, that there is now a preponderance of authority in the Indian High Courts in favour of the view that a subsequent mortgagee who has willfully abstained from the obvious course of searching in the Registration Office cannot obtain priority to an earlier registered mortgagee merely on the ground that the latter did not call for the title deeds and retain them in his control.

The appeal is, therefore, dismissed with costs.

The decision in Civil First Appeal No. 111 of 1917 governs also Civil First Appeals Nos. 112, 113, 114 and 115. These four appeals are, therefore, also dismissed with costs.

Appeal dismissed.

(7) 2 C. W. N. 750.
(8) (1874) 7 H. L. 135.
(9) 34 Ind. Cas. 115; 43 C. 1052.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1920 OF 1916.

June 20, 1918.

Present :—Mr. Justice Fletcher and Mr. Justice Panton.

AMAR CHANDRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Srimati NOOR KHATUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Raiyati *right, whether can be acquired by cultivator settled by trespasser.*

The actual cultivator of a land who honestly and *bona fide* believes that the person who settled him on the land had a right to settle him may, after a period of years, acquire a right in the land as a *raiyat* even where it is proved that the settlor had no such right. [p. 778, col. 2.]

Appeal against the decree of the Additional Subordinate Judge of Chitagong, dated the 22nd of May 1916, modifying that of the Munsif, 3rd Court at that place, dated the 20th of August 1914.

FACTS appear from the judgment.

Dr. *Dwarka Nath Mitter* (with him Babu *Rishendra Nath Sarkar*), for the Appellants.—The plaintiff is the appellant. This was a suit to recover possession of two holdings recorded in the Cadastral Survey as Dags Nos. 3132 and 3125. Certain defendants set up *dartaluqs* under an estate Taraff

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Mohamad, Touzi No. 128. Other defendants pleaded that they took as actual cultivators under the *taluqdars*. The first Court held that the defendants were able to establish *durtaluqs* and dismissed the plaintiff's suit for *khas* possession. Appellate Court reversed the decision and gave the plaintiff a decree for possession through cultivators.

In *Hajra Sardara* v. *Kunja Behari Nag* (1) it was held that long possession merely would not entitle a tenant to acquire a right of occupancy.

Babu *Atindra Nath Mukherjee*, for the Respondents.—Finding is that the cultivators are occupancy *raiyats*.

[FLETCHER, J.- You must prove a better title against the landlord as you are a trespasser.]

I am in possession from 1903.

[FLETCHER, J.—That does not matter: possession must be in good faith; you cannot have a right of occupancy if you cultivated the land as a trespasser.]

I was in *bona fide* possession. I executed a *kabuliyat* in favour of the landlords and did other acts to show my *bona fides*. It has been held in *Kali Prosanna Das* v. *Bhagaban Mali* (2) that if a person is settled on the land as a *raiyat* by a trespasser, when his name is recorded in the Settlement Record as a *raiyat* he is to be treated as a *raiyat* by the Zemindar and cannot be ejected.

[FLETCHER, J.—You are a trespassing *raiyat*, you hold under a trespasser and it has been held by judicial decisions that if a *raiyat bona fide* believes that he is a cultivator then he is entitled to acquire rights of occupancy. If the finding is not clear on the point as to whether you took settlement *bona fide*, then the case must be remanded in order to find out whether the cultivator took settlement under a *bona fide* belief that the alleged *taluqdar* or *dur-taluqdar* had a right to make such a settlement.]

JUDGMENT.—The only question raised in this appeal is this: whether the plaintiff is entitled to evict the actual cultivators who are the defendants Nos. 2, 3, 5, 6, 7, 8, 9, 14 and 15. It is found that the alleged *taluqdars* and the *durtaluqdars* have no interest in the property. The actual cultivators claim possession under an alleged settlement from the alleged *durtaluqdars*. The decisions of this Court show that the actual cultivator who honestly and *bona fide* believed that the person who settled him on the land had a right to settle him may, after a period of years, acquire a right in the land as a *raiyat*. The learned Judge of the lower Appellate Court in the present case has made no finding as to whether these cultivators defendants *bona fide* believed that the alleged *dur-taluqdars* had the right to settle them on the land of which they took settlement. The decree of the lower Appellate Court is accordingly set aside as regards the cultivating defendants, namely, the defendants Nos. 2, 3, 5, 6, 7, 8, 9, 14 and 15, and the case is sent back to that Court to have the question determined as to the belief of the said actual cultivators as stated above. Costs of this appeal will abide the result of the further hearing by the learned Subordinate Judge as directed.

Decree set aside; Case sent back.

(1) 40 Ind. Cas. 271; 25 C. L. J. 635 at p. 637; 21 C. W. N. 1001.

(2) 17 Ind. Cas. 587; 17 C. L. J. 431; 17 C. W. N. 348.

MADRAS HIGH COURT.

APPEAL SUIT No. 344 OF 1916.

November 8, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

PUZHAKKAL EDOM *alias* PUTHAN EDOM KARNAVAN AND KAIKARYAKARTHAMU VALIA ACHAN AVERGAL —DEFENDANT—APPELLANT

versus

MAHDEVA PATTAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX—Injunction, effect of—Malabar Law—Injunction restraining karnavan *from contracting loans for managing* tarwad *property—Loans contracted for necessity—Creditor, rights of*—Tarwad, *liability of.*

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In a suit by the members of a Tarwad to remove the Karnavan from office, the Court passed an injunction restraining the latter from contracting loans to manage the property. The Karnavan nevertheless borrowed money for the necessary purposes of the Tarwad while the injunction was in force. In a suit by the creditor for repayment of the loan:

Held, that the effect of the injunction was what was laid down in Order XXXIX, Civil Procedure Code, and that both the Karnavan and the Tarwad were liable for the debt. [p. 780, col. 1.]

Eastern Trust Co. v. *McKenzie, Mann & Co. Ltd.*, (1915) A. C. 750 at p. 769; 84 L. J. P. C. 152, distinguished.

Delhi & London Bank v. *Ram Narain*, 9 A. 497; A. W. N. (1887) 107; 5 Ind. Dec. (N. S.) 769 and *Manohar Das* v. *Ram Autar Pande*, 25 A. 431; A. W. N. (1903) 92, followed.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Original Suit No. 49 of 1915 and application praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the decree in the said Original Suit No. 49 of 1915 in respect of the amount of proportionate costs to plaintiff.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *A. S. Venku Aiyar*, for the Respondents.

JUDGMENT.—The first question argued before us is on the merits of the case. As a matter of fact, money was advanced by the respondent as alleged by him, and we think there was necessity on the part of the Karnavan who held the office previous to the appellant to borrow money for Tarwad purposes. As regards the fact of the advances, the only evidence is on the side of the respondent which supports his case, and that case is corroborated by the production of receipts obtained from different persons to whom payments were made either on account of maintenance, or salaries or for payment of *kist*. No doubt, the respondent himself was in debt to a large extent but he gives evidence that he borrowed money from different persons in order to make a loan to Andi Achan. He brought the loan to the notice of the Court and it must have been known to the appellant in the suit.

On the question of necessity the Edom consists of 160 members and the income, all told, taking it at the highest, does not amount to more than Rs. 12,000 a year, and the admission of the appellant himself is to the effect that unless jungle trees are leased from time to time the income is not sufficient to meet the maintenance charges, after paying the necessary outgoings. There is evidence to show that at the time when Andi Achan borrowed from the respondent he had large payments to make amounting to nearly Rs. 3,000 and he did make this payment in full. We are, therefore, unable to say that the finding of the Subordinate Judge on this point is wrong.

Then it is pointed out that the present appellant and a number of other members of the family had instituted a suit against Andi Achan for removing him from the Karnavan's office and in the course of that suit an injunction was obtained restraining him from managing the property. We take it that the effect of the different orders passed in that connection was to prohibit his contracting loans. Because the injunction seems to be very widely worded—restraining Andi Achan from carrying on the management of the property which would have authorised him to contract loans for the purpose—he however obtained permission afterwards to raise Rs. 3,000 by leasing jungle trees. But then the evidence shows that he was unable to find such a lessee. Therefore he applied to the respondent and obtained from him the amount on the bond in this suit. It has been argued that since there was an injunction restraining Andi Achan from borrowing money, this bond executed to the respondent is not enforceable even though the money was advanced for necessary purposes of the family and was utilised for such purposes. We have not been referred to any authority which supports the proposition, for the English case, *Eastern Trust Co.* v. *McKenzie, Mann & Co., Ltd.*, (1), cited by Mr. C. V. Ananthakrishna Aiyar does not seem to touch the question at all. On the other hand, the ruling in the *Delhi & London Bank* v. *Ram Narain* (2) which has been followed in *Manohar Das* v. *Ram Autar Pande* (3) lays down the law to the contrary. We

(1) (1915) A. C. 750 at p. 769; 84 L. J. P. C. 152.
(2) 9 A. 497; A. W. N. (1887) 107; 5 Ind. Dec. (N. S.) 769.
(3) 25 A. 431; A. W. N. (1903) 92.

think the effect of an injunction like this is what is laid down in the Civil Procedure Code, and it will be going much too far to say that a person in the position of Andi Achan being so restrained is not liable to repay the money which he has in fact borrowed, and if the money was borrowed and utilised for the benefit of the Tarwad that the Tarwad is not liable. We, therefore, uphold the judgment of the Subordinate Judge and dismiss the appeal with costs.

As regards the application for amendment of the decree we think that it must be allowed. The proportionate cost which the Subordinate Judge has directed as being payable to respondent is Rs. 432-10-1. In this he has proceeded on a wrong basis, because the only amount for which deduction has to be made is the Court-fee; and calculating on that basis, the costs payable in the lower Court to the respondent would be Rs. 573-10-1. The decree will be modified accordingly.

M.C.P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 379 OF 1917.

June 20, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Panton.

Rai Chowdhury SATISH CHANDRA MUSTAFI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ABDUL MAJID MAHAMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 50 (2)—Presumption, rebuttal of, by statement in rent receipts that holding is sarasari—*Appeal, second—Document, statement in, value of—High Court, whether can interfere with finding of lower Appellate Court.*

The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognisance of the Court of first appeal, with which the High Court in second appeal is not entitled to interfere. [p. 781, col. 1.]

The mere statement in some rent receipts that a holding is *sarasari* is not sufficient to rebut the presumption arising under section 50 (2) of the Bengal Tenancy Act from the fact that the rent has been unchanged for more than 50 years. [p. 781, col. 1.]

Appeal against the decree of the Special Judge of Jalpaiguri, dated the 20th of November 1916, affirming that of the Assistant Settlement Officer of that place, dated the 22nd of September 1915.

FACTS appear from the judgment.

Babu *Nagendra Nath Ghose*, for the Appellants.—The question for determination in this appeal is whether the presumption arising under section 50 of the Bengal Tenancy Act by the production of rent receipts for more than twenty years at a uniform rate, has been sufficiently rebutted by the plaintiff landlord. The literal meaning of the word *sarasari* used in the rent receipts is *loose*. Even according to the finding of the learned Judge the word *sarasari* means that the rent is enhanceable. If that is so, when the rent receipts proved by the tenant in support of his case contain the word *sarasari*, the lower Appellate Court has erred in holding that the presumption under section 50 has not been rebutted. The plaintiff is entitled to make use of that statement in the rent receipts in showing that the tenant cannot claim to hold at fixed rent or rate of rent. If your Lordships decide the case on a proper interpretation of the word *sarasari*, the judgment of the lower Appellate Court cannot stand.

Babu *Jitendra Kumar Sen Gupta*, for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the plaintiffs against the decision of the learned Special Judge of Jalpaiguri, dated the 20th November 1916, affirming the decision of the Assistant Settlement Officer of the same place. The only question is whether the learned Judge of the Court of Appeal below was right in holding that the landlords had not rebutted the presumption arising under section 50 of the Bengal Tenancy Act. The tenants have proved that their rent has been unchanged for over 50 years, and the learned Judge remarks that it is exceedingly improbable in that view that the tenancy was originally a temporary one. What is relied on is this, that the word *sarasari* appears in some rent receipts. The learned Judge states that the mere statement in some rent receipts that the holding is *sarasari* would not be, in his

opinion, sufficient to rebut the presumption under section 50 of the Bengal Tenancy Act. The learned Judge, in my opinion, was clearly entitled to come to that conclusion. The weight to be attached to a statement in a rent receipt or any other document is obviously a matter within the cognisance of the learned Judge and, he having arrived at that conclusion, I do not think we are entitled to displace the finding he has arrived at. The appeal fails and is dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 8 OF 1918.

July 28, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

Babu GORIDUT BAGLA—PLAINTIFF—PETITIONER

versus

Babu H. ROOKMAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, scope of—Revision—Irregularity.

If a Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements of Pleaders or witnesses, the method of arriving at such conclusion is illegal and irregular and is a ground for revision, provided the irregularity is material and the petitioner has suffered an injustice thereby. [p. 783, cols. 1 & 2.]

Mr. *J. R. Das*, for the Appellant.

Mr. *Leach*, for the Respondent.

JUDGMENT.

ORMOND, J.—The plaintiff petitioner and defendant-respondent were partners in two timber businesses carried on, one at Rangoon and the other at Moulmein. The Rangoon business ceased before the Moulmein business began. The defendant financed the business and kept the books. The plaintiff executed a promissory note for Rs. 4,500 in favour of the defendant as being his share of the loss in the Moulmein business and the note is dated 4th of April 1914. On the 27th of April 1914 the plaintiff executed what has been styled a "release" in favour of the defendant. It is to the effect that the plaintiff had no liability for any loss and no right to any profit in the partnership business. The defendant sued the plaintiff on the promissory note and obtained a decree in Civil Regular Suit No. 125 of 1915. The case of the plaintiff, who was the defendant in that suit, was that the amount due from him on the promissory note was cancelled by the "release." The District Judge found that the promissory note had in fact been made on the same day that the "release" was executed and gave the defendant a decree on the promissory note, *i.e.*, he found that the debt on the promissory note had not been cancelled by the "release" but that the promissory note was executed in pursuance of a settlement of accounts which resulted in the "release". The plaintiff instituted a suit against the defendant (Civil Regular No. 46 of 1916) asking for a dissolution of both partnerships and for accounts to be taken in both the businesses. That suit was dismissed for the reason given in the judgment in Suit No. 125 of 1915. The plaintiff then applied in review against the order of dismissal, and the suit was restored as to the Rangoon business only but remained dismissed as regards the Moulmein business, and the release was taken to refer only to the Moulmein business. The plaintiff then sued to set aside the release dated the 28th of April 1914 on the ground of fraud (Civil Regular No. 86 of 1916). The fraud alleged was that certain items were omitted by the defendant in the partnership books of account, namely, certain sale proceeds and other items which are specified in paragraph 6 of the plaint. Suits Nos. 46 and 86 of 1916 were heard together. On the 8th of March 1917 both parties appeared by Pleaders and the District Judge recorded an order by consent in the Diary which is as follows:—

"By agreement Messrs. Buchanan and Eusoof are appointed Commissioners to examine the accounts, fees Rs. 200 a side, in both cases. The Commissioners will be given access to all documents

bearing on the matters at issue. There will be a preliminary decree accordingly, in each suit." On that order a preliminary decree for dissolution of partnership was drawn up according to form 21 of Schedule D of the Code. The date of the dissolution was given as the 8th of March 1917, *i.e.*, the date of the consent order. The defendant made an oral application for the amendment of the decree to alter the date of the dissolution from the 8th of March 1917 to the actual and admitted date of dissolution, *viz.*, 28th of April 1914. On the 7th of September 1917 the District Judge held that there was no necessity to alter the date. Then on the 20th of September 1917 the defendant put in an application with an eight-anna stamp asking the Court "to amend the decree or to review it or to take up the case *de novo* as it was obvious that there was a mistake or error on the face of the decree." The District Judge held that the application was an application for the amendment of the decree under section 152 of the Civil Procedure Code, and he dealt with it only on that footing. It may be noted that as an application for review the application was clearly barred by limitation and moreover was not properly stamped. On the 14th of December 1917 the District Judge held that the order of 8th March 1917 was a consent order for these Commissioners to be appointed in order to examine the accounts and to report if there was any fraud and that under Order XXVI, rule 16, the Commissioners would have power to examine any witnesses who were necessary, as it was unlikely that fraud could be detected by the mere perusal of accounts. The learned Judge held that he had erred in adopting the form of preliminary decree No. 21, Schedule D, and that instead of the order being for "a preliminary decree" it should have been for "an order". He adjourned the hearing for parties to agree as to the form which the amendment of the preliminary decree should take. On the 18th December 1917 the District Judge heard the Advocates of the parties and on the 28th December he passed an order cancelling the consent order of the 8th March, on the ground that the parties were not "ad idem." From that order the plaintiff-petitioner applies to this Court in revision.

It is clear that the parties had agreed on the 8th March that these two Commissioners should take the accounts and the District Judge so found on the 14th December. In my opinion the District Judge had no jurisdiction, upon an application to amend the decree (or the formal order) so as to bring it into conformity with the judgment, to annul the order.

Mr. Leach, for the respondent, contends that the District Judge having jurisdiction to entertain the application, this Court cannot interfere in revision. He relies upon the recent pronouncement by the Privy Council upon section 115 of the Code, contained in the case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (1), and he cites a recent case decided by Mr. Justice Rigg, *Ko San Hla* v. *Maung Po Thet* (2), in which the learned Judge has apparently held that the decision in *Zeya* v. *Mi On Kra Zan* (3) is shown to be not good law by the above Privy Council ruling. The learned Counsel also cites the recent case of *Kumar Chandra Kishore Roy Chowdhury* v. *Basat Ali Chowdhury* (4).

Section 115 of the Code allows revision if it appears that the lower Court (*a*) exercised a jurisdiction which it had not, or (*b*) failed to exercise a jurisdiction which it had or (*c*) acted in the exercise of its jurisdiction illegally or with material irregularity.

In *Zeya* v. *Mi On Kra Zan* (3) it was held by a Bench of this Court, that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then, although its decision may be erroneous, the error cannot be corrected on revision, but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has

(1) 40 Ind. Cas. 650; 22 C. W. N. 50 at p 58; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 11 Bur L. T. 48.

(2) Civil Revision No. 30 of 1918.

(3) 2 L. B. R. 333

(4) 44 Ind. Cas. 763; 27 C. L. J. 418; 22 C. W. N. 627.

acted illegally and its decision may be revised.

In the Privy Council case above cited the District Judge under section 10 of the Bengal and Madras Native Religious Endowments Act ordered a Committee to elect a member. The High Court on revision set aside the order on the ground that the District Judge had no jurisdiction to pass such an order under section 10. On appeal to the Privy Council the decision of the High Court was upheld. The effect of the Privy Council judgment is that a wrong construction of the section by the District Judge would not have been a ground for revision if it had not involved a question of jurisdiction; but inasmuch as he had by such wrong construction assumed a jurisdiction which he did not possess, the High Court could interfere in revision. The judgment does not deal with clause (*c*) of section 115, beyond paraphrasing it as "the irregular exercise of jurisdiction." I can find nothing in this judgment which is inconsistent with the decision in *Zeya's case* (3).

In *Chandra Kishore's case* (4) the question before the District Judge was whether property which had been sold by the Court had fetched an adequate price. The property was admittedly a 2/3rds share in a certain Taluk, but the District Judge erroneously assumed that it was only a 1/3rd share and upon that assumption he found the price realised was adequate. Upon application in revision to the High Court the two Judges disagreed as to whether an application for revision would lie under section 115. Upon appeal to a Bench of 3 Judge, 2 Judges held that the High Court could not interfere in revision: the District Judge having merely come to an erroneous conclusion of fact. With great respect I do not agree with this decision. Supposing all the facts of a case are admitted but the Judge erroneously assumes them to be exactly the opposite, the injured party would then have no remedy in revision. The question I think resolves itself into this: was the method irregular by which the conclusion of fact or of law was arrived at? If the Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements of Pleaders or witnesses, the method of arriving at such conclusion is illegal and irregular, and is a ground for revision; provided the irregularity is material and the petitioner has suffered an injustice thereby.

The present case is one of acting without jurisdiction in annulling the consent order upon an application to bring the formal order into conformity with the judgment, rather than of arriving at a conclusion of fact in an irregular manner. I would set aside the order of the District Judge of the 28th December 1917 and restore the consent order of 8th March 1917 for the accounts to be taken by the Commissioners. The costs of this application (5 gold *mohurs*) should, I think, abide the event.

TWOMEY, C. J.—I concur. The Privy Council case reported as *Balkrishna Udayar* v. *Vasudeva Aiyar* (1) does not, in my opinion, restrict the scope of section 115, Code of Civil Procedure, as expounded in *Zeya* v. *Mi On Kra Zan* (3).

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 9 OF 1918.

April 5, 1918.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

Messrs. GOVERDHANDAS VISHINDAS RATANCHAND—PLAINTIFFS—APPELLANTS

versus

Messrs. RAMCHAND MANJIMAL—DEFENDANTS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Stay of suit—Umpire, appointment of, certainty of bias in—Order directing stay for limited period, validity of—Contract Act (IX of 1872), s. 20—Mutual mistake on matter of fact not essential to contract, effect of.

An arbitration tribunal in which the ultimate decision rests with the nominee of a class to which one of the parties belongs cannot be said to be an impartial tribunal. [p 788, col. 1.]

When a Court finds that an agreement of reference to arbitration provides for the appointment of an umpire who would most certainly tilt the scales against one party, the Court should retain its jurisdiction to try the suit and refuse any application for stay thereof. [p. 788, col. 2.]

GOVERDHANDAS VISHINDAS RATANCHAND *v.* RAMCHAND MANJIMAL.

An order for stay under section 19 of the Arbitration Act ought not to be restricted by a time limit. [p 786, col. 1.]

Where an agreement of reference provided that in case of dispute the matter should be referred to the arbitration of two merchants who were members of the Karachi Indian Merchants Association and in case of disagreement between the arbitrators, to an umpire nominated by the said arbitrators or in case of their inability to do so by the Managing Committee of the Association, and it was proved at the trial that the Rules of the Association were so imperfectly drafted and the Association so loosely constituted that the establishment of a valid tribunal of arbitrators was a matter of considerable difficulty:

Held, per *Pratt*, *J. C.*—That under such circumstances the Court would hesitate to enforce the arbitration. [p. 786, col. 1.]

Per *Fawcett*, *A. J. C.*—That both the parties appeared to be under a mistake of fact as to the validity of the constitution of the Association but as the matter was not one essential to the agreement, the agreement of reference was not void under section 20 of the Contract Act and hence could not be avoided on this ground. [p. 786, col. 2; p. 787, col. 1.]

The Court should exercise its discretion, in refusing to stay a suit or granting leave to revoke a submission, in a sparing and cautious manner and should not do so, unless the applicant can establish that there is good ground for apprehending that there will be a failure of justice if the reference to arbitration is allowed to proceed. [p. 790, col. 2.]

Appeal against the order of Mr. Crouch, Additional Judicial Commissioner, Sind.

The Hon'ble Mr. *Strangman*, Advocate-General, Bombay, for the Appellants.

Messrs. *Kalumal Pahlajmal* and *F. J. Deverteuil*, for the Respondents.

JUDGMENT.

PRATT, J. C.—This is an appeal from an order made by the learned Additional Judicial Commissioner staying under section 19 of the Indian Arbitration Act, 1899, a suit filed by the plaintiffs-appellants against the respondents.

The suit was upon a contract under which the defendants had agreed to sell to the plaintiffs cotton at the rate of Rs. 35-2-0 a maund deliverable in January not later than the 25th. The plaintiffs contended that the defendants had committed a breach of this contract by failing to deliver and the suit was for damages for that breach. The contract was on Karachi Indian Merchants Association terms and contained an arbitration clause which was in the following form: —

"Any dispute whatsoever, including construction of this document, arising out of this contract shall be referred to the arbitration of two merchants who are members of the Karachi Indian Merchants Association under the provisions of the Indian Arbitration Act, 1899, as subsequently amended."

"If one party fails to appoint an arbitrator for 7 clear days after the party having appointed his arbitrator has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference."

"Should the two arbitrators be unable to agree the dispute shall be referred to an Umpire nominated by the said arbitrators. If the two arbitrators are unable to agree to an Umpire, the latter shall be nominated by the Managing Committee of the Karachi Indian Merchants Association. The decision of the arbitrators or the Umpire, as the case may be, shall be final and binding."

To enforce this agreement of reference the defendants applied for stay of the suit. It was *prima facie* the duty of the Court to act on the agreement and stay the suit and the onus was, therefore, on the plaintiffs to show cause why the suit should not be stayed.

The plaintiffs did show cause and called evidence but the lower Court ordered the suit to be stayed without calling upon the defendants.

The case against stay of the suit was based on two main grounds. In the first place, plaintiffs contended that the tribunal of arbitration constituted under the agreement of reference would not be impartial and that there was the reasonable prospect of bias. In the second place, they contended that there would be difficulties in constituting the tribunal of arbitration as the class from which the arbitrators were to be selected could not easily be ascertained with the result that even if parties went to arbitration, the award might be impeached on the ground that the arbitrators nominated did not belong to the class and were not empowered to act.

Now on the first point the plaintiffs showed to the satisfaction of the lower Court that the market rate of ready cotton on due date was Rs. 57-59 per maund, whereas contracts made on the Indian Merchants Association terms had

been settled at Rs. 41 to 43½. Plaintiffs contended that this lower rate was not an actual market rate but an artificial rate under which certain contracts had been settled or compromised by cross-contracts. The plaintiffs urged that the parties would more certainly appoint arbitrators one in favour of the higher and the other in favour of the lower rate and that the final decision would, therefore, rest with the Umpire selected by the members of the Managing Committee of the Karachi Indian Merchants Association. They then gave evidence that the majority of this Managing Committee were either pecuniarily interested in the lower rate or were in favour of the lower rate; and contended that the arbitration would be vitiated by the bias of the Umpire.

The lower Court thought that the arbitration might never reach the Umpire. It expressed a hope that each party would appoint an independent arbitrator and these arbitrators might be able to settle the matter without the appointment of an Umpire. Possibly this pious hope might be realized but that does not conclude the matter. If the agreement of reference provides that the final decision should rest with an Umpire who is biassed, that is surely a matter which the Judge should consider when exercising his discretion as to whether or not he should surrender his jurisdiction to try the suit.

Mr. Kalumal contends that the fact that the members of the Managing Committee are in favour of the lower rate is not evidence of bias, for that lower rate is an actual market rate. His case is that cotton delivered under the Karachi Indian Merchants Association terms is cotton of an inferior quality and fetches lower price because the condition as to place of delivery is not so favourable as in the case of cotton bought under the other contract terms prevailing in the market. But this was not the view of the lower Court. The judgment does not proceed on this ground. The learned Additional Judicial Commissioner held that the lower rate of the Association contract is due to the fact that in these contracts there is no intention to give or take delivery. This finding is altogether outside the pleadings It is not the case of either party that delivery was not intended. Moreover that finding would involve the conclusion not only that the main contract is void as one of wager, but also that the collateral contract of reference to arbitration is equally invalid.

On the question of bias, therefore, it seems to me that there is a case for defendants to rebut.

The second ground arises out of the Rules of the Karachi Indian Merchants Association. The plaintiffs contend that if both the arbitrators and the Umpire are to be appointed from among members of the Association and its Managing Committee, it should be reasonably certain who those members are. The annual report of the Association gives a list of members which includes several firms, implying that every partner of the firm named is a member. On the other hand rule 1 (2) of the Rules of the Association says expressly that not more than on member of the firm shall be admitted as a member. The Judge seeks to reconcile this discrepancy by suggesting that the name of the firm in the list of the members in the annual report is *falsa descriptio* of the name of the actual partner who is a member. But there is no evidence to support this explanation and it is not that given by the Secretary. Mr. Kalumal seeks to reconcile the list of the members with the rule, *first*, by suggesting that each firm had a right to appoint a representative who alone is a member; and *secondly*, by suggesting that all the partners of the firm are members, but that only one partner is an active member while the other members are passive members. With reference to Mr Kalumal's first explanation if only the representatives were members, their names would appear in the list. But the names of no representatives appear either in the list or in the report of the proceedings. And with reference to Mr. Kalumal's second explanation the rules make no distinction between the active members and the passive members. These different explanations show that Mr. Kalumal himself is in doubt as to who the members are

They also introduce further elements of uncertainty. Who are the representatives whose names are not recorded anywhere? Are the passive members qualified to act as arbitrators, or to take part in the appointment of the Managing Committee? Again if all partners of the firms are members, the very fact of partnership might be a source of dispute for the constitutions of the firms vary from time to time. This uncertainty as to the membership reflects on the constitution of the Managing Committee, for if that membership is in doubt then the membership of the Managing Committee which is selected by the Association must be equally doubtful. Rule 2 (*e*) of the rules providing for the appointment of the successor to a member of the Managing Committee appears to assume that all the partners of the firms are members and conflicts with rule 1 (2) which provides that only one partner can be a member.

It is no answer to these objections that the contracting parties are bound by the rules and that their agreement should be construed as referring to *de facto* members, for the doubt arises as to the meaning of the rules and the fact of membership.

It may be that these matters are capable of being made certain and that the agreement of reference is not void, but the plaintiffs' case is that the rules are so imperfectly drafted and the Association so loosely constituted that the establishment of a valid tribunal of arbitration would be a matter of considerable difficulty and that the Court should for that reason hesitate to enforce arbitration.

On this ground also it seems to me that plaintiffs have made out a *prima facie* case against stay.

I would also observe that the order of stay made by the lower Court for a period of two months is an order which is not contemplated by section 19 of the Arbitration Act. An order of stay for a limited time involves this difficulty that at the expiry of that time the suit automatically revives although the arbitration may still be pending. There is thus the conflict of jurisdiction which, as pointed out in the case of *Doleman* v. *Ossett Corporation* (1), the provision for stay of suit is designed to obviate. The Judge has to decide whether the Court or the arbitrator should exercise jurisdiction. If he decides in favour of the arbitrator he declines jurisdiction; and any future revival of the suit should depend on a future order on proper cause being shown.

I would, therefore, remand the appeal to the lower Court with the direction to record the evidence cited by the respondent. This evidence is embodied in a list of witnesses and documents to be put in by Mr. Kalumal to-day. Evidence to be certified to this Court within a week.

FAWCETT, A. J. C.—There can be no doubt that there is a considerable divergence between the Association Rules, as to membership both of the Association and its Managing Committee, and the practice which appears to have been generally followed. It would certainly seem advisable for the Association to take steps to make either the practice conform with the rules or the rules conform with the practice.

But I think it is important to bear in mind that we are not now considering the validity of some act either of the Association or its Managing Committee to which the doctrine of *ultra vires* would be applicable. The question of the validity of the present practice arises only incidentally in connection with clause 17 of the contract, and the first thing to be decided is the meaning to be assigned to the words "members of the Karachi Indian Merchants Association" and "the Managing Committee of the Karachi Indian Merchants Association." It is at the present stage desirable to say as little as possible on the main point in controversy and to avoid prejudging any of them. But I think it may safely be said that, at any rate, in my opinion, there are grounds for the contention that what the parties in making this contract had in contemplation was the actual Association and its Managing Committee, as constituted in practice, whether that constitution was actually valid or invalid. If so, the most that could be said is, I think, that both parties were under a mistake of fact as to the validity of their constitution. But, unless it was an implied term of this con-

(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

tract that the members of the Association and its Managing Committee had been validly appointed in accordance with the Rules of the Association, I do not think that the Court could hold that the matter, on which there was this mutual mistake, was one essential to the agreement, so as to make it void under section 20 of the Contract Act. In support of this I may refer to *Debendra Nath Dutt* v. *Administrator-General of Bengal* (2). There the sureties who had given a bond for due administration of the estate in a case where the Letters of Administration had been obtained by fraud, were held bound by their bond, although the sureties were unaware of this fraud and were under the mistaken belief that the Letters of Administration had been validly granted. It was held that the liability of the sureties under the administration bond did not depend on the validity or the invalidity of the grant; and this decision was upheld by the Privy Council on appeal, *Debendra Nath Dutt* v. *Administrator-General of Bengal* (3). If the real agreement was what I have already stated, then I do not think that this objection is one which can be raised by the plaintiffs, especially as all except one are members of the Association and some of them are also members of the Managing Committee. I am not disposed, therefore, as things stand, to interfere on this particular ground with the discretion exercised by the lower Court. I also do not think that the plaintiffs have shown that it is impossible in any case to obtain two arbitrators, and if necessary an Umpire, from among the members of the Assocaition or the Managing Committee who had been validly appointed under the Rules of the Association. I know of no warrant for saying that a mere possible difficulty on this point would justify the Court in refusing to stay the suit. It is, I think, on a very similar footing to the question of bias, and it has often been held that a mere suspicion of possibility of bias is not sufficient to justify interference with an agreement for abritration. Similarly, I think that a mere possibility in a technical point of this description is not ordinarily sufficient to justify the Court in refusing to stay a suit under section 19 of the Arbitration Act.

But the other objection raised by the plaintiffs is, I think, on a more substantial basis, and I concur generally with what the Judicial Commissioner has said on that point. I do not think that the assumptions made by the Court below are justifiable in the circumstances of this case. They might be justifiable, if the arbitrators had to be chosen from a body of archangels. But the Court cannot rightly lose sight of the fact that they have to come from a body of traders, with whom their financial interests would generally outweigh any other factor likely to influence them. We have the main fact established that the majority of the Managing Committee are in favour of a lower rate in the neighbourhood of Rs. 40 as opposed to a higher rate in the neighbourhood of Rs. 59, which the plaintiffs say is the proper rate to be fixed. It is, I think, at any rate at the present stage, unnecessary to decide which is the proper rate; that is more for the Court or arbitrators or Umpire who may eventually have to deal with the dispute on its merits. But the fact that the majority of the Managing Committee are in favour of the defendant's contention certainly affords basis for bringing the case within the general rule that an order of stay will not be granted, if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter (Halsbury's Laws of England, Volume I, page 453). There are abnormal circumstances in this case which differentiate it from the ordinary one, and I think that the plaintiffs have made out a *prima facie* case in regard to this point, which it is for the other side to rebut, if they can. I, therefore, concur in the order proposed by my learned colleague.

PRATT, J. C.—The evidence of the defendants has now been certified before us and on the question of bias it does not establish the contention raised at the last hearing that there is a different market rate for cotton purchased on Association terms. Such contracts had been settled in January at a lower rate, but a settlement rate is clearly not a market rate, for it is controlled by

(2) 33 C. 713; 3 C. L. J. 422; 10 C. W. N. 673.
(3) 35 C. 955; 10 Bom. L. R. 648; 12 C. W. N. 802; 35 I. A. 109; 14 Bur. L. R. 197; 4 M. L. T. 21; 18 M. L. J. 367; 8 C. L J. 94 (P. C).

other factors such as the solvency of the seller or the urgency of the buyer's need for cash.

It is, however, contended that the market rate is for the arbitrator to decide and that if the Court considers the rate as affecting the question of bias it would be usurping the functions of the arbitrator. And further it is contended that the plaintiffs knew that members of the Managing Committee were dealers in cotton and that on the terms of the reference it was a reasonable expectation that a 'bear' might be an Umpire and be in favour of a lower rate. As to these contentions I may remark incidentally that they are diametrically opposed to the defence raised in the lower Court. The defendants' case there was that the Managing Committee were either disinterested or were in favour of a higher rate. But apart from that I do not think the arguments now put forward are sound. It may be admitted that the same strict rule of bias which applies to a Judge does not apply to an arbitrator chosen by parties. If the plaintiff's only complaint was that a 'bear' might be appointed Umpire, he would be estopped for it was a reasonable expectation on the terms of the contract that the 'bear' might be so appointed. It might also have been anticipated that if a 'bear' were appointed Umpire, he would be in favour of the lower rate if there were two market rates. But the defendants have failed to prove that there is a lower market rate and plaintiff could not reasonably anticipate that the Umpire would be in favour of a rate which was not a market rate at all. There is, therefore, no estoppel against the plaintiff. And in considering the question of rate we are not usurping the functions of the arbitrator, for we do not decide which of two market rates is the proper one but merely that a particular rate is not a market rate at all. On this our conclusion is that the class from which the arbitrator is to be selected is interested in declaring that to be a market rate which is not a market rate.

An arbitration tribunal in which the ultimate decision rests with the nominee of the class having such an interest is not an impartial tribunal.

The defendants attempt to meet this objection by undertaking that the members of the Managing Committee who have this pecuniary interest will not take part in the appointment of an Umpire. This seems to me to make their case worse. It is an attempt to improve upon the agreement of reference by amending the procedure for the appointment of an Umpire and it is, therefore, an admission that the arbitration under terms of the reference will not be impartial.

It is also contended that the Court should not interfere unless and until the arbitrators disagree and the reference to an Umpire becomes necessary. But the Court must decide the question of stay when the application is made and on materials before it. When it finds that the agreement of reference to arbitration provides for the appointment of an Umpire who will most certainly tilt the scales against one party, the Court should retain its jurisdiction to try the suit.

It has also been said that it is a serious thing to interfere with a mercantile arbitration which, as Lord Sumner said in the case of *Produce Brokers Co.* v. *Olympia Oil & Cake Co.* (4), is a system devised by mercantile men to suit their needs and (which) has been found to be highly beneficial to business. There is a great force in this argument and the Court should always approach the question of stay with a bias in favour of keeping the parties to their agreement to refer to arbitration. But these considerations have less weight with me in this case, for I have great doubt as to whether the form of the contract used here represents a legitimate and *bona fide* business. I am far from saying that the present contract was one of wager or that the parties had no intention to give or take delivery. That is a matter which may or may not be in issue. But the provision in the contract that the seller should offer delivery; the absence of any clear specification of the quality of cotton or of the place of delivery; the lower rate for which many theories have been advanced but for which no satisfactory explanation is supplied by the evidence; the admission

(1) (1916) 1 A. C. 314; 85 L. J. K. B. 160.

of some dealers that delivery is not expected, all these circumstances do suggest that these contracts are primarily intended to meet the demand of a purely speculative business. And again the interest of the mercantile community cannot require that the settlement of business disputes should be by a tribunal that is not impartial.

It seems to me, therefore, unnecessary to proceed with the consideration of the second point affecting the constitution of the Karachi Indian Merchants Association.

In these circumstances I think the Court should exercise its discretion to refuse the application for stay. I would, therefore, reverse the order of the lower Court and allow this appeal.

Costs to be costs in the cause.

FAWCETT, A. J. C.—I concur that sufficient reason has been shown why the matter should not be referred in accordance with the submission in this case and that the lower Court should accordingly have exercised its discretion under section 19 of Act IX of 1899 by refusing to stay the suit. In coming to this conclusion, I see reason to modify the view expressed by me in my previous judgment as to the inadvisability of this Court entering into the question whether the rate contended for by the respondents is a proper one or not. For the evidence since obtained and certified makes it clear that prior to July 1917 it had never been suggested that there should be different market rates of settlement at due date for the two kinds of contracts, *viz.*, those on European office terms and those on Association terms. And with regard to the subsequent period no evidence has been adduced by the respondents to show that, as a matter of fact, where damages have been duly paid under clause 4 of the Association contract they have been fixed at a rate differing from the market rate for ready cotton with anything like the wide divergence now contended for by the respondents; while in regard to contracts for future delivery in January 1918 (like the contracts in suit) the only evidence adduced relates to cases of "settlement" to which other considerations apply. For the respondents Mr. Deverteuil has not relied on any of the additional evidence that has been adduced as rebutting the appellants' case, but has put forward arguments, which would more appropriately have been addressed to us at the previous hearing. His strongest point is that, for the plaintiffs to succeed, it must be established there is a definite probability that the Umpire appointed will, in fact, be biassed, and that until he is appointed any interference with the arbitration is premature. He urges that the most the appellants have done is to show a probability that the electors of the Umpire will be biassed and that it cannot properly be assumed that, even if they appoint a nominee, he will misconduct himself. It is, no doubt, the ordinary rule that bias is not lightly to be presumed, and that there is a primary presumption in favour of honesty. But in this case there has been an unusually full enquiry in which both sides have had ample opportunity of placing every material consideration before the Court. If, as the result of that enquiry, it could be said that the appointment of a biassed Umpire was improbable or of little probability, then Mr. Deverteuil's argument would, I think, be sound. But, in my opinion, it has been clearly shown that the probability of a biassed Umpire being appointed is so strong that it amounts to a practical certainty. In forming this opinion, I have not overlooked the offer of some 12 interested members of the Managing Committee not to vote in the election of an Umpire. This goes, however, very little way towards securing a really unbiassed Umpire. It would obviously not be difficult to arrange that, under a specious display of a fair and proper election of an independent Umpire, one really biassed in favour of respondents should be appointed. And such a course is one that respondents might naturally try to take in order to make interference with the appointment of the Umpire or the upsetting of his award as difficult as possible. The Court should, of course, be reluctant to suspect a dishonest intention of this kind; but I am very unfavourably impressed by the shuffling and far from straightforward attitude adopted by the respondents in this case Not only has there been a complete change of ground from that pleaded in the first affidavits,

ut there is also a significant refusal to listen to any proposal that the appointment of an Umpire should, in the special circumstances of the case, be made by the Court or otherwise taken out of the hands of the Managing Committee of the Association. It certainly looks as if the respondents are anxious to keep the appointment in the hands of the Managing Committee, because by these means they believe that they can secure the appointment of an Umpire who has a bias in their favour. In all the circumstances, I think that there is 'adequate and reasonable' ground for appellants' anticipation of bias and that (in regard to the offer already mentioned) they may well say, "*Timeo Danaos et dona ferentes.*" The case is quite different from that of *Messrs. Volkart Bros.* v. *Firm of Kodumal Kalumal* (5) referred to by Mr. Deverteuil. The contract in that case provided for the appointment of an Umpire by the two arbitrators, in case they were unable to agree on an award; and under section 8 of the Arbitration Act, this appointment could, if the arbitrators failed to make it, be made by the Court. The circumstances there were also quite different from those established in this case. Moreover, a case like this appears to me to be on quite a different footing to one where the submission clause in the contract appoints a named arbitrator, who is in the employ of one of the parties and, therefore, known by the other party to be likely to be biassed in favour of his employer. Though under the present contract the right of appointing an Umpire is vested in the Managing Committee of the Association, yet it would surely be within the contemplation of the parties that an unbiased Umpire should be so appointed. I do not, therefore, think there is any good ground for respondents' contention that the appellants are estopped from showing that circumstances have arisen which make the appointment of an Umpire by the Managing Committee objectionable and likely to result in failure of justice.

To sum up, I think it is a case where the Court has a duty to weigh the real probabilities and act on them, if it considers they outweigh the initial presumption in favour of honesty and freedom from bias. I think there is no reasonable doubt on the evidence and arguments in this case that each party will appoint an arbitrator thought to be safe on his side, and that, with such a wide difference between the two opposing rates, there will be disagreement both as to the award and the person to be appointed Umpire. In my opinion, therefore, it is a practical certainty that an Umpire will have to be appointed by the Managing Committee, and in that event, I think, there is a strong probability that an Umpire biassed in favour of respondents will be appointed. The Court should, of course, exercise its discretion, in refusing to stay a suit or granting leave to revoke a submission, in a sparing and cautious manner and should not do so, unless the applicant can establish that there is good ground for apprehending that there will be a failure of justice, if the reference to arbitration is allowed to proceed (Halsbury's Laws of England, Volume 1, Articles 951 and 959 at pages 449 and 453). But in the proved circumstances of this case I am clearly of opinion that sufficient ground has been shown for the Court's interference under section 19 of the Arbitration Act. I, therefore, concur in the proposed order.

Order reversed.

(5) O. S. Mis. Application No. 40 of 1918.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 115 OF 1918.

August 8, 1918.

Present:—Justice Sir Ali Imam, KT., and Mr. Justice Thornhill.

Maharaja Sir RAMESHWAR SINGH BAHADUR—DECREE-HOLDER—APPELLANT

versus

KESHWAR RAI—JUDGMENT DEBTOR—RESPONDENT.

Res judicata—*Execution proceedings—Non-transferable holding—Failure to raise objection as to non-transferability in previous execution proceeding—Estoppel—Tenant, whether can object to sale of non-transferable holding to which landlord consents.*

RAMESHWAR SINGH *v.* KESHWAR RAI.

A tenant can object to the sale of a non-transferable holding in execution of a money-decree even if the landlord consents to it.

If a tenant judgment-debtor omits to raise an objection as to the non-transferability of a holding in an execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree.

Appeal from a decision of the District Judge, Darbhanga.

Messrs. *Purnendu Narayan Sinha* and *Murari Prosad*, for the Appellant.

Mr. *Baikunthanath Mitter*, for the Respondent.

JUDGMENT.

IMAM, J.—The appellant who is a decree-holder proceeded to execute his decree as a mere money decree against the respondent and took out attachment against a non-transferable holding in the year 1913. It is admitted that when the attachment was made in that year the judgment debtor did not raise any question of the non transferability of the holding. That execution proceeding seems to have ended infructuously. A fresh attachment was issued in the year 1915 when the judgment debtor objected to the sale of the holding on the ground mentioned above. The learned Munsif of Madhubani held that the judgment-debtor was estopped from raising the objection on the ground of non-transferability as he had failed to do so in the previous execution proceeding. The judgment-debtor appealed to the learned District Judge of Durbhanga, who allowed the appeal and held that the failure to raise the objection in the previous execution was no bar to its being advanced against the present attachment. He accordingly ordered that the property under attachment was not saleable.

The question, therefore, for consideration is, whether the omission to object to the sale on the ground of non-transferability in the previous execution proceeding is a bar to its being advanced now. The learned Vakil appearing for the appellant contends that on the authority of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Mazzem Hossein Mondal* v. *Sarat Kumari Debi* (2) the judgment-debtor is barred from raising he objection.

On the authority of *Dayamoyi* v. *Ananda Mohan Roy* (3) and *Narayani* v. *Nabin Chandra Chowdhari* (4) it is quite clear that even if the landlord consents to the sale of a non-transferable holding the tenant can successfully object to the sale of such a holding. It is not denied that this is the case-law on the subject since 1914, when the decision in *Dayamoyi* v. *Ananda Mohan Roy* (3) was given. It is contended that even if this is the law the judgment debtor cannot take advantage of it because of the decisions reported as *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Mazzem Hossein Mondal* v. *Sarat Kumari Debi* (2). On the other hand, the learned Vakil for the respondent contends that the state of the case-law in 1913 was uncertain, and, therefore, his client in the earlier execution proceeding failed to raise the objection. There seems to be not much force in this contention. On the authorities referred to during the address at the Bar it is quite clear that there were conflicting decisions on the point which were considered and finally concluded by the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (3), indeed the learned Vakil for the respondent does not contest the fact that the decisions prior to the Full Bench case were not uniform. The uncertainty of the case-law in 1913, however, cannot be accepted as a sufficient justification for the omission in the earlier execution proceeding to raise the objection on the ground of non-transferability. In the circumstances the view taken by the lower Appellate Court appears to be unsustainable. The order of the learned District Judge is set aside and that of the learned Munsif restored. The appeal is allowed with costs throughout.

THORNHILL, J.—I agree.

Appeal allowed.

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(2) 5 Ind. Cas. 89; 14 C. W. N. 433; 11 C. L. J. 357.

(3) 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971.

(4) 36 Ind. Cas. 803; 21 C. W. N. 400; 25 C. L. J. 351; 44 C. 720.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 43 OF 1914.

October 20, 1916.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

PAMANDAS KHEMCHAND AND OTHERS —PLAINTIFFS—APPELLANTS

versus

HIRANAND KHATANMAL AND OTHERS— DEFENDANTS—RESPONDENTS.

Mortgage—Separate suits by first and second mortgagee without impleading each other—Sales under separate decrees—Possession and enjoyment, right to—Puisne mortgagee, suit by, for sale, without impleading prior mortgagee—Decree, form of Court, duty of, in ordering sale—Court, power of, to sell property of persons not parties to suit.

A Court cannot sell the right, title and interest of any person who is not a party to the suit [p 796, col. 1.]

Where two separate suits are filed by a first and second mortgagee respectively, neither impleading the other, and each brings the property mortgaged to him to sale, the present right of possession and enjoyment of the property passes to the first purchaser and this right cannot be sold again [p. 794, col. .]

Where the second mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser under the first mortgagee's decree has no right to turn him out but he can, *qua* first mortgagee, bring the property to sale in a properly framed suit. [p. 794, col. 1.]

Where the first mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser under the second mortgagee's decree has no more than the rights of the second mortgagee; he has no right to possession. [p. 794, col. 1.]

A puisne mortgagee may sue for sale without making the prior mortgagee a party to the suit; but where the prior mortgagee is impleaded, the Court should not ordinarily permit a sale subject to the first mortgage. The proper form of the decree is Form No. 8 in Appendix D to the Civil Procedure Code. [p. 794, col. 1.]

When a person holding both a first and a second mortgage sues on the second mortgage only, the Court should ordinarily refuse to order a sale unless it be free of both the mortgages [p. 794, col. 2.]

Second appeal against the decision of the Joint Judge, Hyderabad.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Motiram Ramchand*, for the Respondents.

JUDGMENT.

CROUCH, A. J. C.—In this case plaintiff obtained a mortgage decree on a first mortgage, ordering that properties in lists D, E, F, G and H to be sold subject to the condition that properties D, E, F and G were to be sold before H, which had been bought by private sale by defendants Nos. 8—13 and had passed into their possession. The mortgagor had, however, executed three other several mortgages of properties D, E and F respectively in favour of the plaintiff. On each of these three mortgages a separate suit had been instituted and orders for sale had been obtained. Sales in pursuance of these decrees were effected, but at a date subsequent to the date of the decree obtained under the first mortgage. The purchasers were the defendants Nos. 8 and 9 and some strangers. At the sale, it was notified that a decree for sale had been obtained by the first mortgagee.

In execution of his decree on the first mortgage, plaintiff applied for sale of properties G and H. No one appeared to oppose, and an *ex parte* order was passed for the sale of these two properties. But on the application of the defendants Nos. 8—13, who contended that property H should not be sold until G had been exhausted, for G had not been mortgaged a second time and was still in the hands of the mortgagor, and also D, E and F sold, the Court held that execution should proceed against G only in the first place, leaving plaintiffs to file a fresh application for the sale of properties D, E, F and H.

On appeal this order was affirmed, but there was a declaration added that properties D, E, F and G should be exhausted before H was brought to sale.

Plaintiff's legal representatives now appeal, asking that (1) G be sold and that if the whole debts be not realised, that H be sold; and that it be declared that properties D E and F are not liable to be sold at all having already been sold under the decree of the second mortgagee; (2) they allege they have a grievance in that the first Court varied its order for sale though passed after due notice; and (3) that, in any case, the original order of the first Court that the properties G and H be brought to sale should be restored.

The two last objections may be disposed of very briefly. It is contended that the first Court had no power to review, or amend, an order for sale once duly passed, and that the original order for sale of all the properties should be restored. But it is not admitted that the original order was duly passed, for it is not ad-

mitted that notice was issued. This is a question of fact into which we cannot inquire in second appeal and one for the solution of which the record offers no material. Further we are of opinion that a Court has full power to vary any order for sale in execution which it has passed through ignorance of material facts. We cannot restore the order which we consider was legally and properly set aside.

Mr. Kimatrai contends that, once a property has been sold under a mortgage decree, it cannot be sold over again, and that if it be again sold the conflict between the two purchasers will be determined not by the priority of the mortgages under which the property was brought to sale, but by the priority of the purchase. If this be the law, no title will pass to the purchaser under the sale which would be held under the order now appealed against and his clients would be exposed to litigation. In support of these somewhat startling assertions, Mr. Kimatrai has been able to cite reported decisions which seem to offer support, and it becomes necessary to deal with the points raised at some length. It will, I believe, simplify the discussion if I first state as briefly as possible what the law is. As we are dealing with simple mortgages only, it is unnecessary to bring the complications occasioned by the English form of mortgage into discussion:—

(1) When an owner mortgages his property by simple mortgage, the mortgagee obtains nothing more than a right to obtain from the Court an order that the property be sold. Inasmuch as the estate is not vested in the mortgagee, there is no right of foreclosure. See sections 58, 60 and 67 (*a*) of the Transfer of Property Act, 1882. The rule follows inevitably from the form of mortgage. As the properties with which we are now concerned are not situate in Karachi we need not consider the effect of section 69.

(2) If a mortgage be without possession, the mortgagor retains (1) a right to redeem; and (2) the right of physical possession and enjoyment, and also a limited *jus abutendi*. See section 66, Transfer of Property Act.

(3) When a mortgagor sells his interest in the mortgaged property or executes a further charge on it, he can transfer or charge only such right, title and interest as is still vested in him; for no one can legally dispose of property which is not his. Ordinarily, he can transfer the right of present possession and enjoyment of the right to redeem and nothing more. After executing the second mortgage he has the right to redeem the second mortgage, and if the second mortgage be without possession he also retains the present right to possession.

(4) Where a first mortgagee brings the mortgaged property to sale in a suit in which the mortgagor, but not the second mortgagee, is a defendant, the purchaser takes (1) the right of the mortgagor to present possession and enjoyment; (2) the right of the mortgagor to redeem the second mortgage; and (3) the right of the first mortgagee to bring the property to sale. In such case, the first mortgage is deemed to be kept alive and not to merge in the equity of redemption and can be used as a shield against the claim of the second mortgagee. *Mata Din Kasodhan* v. *Kazim Husain* (1) and *Chandulbai* v. *Basarmal Topanmal* (2).

The Court cannot sell the right, title and interest of any person who is not a party to the suit. *Umes Chunder Sircar* v. *Zahur Fatima* (3) and *Chandulbai* v. *Basarmal Topanmal* (2). Hence it follows that a puisne mortgagee who is not impleaded is not affected by a sale. The right to redeem the first mortgage and the liability to be redeemed by the mortgagor or his transferee, persist. Neither in this rule nor in the following do I purport to deal with the effect of notice or estoppel, both of which may have results which do not properly come within the scope of the law of mortgage.

(5) Where a second mortgagee brings the mortgaged property to sale in a suit to which the mortgagor, but not the first mortgagee, is a defendant, the purchaser takes (1) the right of the mortgagor to present possession and enjoyment and (2) the right to redeem the first mortgage.

(6) From these two rules it follows that where there are two separate suits filed by

(1) 13 A. 432; 7 Ind. Dec. (N. S.) 276 (F. B.).
(2) 28 Ind. Cas. 67; 8 S. L. R. 264.
(3) 18 C. 164; 17 I. A. 201; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. S.) 110 (P. C.).

the first and second mortgagees respectively, neither impleading the other, and each brings the property mortgaged to him to sale, the present right of possession and enjoyment passes to the first purchaser and this right cannot be sold again.

Hence, where the second mortgagee brings the property to sale first and the purchaser obtains possession, the purchaser under the first mortgagee's decree has no right to turn him out but he can, *qua* first mortgagee, bring the property to sale in a properly framed suit.

And where the first mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser in the suit filed by the second mortgagee has no more than the rights of second mortgagee; he has no right to possession.

(7) Where the first mortgagee, before the second mortgagee has brought the property to sale, obtains a transfer of the right, title and interest of the mortgagor, then having the legal title of the mortgagor vested in him, he can foreclose the second mortgagee. This was the position dealt with in the case of *Chandulbai* v. *Basarmal Topanmal* (2). If the second mortgagee chose to exercise his right of redemption, the first mortgagee, as holder of the equity of redemption, would, it seems, be entitled in his turn to redeem both the first and second mortgages; but this is a position which no Court seems to have been called on to deal with.

(8) A puisne mortgagee may sue for sale without making the prior mortgagee a party to the suit but where the prior mortgagee is impleaded, the Court should not ordinarily permit a sale subject to the first mortgage. For, it is the duty of the Court to make a decree which shall deal finally with the question between the parties and preclude the necessity of further litigation for enforcement of any right arising out of the mortgage or mortgages in question.

The proper form of decree is No. 8 in Appendix D to the Civil Procedure Code. The second mortgagee and the mortgagor are given successive opportunities to redeem. If the second mortgagee fails to redeem the first mortgage, his suit is, at the option of the first mortgagee, either dismissed—that is, he is in effect foreclosed—or the property is sold free of both mortgages.

The right of a puisne mortgagee to sue without impleading the prior mortgagee is given by the explanation to Order XXXIV, rule 1.

It follows that, where the person who holds both a first and second mortgage sues on the second mortgage only, the Court should ordinarily refuse to order a sale unless it be free of both mortgages.

As to the duty of the Court see *Venkataramana Iyer* v. *Gompertz* (4) and *Sundar Singh* v. *Bholu* (5).

We are now in a position to apply the law to the facts of this case. When the plaintiff brought the properties D, E and F to sale by right of his several puisne mortgages, the Court should properly have insisted on the property being sold free of all charges which the plaintiff held; had it done so, very much unnecessary litigation would have been avoided. But where property is sold in execution of a mortgage-decree, the question what was the nature and extent of the interest sold depends not on what the Court might have done or ought to have done but on what the Court did, what the Court intended to sell, and what the purchaser had reason to think that he was buying. See the cases cited in the judgment of Stanley, C. J., in *Inayat Singh* v. *Izzat-un-nissa Begam* (6). In this case, both Courts have held that the sale was subject to the decree for sale obtained under the first mortgage, and accordingly the defendants Nos. 8—13 obtained only the right to redeem the first mortgage and the right to present possession. The plaintiffs as first mortgagees now have the right to bring the property mortgaged to them to sale free of all encumbrances, unless their mortgage be redeemed.

I will now examine the various cases on which Mr. Kimatrai has relied in argument.

(4) 31 M. 425 at p. 427; 3 M. L. T. 397; 18 M. L. J. 298.

(5) 20 A. 322; A. W. N. (1898) 58; 9 Ind. Dec. (N. S.) 566.

(6) 27 A. 97 at p. 123; A. W. N. (1904) 174; 1 A. L. J. 435.

In *Venkatanarasammah* v. *Ramiah* (7) the same property was mortgaged to two several persons. The first mortgagee brought the property to sale in a suit to which the second mortgagee was not a party, purchased it himself and obtained possession. The second mortgagee then brought the property to sale in a suit to which the first mortgagee was not a party, purchased it and succeeded in dispossessing the plaintiff. The plaintiff sued for possession. It was held that nothing whatever passed to the defendant by the second sale and possession was awarded to the plaintiff. The learned Judges were not in agreement as to whether the defendant's mortgage was capable of being still enforced.

This is an illustration of rules 4, 5 and 6 above given. Both Judges held that defendant took nothing by his purchase of the rights and interests of the mortgagor because these had already been sold to plaintiff, but they did not assert that defendant as second mortgagee had lost anything by the sale to plaintiff. Kernan, J., was of opinion that his right had not been affected by the sale; Innes, J., thought it possible that defendant might be barred of any further remedy by having already brought a suit on his mortgage.

In *Nanack Chand* v. *Teluckdye Koer* (8) the owner of certain property mortgaged it, on the same day by two several deeds, to two several mortgagees. Both mortgagees obtained decrees on their mortgages as against the mortgagor only. The defendants got their decree first and under it brought the right, title and interest of the mortgagor to sale, purchased it themselves and obtained possession. The plaintiffs subsequently got a decree on their bond and also bought the right, title and interest of the mortgagor and brought the suit for recovery of possession. It was held that the right to possession depended not on the priority of the mortgage but on the priority of possession.

This was, of course, a perfectly correct statement of the law as applied to the particular facts. For, whether the defendant's mortgage was first or second, he nevertheless obtained by his purchase the present right to possession vested in the mortgagor and if plaintiff desired to raise the question of priority of mortgage, he should have done so in a properly constituted suit.

In *Sundar Singh* v. *Bholu* (5) the plaintiffs sued for sale on a second mortgage. They had already obtained a decree for sale on a first mortgage. It was held that there was nothing in the Civil Procedure Code or the Transfer of Property Act which prevented the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. But the learned Judges added the following *obiter dictum*: "What benefit the two decrees will be to the plaintiffs it is difficult to see, except that the plaintiffs may execute one of these decrees by sale of the property, and if there is a surplus arising from the sale, they may probably attach that surplus in execution of the other decree. One thing is quite clear, that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first. That would be selling the equity of redemption, a right which is not acknowledged or recognised by Act IV of 1882 and would be a mischief which has been struck at by section 99 of that Act. This Court in *Mata Din Kasodhan* v. *Kazim Husain* (1), which has been followed in many other cases, has recognised that the intention of the Legislature was to put an end to the abuses which existed before Act IV of 1882 came into force, and that there can be no sale of equity of redemption apart from the property itself at the instance of the mortgagee."

Though isolated sentences in this passage suggest that novel rules of law were being laid down, the passage taken as a whole is found to do no more than declare that the Courts should not allow a person who holds two independent mortgages to bring the property to sale piecemeal (rule 8).

In *Mata Din Kasodhan* v. *Kazim Husain* (1) the first mortgagee had obtained a transfer of the right, title and interest of the morgagor. The second mortgagee brought a suit for sale of the property without asking for redemption. It was held that the first mortgagee, not having exhibited any inten-

(7) 2 M. 108; 3 Ind. Jur. 360; 1 Ind. Dec. (N. S.) 346.

(8) 5 C. 265; 5 Ind. Jur. 81; 4 C. L. R. 358; 2 Ind. Dec. (N. S.) 779.

tion of foregoing altogether his rights under his mortgage deed, was entitled to keep it alive and to use it as a shield against the claim of the plaintiff to the extent of the amount due to him on the day on which he took the assignment of the mortgagor's interest; and also that the plaintiff could not bring the property mortgaged to him to sale without first redeeming the prior mortgage.

The bare decision in this case presents no special features and is in accordance with rules 7 and 8. But in his judgement, Edge, C. J., expressed the opinion that under a decree for sale in a mortgage suit the property which might be effectively brought to sale was the specific immoveable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property, and that as a general rule a mortgagee had no right to bring mortgaged property to sale without redeeming the prior mortgage.

It is difficult to understand what is meant by saying that it is the "specific immoveable property" which is brought to sale. Mr. Kimatrai contends that under a sale in execution of a mortgage decree the whole specific immoveable property, the fee simple in fact, is sold, and consequently cannot be sold again. But, in a properly drawn decree it is not the property, without qualification, that is sold, but the "mortgaged property." And it is well established that no Court has jurisdiction to dispose of property, or interests in property, vested in persons not parties to the suit before it. With the exception of *dicta* of the learned Chief Justice in this judgment there seems to be no authority whatever for contending that the Court can sell the fee simple of an estate notwithstanding that it is not wholly vested in the parties whose rights it is adjudicating.

In asserting that a puisne mortgagee cannot bring the property to sale without first redeeming the first mortgage, the learned Chief Justice may be construed as having raised a mere rule of procedure into a rule of substantive law having universal application. But it would be fairer to restrict the application of every part of his judgment to the facts with which he was actually dealing. If this be done it is consistent with the view adopted in recent legislation.

Fortunately, the confusion suggested by this judgment has been completely cleared up by the framers of the new Civil Procedure Code. Formerly, the Transfer of Property Act contained not only the law as to mortgages, but also the rules of procedure to be followed in enforcing rights under mortgages, with the result that there was no clear demarcation between substantive law and pure procedure. By repealing all the sections which deal with procedure and repeating all essential rules in Order XXXIV and adding in the appendix some extremely useful and instructive forms of decrees, the Legislature has put the questions now before us outside the region of controversy. Rule 4 and the forms of decree make it clear that only the mortgaged property should be sold. The Act does not state that the interests of parties not impleaded are not affected by any sale, probably, as suggested by Messrs. Woodroffe and Amir Ali, because it was considered unnecessary to do so: it is too obvious to need assertion. That the equity of redemption can be sold when the prior mortgage is not impleaded is made clear by the Explanation to rule 1 of Order XXXIV.

In *Akatti Moidin Kutti* v. *Chirayil Ambu* (9) the proprietor of certain land mortgaged it to plaintiff in 1890 and in 1893 executed a second mortgage to the defendant. In 1895, the defendant sued on his puisne mortgage, obtained a decree and purchased the property in 1899. Plaintiff then sued defendant for possession. It was held that defendant was entitled to retain possession.

As defendant had purchased the mortgagor's present right to possession, he was entitled to retain it until plaintiff had enforced his rights in a properly framed suit. It must be assumed that plaintiff was not a party to the suit filed by defendant and that defendant was not a party to the previous suit filed by the plaintiff; the report is silent on the point.

In *Kutti Chettiar* v. *Subramania* (10) the same property had been sold twice

(9) 2 M. 486 at pp. 488, 489.
(10) 4 Ind. Cas. 1077; 32 M. 485; 19 M. L. J. 728.

over in execution of two several mortgages. The first sale was in execution of the decree on the puisne mortgage obtained in a suit to which the first mortgagee had not been made a party. Plaintiff, the purchaser at the second auction, sued to recover possession from the purchaser at the first auction. It was held that any relief to which he was entitled could not be enforced in a suit for possession.

This decision is an illustration of rules 4, 5 and 6. But in the judgment the following passage, on which great reliance has been placed by Mr. Kimatrai, appears:— "When, therefore, defendants bought the house in execution of their decree no saleable interest was left in the judgment-debtor. As pointed out in *Venkatanarasammah* v. *Ramiah* (7), *Nanock Chand* v. *Teluckdye Koer* (8) and *Akatti Moidin Kutti* v. *Chirayil Ambu* (9) where there is a question between the purchasers at two distinct Court sales held on different dates in execution of two several mortgage-decrees, the Court in deciding between the two competing titles is guided not by the dates of the several morgages but of the several purchases. For both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee there is no further saleable interest left in the judgment-debtor to be sold again."

This passage offers no difficulty if we realise that the Court was referring to suits for possession, and that the right to possession was the only matter in dispute. The Court did not hold that plaintiff was entitled to no relief. An examination of the above cases makes it clear that they give no support to Mr. Kimatrai's main contentions. His case was founded in a confusion between "possession" and "absolute ownership."

I would, therefore, dismiss the appeal with costs. Mr. Kimatrai asks that the Court will amend the order of the lower Court by ordering the sale of the properties D, E and F but appellant must pursue the ordinary course and file a regular application for sale. It is possible that he may be now barred from obtaining the order.

HAYWARD, J. C.—I concur in the conclusion reached by my learned brother. It appears that the plaintiffs obtained a first mortgage on certain properties represented by D, E, F, G, and H. They subsequently obtained second mortgages on the same properties. Third parties then purchased the properties represented by H.

The plaintiffs did not commence by suing out their first mortgage but obtained decrees on their second mortgages and proceeded to sell the properties represented by D, E and F. The plaintiffs in the meanwhile have obtained a decree on their first mortgage on the condition that they proceeded first against the properties represented by D, E, F and G and afterwards against the properties represented by H. They, therefore, sought to sell not the properties already sold and represented by D, E and F but the properties represented only by G and asked for permission to sell after those the properties represented by H. The original and first Appellate Courts both held in effect that the equity of redemption only has been sold of the properties represented by D, E and F and that it would be necessary to sell further the remaining interests in the properties represented by D, E and F after the sale of properties represented by G before permission could be granted to sell the properties represented by H according to the condition in the decree.

This second appeal has been brought to obtain a declaration that there remain no interests to sell in the properties represented by D, E and F and a direction for the sale after the properties represented by G of the properties represented by H. The respondents strongly object, as they are the third parties who purchased the properties represented by H. It seems to me that their objections must be upheld. So far the equity of redemption only has been sold in the properties represented by D, E and F and the purchasers have merely bought the right to redeem the prior mortgage. There was, in my opinion, no legal bar to such a sale as pointed out by my learned brother and the result is that the purchasers must, in order to prevent a further sale of the interests remaining in the properties represented

by D, E and F, redeem the prior mortgage. The cases quoted before us in support of a contrary conclusion would appear to have been mainly cases of competition in ejectment suits between different purchasers at diffrent sales under different mortgage decrees and to have no relation to regularly constituted mortgage suits. Such is the case of *Chandulbai* v. *Basarmal Topanmal* (2). We have moreover here to give directions for the execution of the prior mortgagee's mortgage decree and not to consider whether it was proper to have allowed this piecemeal sale of the various interests in the properties under the subsequent and prior mortgages. It might no doubt be argued that the procedure was at the time improper though it would apparently have been proper now under Order XXXiV, rule 1, of the Schedule to the Civil Procedure Code, as pointed out in the note at page 321 of Shepherd and Brown on section 75 of the Transfer of Property Act, 7th Edition.

Appeal accordingly dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 297 OF 1917.

July 24, 1918.

Present :—Mr. Justice Mullick and Mr. Justice Thornhill.

SHEO SARAN RAM AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BASUDEO PRASAD SAHU AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), ss. 17, 25—Insolvency proceedings, whether bar execution of decree—Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182—Execution—Insolvency of judgment-debtor—Limitation, running of.

The pendency of an insolvency proceeding under the Presidency Towns Insolvency Act does not of itself, in the absence of a protection order under section 25 of the Act, bar the remedy of a decree-holder to execute his decree by arrest of the judgment-debtor Limitation for execution of a decree, therefore, continues to run against a decree-holder during the pendency of an insolvency proceeding and he is not entitled to exclude the period during which the insolvency proceeding has been pending from the period allowed for execution of the decree. [p. 799, col. 2.]

A decree-holder arrested his judgment-debtor in execution of his decree. On the 19th August 1911, however, the judgment-debtor was released on the production of an adjudication order made under the Presidency Towns Insolvency Act. No further action was taken by the decree-holder and the execution proceedings dropped. In January 1916 the adjudication was annulled. The decree-holder then applied for execution:

Held, that in the absence of a protection order under section 25 of the Presidency Towns Insolvency Act the decree-holder was at liberty to execute his decree by arresting the judgment-debtor, and that, therefore, limitation continued to run against the decree-holder and the present application for execution was barred by time. [p. 799, col. 2; p. 800, col. 1.]

Appeal from a decision of the District Judge, Shahabad.

Mr. *Rajendra Prasad*, for the Appellants.

Messrs. *Parmeshwar Dayal* and *Jadubans Sahai*, for the Respondents.

JUDGMENT.

THORNHILL, J.—The facts presented to the Court are as follows. The respondents in execution of a money-decree had a judgment-debtor brought up under arrest in the Court of the 1st Subordinate Judge of Arrah. On the production of an adjudication order made in the High Court of Calcutta under the Presidency Towns Insolvency Act, he was released on 19th August 1911. Subsequently no further action was taken by the decree-holders and the execution proceedings dropped. In January 1916, the adjudication was annulled. The decree-holders then applied for execution, when it was held that the application for execution was not time-barred. On appeal to the District Judge of Shahabad this order was upheld, the District Judge holding that although the decree-holders could have taken steps in the insolvency proceedings towards realizing their decree at the same time they were prevented from executing the decree against the judgment debtor, and, therefore, the time during which the judgment-debtor was an undischarged insolvent must be excluded in calculating the time allowed for execution.

The question is, can this period be excluded in calculating the three years referred to in Article 182 (5) of the Limitation Act.

The decree-holders suffered from no disability, and, therefore, can have no ex-

tension of time under section 6. Section 9 provides that when once time has begun to run no subsequent disability or inability to sue stops it. As pointed out in Mitra's Law of Limitation, "Disability is want of a legal qualification to act. Inability is the want of physical powers to act." According to Birdwood, J., in *Hanmantram Sadhuram Pity* v. *Arthur Bowles* (1), the inability referred to in section 9 is a personal nability affecting the plaintiff himself and having reference to his condition, or state, or position, and not to the circumstances of the person against whom he is entitled to institute a suit.

Section 15 of the Act of 1877 gave relief in computing the period of limitation prescribed for any suit the institution of which had been stayed by injunction or order, but this section was held not to apply to applications for execution even where the execution had been stayed by an injunction, *Rajarathnam* v. *Shevalayammal* (2), but the difficulty was got over by considering the decree-holder's application for execution, after the removal of the injunctior, as only an application for the continuation or revival of the previous application which had been interrupted owing to a cause for which the decree-holder was not responsible, *Lakhmi Chand* v. *Ballam Das* (3).

In *Ashrafuddin Ahmed* v. *Bepin Behari Mullick* (4), after the decree-holder had applied for execution of the decree, the judgment-debtor represented that, as all his property had vested in a Receiver, proceedings in execution could not be carried on, and thereupon the Court released from attachment the salary of the judgment-debtor which had been attached at the instance of the decree-holders. After the discharge of the Receiver the decree-holders applied to the Court to re-attach the salary of the judgment-debtor and to allow them to proceed with the execution case originally instituted by them from the point which it had reached and at which it was stopped by the order of the Court. It was held that the application was no fresh application for execution but a mere continuation of the previous application, and the period of limitation applicable to it was that prescribed by Article 178 of the Second Schedule of the Limitation Act of 1877.

In consequence of conflict of decisions the law was amended and section 15 (1) of Act IX of 1908 enacted that in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded. This Act came into operation on the 1st January 1909, and the Presidency Towns Insolvency Act one year later.

The latter Act, section 25, expressly provides that any insolvent who shall have submitted his schedule as aforesaid may apply to the Court for protection, and the Court may, on such application, make an order for the protection of the insolvent from arrest or detention.

There is also a provision in that section that no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled.

It, therefore, appears clear in the present case that the execution taken out by the decree-holders under which they had the judgment-debtor arrested was not interrupted by the insolvency proceedings, as no protection order was made. He was simply released when it was known that he had become an insolvent, presumably on the ground that the decree-holders thought it useless to proceed further. Section 17 of the Presidency Towns Insolvency Act provides that during the pendency of the insolvency proceedings a creditor shall have no remedy against the property of the insolvent save with leave of the Court, but it does not exclude the arrest of the person.

It would, therefore, appear that the decree-holders' execution arresting the judgment-debtor in 1911 was neither stayed by any injunction or order, nor was it interfered with by the insolvency proceedings, and, therefore, the present application cannot be taken as a continuation or revival

(1) 8 B. 561; 4 Ind. Dec. (N. S.) 750.
(2) 11 M. 103; 4 Ind. Dec. (N. S.) 72.
(3) 17 A. 425; A. W. N. (1895) 82; 8 Ind. Dec. (N. S) 594.
(4) 30 C. 407.

of the former proceedings, even on the arguments advanced in *Ashrafuddin Ahmed* v. *Bepin Behari Mullick* (4), which was a decision prior to the Limitation Act of 1908.

Having regard, therefore, to the above, and to the express provisions of section 15 of Act IX of 1908, coupled with the fact that the Insolvency Court had power to stay any suit or other proceeding pending against the insolvent in any other Court (section 18), but made no such order, we think the decree-holders' application for execution is time barred.

MULLICK, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2728 OF 1916.

June 5, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

AKRURMANI BAISNABI—DEFENDANT NO. 1—APPELLANT

versus

MADHAB CHANDRA CHAKRABARTY, INSANE, AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 108 (j)—Lease, transfer of—Lessee, original, liability of, for rent.

Under section 108, clause (*j*), of the Transfer of Property Act, the liability of a lessee to pay rent continues even after he has parted with his interest in the lease, and it is no answer to a suit for rent that the transferee from the lessee is willing to pay the rent.

Appeal against the decree of the District Judge, Rangpur, dated the 23rd August 1916, modifying that of the Munsif, Rangpur, dated the 2nd August 1915.

FACTS appear from the judgment.

Babu *Girija Prasanna Sanyal*, for the Appellant.—This appeal is on behalf of the defendant, and it arises out of a suit for recovery of arrears of rent under the Transfer of Property Act. The defence was that the defendant had sold her interest to another person, Babu Jatindro Nath Lahiri, by a registered Kobala, and as the sale was in 1318 B. S. and the suit is for the rent for the years 1319 to 1321 B. S., she is not liable for the rent sued for.

[FLETCHER, J.—Unless there is a contract to the contrary, the defendant is liable under section 108, clause (*j*), of the Transfer of Property Act]

Section 108 (*j*) of the Transfer of Property Act is intended to protect the interests of the landlord in those cases where his interests would be jeopardised by reason of the land being transferred to a man of straw. That is not the case here. The transferee of the defendant is ready in this case to pay all arrears due after the transfer.

The Court of Appeal below was also not right in reversing the finding of the primary Court on the question whether the interest granted by the lease was perpetual.

Babu *Atul Chandra Gupta*, for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J.—This appeal must stand dismissed. The suit was a suit for rent against the original lessee of a property to which the provisions of the Transfer of Property Act apply. The liability of the original lessee who has transferred the land is contractual; that liability subsists under the provisions of section 108 (*j*) of the Transfer of Property Act, notwithstanding that the defendant No. 1 has parted with her interest in the leasehold property.

Then, the next point is this: It is said that the Munsif found that the interest granted by the lease was perpetual. The learned District Judge says it was unnecessary to make such a finding for the decision of the case. I agree with the learned District Judge. Not only it was unnecessary but it was improper after the defendant No. 1 had parted with her interest to adjudicate on what was the nature of the lease granted in the absence of the transferee. All that the learned Judge had to adjudicate on and did adjudicate on was that the lease was subsisting at the time the present suit was brought.

The appeal is accordingly dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 303 OF 1918.
July 15, 1918.
Present:—Mr. Justice Piggott.
BABU RAM—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 103—Search of house—Witnesses present at search, evidence of, value of—Arms Act (XI of 1878), ss. 19 (f), 30—Search by Police Officer specially empowered to conduct searches, legality of.

A Court is not bound to accept as true the evidence of witnesses called in under section 103 of the Criminal Procedure Code to witness a search, if it can be shown to be false. [p. 801, col. 2.]

The power of search in respect of an offence punishable under section 19, clause (*f*) of the Arms Act, must, by virtue of section 30 of the Act, be exercised in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf. [p. 802, col. 2.]

Where a Police Officer in charge of a reporting station is specially empowered by the Local Government to conduct searches in respect of offences under section 19, clause (*f*) of the Arms Act, a search conducted by such officer in respect of an offence under that clause without obtaining a warrant from a Magistrate is not illegal. [p. 802, col. 2.]

Criminal appeal from an order of the Sessions Judge, Mainpuri, dated the 8th April 1918.

Messrs. *C. R. Alston* and *A. P. Dube*, for the Appellant.

Mr. *Lalit Mohan Banerji* (Government Pleader), for the Crown.

JUDGMENT.—Babu Ram appeals against his conviction on a charge under section 19 (*f*) of the Indian Arms Act (XI of 1878). The case against him is that he had in his possession and under his control two swords, one gun, one pistol and certain ammunition in contravention of the provisions of the Arms Act, that is to say, without having any license for the same. The evidence has been fully set forth and discussed in the admirably lucid and convincing judgment of the Sessions Court and I do not propose to go into it at length. The essential facts are that a certain house was searched upon information given by one Khiali Ram, who has been produced as a witness for the prosecution, and that the arms which are the subject-matter of the charge were found in a receptacle formed by hollowing out a log of wood, the receptacle itself being buried underground in a small room in a corner of the building. The case for the defence is that the discovery of the arms in that place does not prove that they were in the possession or under the control of Babu Ram. The suggestion further is that it is a matter of fair inference from the evidence that they had been concealed in that place by enemies of Babu Ram in order to get him or his father Hulas Rai into trouble. The decision of the questions thus raised must depend upon the proper appreciation of certain evidence given by Sub-Inspector Mafuz Ali Khan and the witnesses Angan Lal and Sikhar Chand on the one side, and the witnesses Maharaj Singh, Chunni Lal and Gokul on the other. Maharaj Singh and Chunni Lal were official witnesses to the search, that is to say, the witnesses from the neighbourhood of the appellant's house whose attendance had been procured by the Sub Inspector in accordance with the section 103 of the Code of Criminal Procedure. The Sub-Inspector had complied with the law by calling in these two persons, but the fact that he had done so does not bind the Court to accept as true their evidence, if it can be shown to be false. In the present case the Sub-Inspector for reasons sufficiently apparent had taken the trouble to secure the attendance of two other witnesses; the evidence given by himself and by these men, Angan Lal and Sikhar Chand, receives strong corroboration from the unimpeachable testimony of Rai Bahadur Man Singh, Superintendent of Police, and Mr. Sheo Rakhan Singh, Deputy Magistrate. I have not the slightest doubt, after an examination of the record, that the learned Sessions Judge, who had the concurrence of the Assessors, was perfectly right in rejecting the evidence of Maharaj Singh, Chunni Lal and Gokul. Anything less convincing on the face of it I have rarely read. Their assertion that the house in question had been lying vacant for years is conclusively disproved by the observations made on a subsequent date by the Superintendent of Police and the Deputy Magistrate. The most crucial point in their evidence, namely, the assertion that the Sub-Inspector on entering the house went straight to the remote and somewhat isolated chamber in which the discovery

was made, is introduced in a singularly unconvincing manner in the evidence of Maharaj Singh, and is, in my opinion, quite sufficiently contradicted by the ordinary probabilities of the case. The conduct ascribed to the Sub-Inspector by the defence evidence is that of a man at once unscrupulous and singularly guileless and open in betraying himself by his actions. I am satisfied that the inner room in which these arms were found was under the control and in the exclusive possession of the appellant Babu Ram. He had the key of the outer door of the house in his own possession. He was the only inhabitant of the house (along with his family) at the time of the search, and he produced from his own possession the key of the inner room from which alone the small closet in which the unlicensed arms were found could be approached. I have not been asked by the prosecution to reconsider the question whether the learned Sessions Judge was right in refusing to record the conviction in this case under the first clause of section 20 of Act XI of 1878. Personally I find it difficult to understand with what purpose the offences mentioned in clause (*f*) of section 19 of the said Act are included in the list of offences specified in the first portion of section 20, if that section was not intended to apply to such a case as the present. The question must not be confused by reference to the wholly distinct question of the scope of the second clause of section 20 of Act XI of 1878, in respect of which I in no way dissent from the opinion pronounced by a learned Judge of this Court in the case of *Ram Sarup* v. *Emperor* (1). The sentence passed, however, was within the power of the Court below under section 19 of Act XI of 1878, and I see no adequate reason for making a formal alteration in the conviction.

A strong point has been made on behalf of the appellant of the alleged illegality of the search of this house by the Sub-Inspector Mafuz Ali Khan, without a warrant from a Magistrate. I find nothing in the provisions of Chapter VII of the Indian Arms Act to make such a search illegal. Section 25 deals with the special case of a Magistrate who receives information that a person who has arms, ammunition or military stores in his possession, is keeping them for some unlawful purpose or that for any other reason such person cannot be allowed to remain in possession of the same without danger to the public peace. In cases falling under section 25 it is wholly irrelevant whether the arms, ammunition or military stores in question are or are not covered by license. Unlicensed possession of arms punishable under section 19, clause (*f*) of Act XI of 1878, is a cognisable offence, and is, therefore, an offence which under the Code of Criminal Procedure a great many Police Officers are entitled to investigate. In the conduct of such an investigation a search for the purpose of discovering the arms in respect of which it is believed that an offence has been committed would be legal under section 165 of the Code of Criminal Procedure. The Legislature, however, has seen fit to restrict the powers of Police Officers in the matter of offences punishable under section 19, clause (*f*) of the Indian Arms Act, by the special provisions of section 30 of the said Act. The power of search in respect of an offence punishable under that particular clause of the Act is required to be made in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf. The Local Government has seen fit to empower, amongst other persons, Police Officers incharge of reporting stations, by virtue of their office, to conduct such searches. Sub-Inspector Mafuz Ali Khan was on the date in question an officer in charge of a reporting station and there is nothing illegal in the action taken by him. I am quite satisfied that the appellant has been rightly convicted and I am not prepared to interfere with the severity of the sentence passed by the Court below. I think the learned Sessions Judge has given an adequate reason for the same. I dismiss the appeal. The appellant must surrender to his bail to undergo the unexpired portion of his sentence.

Appeal dismissed.

(1) 3 A. L. J. 833; 28 A. 309; A. W. N. (1906) 11; 3 Cr. L. J. 88.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 293 OF 1918.
June 20, 1918.

Present:—Mr. Justice Newbould and Justice Sir Syed Shamsul Huda, KT.

CHANDRA NATH MUKERJEE, MINOR, BY HIS GUARDIAN SHIB KRISHNA ROY CHOUDHURY—2ND PARTY—PETITIONER

versus

EMPEROR (EAST INDIAN RAILWAY COMPANY)—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144—Jurisdiction of Magistrate to pass order—Imminent danger—Order, whether can be set aside after expiry of 2 months.

The jurisdiction of a Magistrate to pass an order under section 144, Criminal Procedure Code, depends on the urgency of the case. A mere statement by the Magistrate that he considers the case to be urgent is not sufficient to give him jurisdiction, if the facts set out by him show that in reality there is no urgent necessity for action. [p. 804, col. 2.]

In a proceeding to set aside an order of a Magistrate under section 144, Criminal Procedure Code, the High Court would not be justified in considering whether the opinion expressed by the Magistrate on the civil rights of the parties is right or wrong: what it has to consider is, whether the Magistrate's order was made with jurisdiction or not. [p. 804, cols. 1 & 2.]

Where a Magistrate by an order under section 144, Criminal Procedure Code, directed the petitioner to remove an obstruction to a culvert through which drainage of the Railway menial quarters used to flow into his tank and the only fact set out in the Magistrate's judgment indicating any imminent danger was that a rainfall of one inch in an hour would flood the menial quarters and compel their evacuation:

Held, (1) that this was an imminent danger of quite a different kind to that contemplated by section 144, Criminal Procedure Code: it was a danger to the inhabitants of a particular quarter who might be inconvenienced but was not a source of danger to public health; [p. 804, col. 2.]

(2) that the order under section 144, Criminal Procedure Code, should be set aside even though more than 2 months had expired since its passing inasmuch as a prosecution of the petitioner under section 188, Indian Penal Code, for disobedience to the order had been instituted. [p. 804, col. 1.]

Rule against the order of the District Magistrate, Burdwan.

FACTS.—Petitioner was the owner of a tank near Burdwan Railway Station. The railway authorities used to pour the washing and drainage of their menial quarters into this tank and these made the tank fearfully foul and insanitary. The Municipality served the petitioner with a notice to keep the tank perfectly clean. The petitioner thereupon let it out by taking a *kabuliyat*, dated Aswin 1324 B. S., and also put certain obstructions to prevent the railway drainage from falling into the tank. Then the railway authorities asked for an injunction from the Magistrate of Burdwan against the petitioner for removing the obstruction, and the District Magistrate hearing the evidence of both sides decided the matter in the petitioner's favour. Then sometime after the railway authorities again moved the Magistrate and the Magistrate, after taking evidence of both sides, passed an order under section 144 of the Criminal Procedure Code on the 13th March 1918 directing the petitioner to remove the obstruction within 7 days and allow the drainage water of the railway quarters to fall into the petitioner's tank. The petitioner thereupon moved the High Court against that order.

Mr. *S. K. Das* (with him Babu *Ambika Pada Chaudhury*), for the Opposite Party, raised a preliminary objection that two months having expired the petitioners were time-barred. The order of the Magistrate has spent its force and what is the use of interfering after 2 months? In such cases your Lordships have always refused to interfere. *In the matter of Krishna Mohun Bysack* (1), *In the matter of the petition of Chunder Nath Sen* (2), *Ananda Chandra Bhuttacharjee* v. *Carr Stephen* (3), *Queen-Empress* v. *Pratap Chunder Ghose* (4), *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (5) cited.

Babu *Manmatha Nath Mukerjee* (with him Babu *Haradhan Chatterjee*), for the Petitioner.—Your Lordships have interfered in such cases even after two months [see *Thomson* v. *Emperor* (6), *Chandra Kanta Kanjilal* v. *Emperor* (7)] in cases of imminent danger to public health.

As regards merits I submit: (1) The order of the Magistrate does not come within the provision of section 144, Criminal Procedure Code, and the materials on the record do not give the Magistrate jurisdiction to make the order.

(2) No order can legally be passed under section 144 which will have the effect of causing nuisance to the petitioner's tank.

(1) 1 C. L. R. 58.
(2) 2 C. 293; 1 Ind. Jur. 841; 1 Ind. Dec. (N. S.) 478.
(3) 19 C. 127; 9 Ind. Dec. (N. S.) 530.
(4) 25 C. 852; 2 C. W. N. 593; 13 Ind. Dec. (N. S.) 555.
(5) 25 C. 183 at p. 192; 3 C. W. N. 49; 13 Ind. Dec. (N. S.) 725.
(6) 4 Ind. Cas. 590; 13 C. W. N. 195; 5 M. L. T. 96; 11 Cr. L. J. 12.
(7) 36 Ind. Cas. 144; 20 C. W. N. 981; 17 Cr. L. J. 464.

CHANDRA NATH MUKERJEE *v.* EMPEROR.

An order under this section (section 144) is only justifiable if there be satisfactory ground for holding that the 2nd party's action has caused serious and imminent danger to the health of the locality.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Burdwan and the East Indian Railway Company to show cause why the order of the District Magistrate directing the petitioner to remove an obstruction to a certain culvert should not be set aside. The order in question was passed under section 144, Criminal Procedure Code, and a preliminary objection has been taken that as more than two months have expired since the order was passed, the order has spent itself and that this Court cannot now interfere.

Our attention, however, has been drawn on behalf of the petitioner to the decision of this Court in the case of *Chandra Kanta Kanjilal* v. *Emperor* (7). In that case an order under section 144, Criminal Procedure Code, which had expired was set aside. The only difference which we can see, so far as the present point is concerned, between that case and the present one is that in that case the petitioner had been prosecuted under section 188 before the Rule was obtained. In this case the Rule has been obtained against the order under section 144 only; but we are informed that a prosecution under section 188, Criminal Procedure Code, for disobedience of that order has since been instituted. We do not think it necessary to require the petitioner to make a fresh application to quash the prosecution which has since been instituted in order to give him a *locus standi* to question the order under section 44, Criminal Procedure Code. Sooner or later this Court will have to determine whether this order was made with or without jurisdiction and as the parties are now before us, we think that that question should be decided in these proceedings.

Stated shortly, the dispute between the parties is, whether the opposite party have a right to drain a certain triangular piece of land belonging to them into the petitioner's tank or whether they have not. Into the merits of this dispute we have no intention of entering. In fact, in these proceedings we should not be justified in considering whether the opinion expressed by the Magistrate on the civil rights of the parties is right or wrong. What we have to consider is, whether the Magistrate's order was made with jurisdiction or not. Jurisdiction under section 144, Criminal Procedure Code, primarily depends on the urgency of the case. The Chapter is headed: "Temporary orders in urgent cases of nuisance or apprehended danger." In our opinion in the present case although the Magistrate has held that the present state of the land round the railway menial quarters is a source of imminent danger to the public health in consequence of the 2nd party's act in closing the culvert which admits the drainage water into his tank, we cannot find in his statement of the facts any justification for the finding that the danger is imminent. It appears that this dispute has been going on for some time and on a previous occasion proceedings under the same section resulted in an order directing the removal of the obstruction of the passage of water into the petitioner's tank being revoked on the 2nd October 1917. The Magistrate has held that the evil is a cumulative one. That may be so; but it is not shown that the culminating point has been reached at which there is imminent danger. The only fact which he sets out in his judgment which would indicate any imminent danger is that a rainfall of one inch in an hour would flood the menial quarters and compel their evacuation. But this is an imminent danger of quite a different kind to that on which this order is based. It is a danger to the inhabitants of this quarter who may be inconvenienced but is not a source of danger to public health. The mere statement by the learned District Magistrate that he considered the case to be imminent is not sufficient to give him jurisdiction, if the facts set out by him show that really there was no urgent necessity for action in this connection, and that we so hold in the present case. We accordingly make the Rule absolute and set aside the order of the District Magistrate, dated the 13th March 1918, under section 144, Criminal Procedure Code, passed against the petitioner, on the ground that it was made without jurisdiction.

Rule made absolute.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 282 OF 1918.
July 4, 1918.
Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.
EMPEROR—APPLICANT
versus
GULAB AND OTHERS—CONVICTS—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 300, Excep. 4, 304—Culpable homicide not amounting to murder—Death caused in sudden fight—Offence.

A dispute arose over the payment of the rent of a certain field between the three accused and the deceased. The former attacked the deceased and his nephew with *lathis* and a regular fight took place between the parties. The result was that considerable injuries were caused on both sides and that the deceased was killed:

Held, (1) that *lathis* being lethal weapons, the accused must have known that they were likely to cause death; [p. 805, col. 2; p. 806, col. 1.]

(2) that the case fell under Exception 4 to section 300 of the Penal Code and that all the accused were guilty of an offence under section 304 of the Penal Code. [p. 806, col. 1.]

Criminal revision from an order of the First Additional Sessions Judge, Aligrab, dated the 9th February 1918.

Mr. *R. Malcomson* (Assisstant Government Advocate), for the Crown.

JUDGMENT.—Notice was issued by a learned Judge of this Court to the three persons Gulab, Majid and Ghafoor to show cause why they should not be convicted of an offence punishable under section 304 of the Indian Penal Code; why the sentences passed on them should not be enhanced, or why they should not be ordered to be re-tried on a charge under section 302 of the Indian Penal Code. The facts of the case, as found by the Court below and which appear to us to have been correctly found, are as follows:—There was a sugarcane crop standing in three fields. It had been sown by the deceased Hardial and his partners Jahangir, Bhagwan Sahai and others. These fields had been given to Hardial by the accused to enable him to recoup himself for certain monies which he had advanced to them and which were due to him from them. The mortgage of an occupancy holding is of course contrary to law. No bond was executed in this case but the fields were actually made over to Hardial and he cultivated them. One of his duties was to pay the rent. The evidence shows that he had failed to pay two instalments. On the date in question he and his friends and his nephew Ganga Prasad were cutting the sugarcane crop when the three accused appeared upon the scene and Gulab objected to his cutting the crop as he had not paid the rent. Hardial replied that he had intentionally not paid the rent because the accused owed him other money and that he had set it off against the debt. Abuse followed between the parties and thereupon, according to the evidence for the prosecution, the three men attacked Hardial with their *lathis*. Ganga Prasad was also armed with a *lathi* and a regular fight took place between two men on one side and three on the other. The result was considerable injuries on both sides. Hardial received three blows on the head, one on the cheek, one across the ear and some on his body. The injuries on the head were all on the right side. According to the evidence for the prosecution some of the injuries were inflicted after he had been knocked down and the fact that the injuries on the face, ear and head are all on the right side, is some indication of the fact that this really occurred. Ganga Prasad also received considerable injuries. Upon other persons arriving at the scene, the accused fled. The Court below has convicted the accused under section 325 of the Indian Penal Code of having voluntarily caused grievous hurt, relying upon the ruling in the case of *Chandan Singh* v. *Emperor* (1). It is obvious that the offence of culpable homicide either amounting to murder or not amounting to murder was committed. A man's life had been taken. It is obviously impossible in cases of this description to be able to prove that the fracture of the skull which resulted in death was caused by a blow from the *lathi* of any special one of the assailants. In the present instance Hardial had three fractures of the skull and had received three *lathi* blows upon the head. The three accused were all armed with the same class of weapon. They all attacked Hardial. A *lathi* is a lethal weapon, as has been repeatedly held in this Court for very many years. The person who uses a *lathi* must know,

(1) 43 Ind. Cas. 438; 16 A. L. J. 11; 40 A. 103; 19 Cr. L. J. 150.

on an occasion like this, that he is very likely to cause death. The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death. We cannot agree that the accused can only be convicted of voluntarily causing grievous hurt. It is impossible to say whose *lathi* fractured the skull. The other blows inflicted on the body of Hardial caused only simple hurt. It appears to us that the present case falls within Exception 4 of section 300 of the Indian Penal Code, wherein it is stated "that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner." If five or more persons had banded together in this matter on behalf of the accused, no one would have hesitated to have held all five guilty of the offence of culpable homicide not amounting to murder (section 149 of the Indian Penal Code). Why, because the number is reduced to three, these three should not be equally guilty under section 304 of the Indian Penal Code, we fail to understand. If one man alone had committed the offence he also would have been convicted under section 304 of the Code. It is illogical to say because two others joined with him with similar weapons, that, therefore, the offence committed by the three is reduced to the lesser offence of voluntarily causing grievous hurt. With all due respect to the learned Judge who decided it we find it impossible to agree with the opinion expressed in the case of *Chandan Singh* v. *Emperor* (1). If the facts were as they are reported, then the offence, in our opinion, was not even one under section 304 of the Indian Penal Code. It was a cruel and a brutal assault, premeditated and committed for the purpose of revenge upon an unfortunate man. The offence committed appears to us nothing more or less than murder and all three accused were equally guilty as they were clearly moved by the same intent and had the same object and all three used lethal weapons. We do not agree with the view of the law taken in that case and in that respect we would point out that it was quite inconsistent with the remarks to be found in the case of *Hanuman* v. *Emperor* (2). The remarks at page 563* are worthy of note. They run as follows:—"It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The learned Judge seems to confuse the meaning of the term intention with desire. It is quite possible that these persons had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head) but nevertheless if they beat him in the way it is proved that they did, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as was likely to cause death, and if so they are guilty of murder. Under circumstances such as these it is quite immaterial to ascertain whose blow was the immediately fatal one." The learned Judges who decided that case distinctly dissented from the rule of law laid down in the case of *Dhian Singh* v. *Emperor* (3), which was a judgment of a single Judge of this Court. They distinctly say: "We cannot agree with the rule of law laid down in *Dhian Singh* v. *Emperor* (3)." We should also call attention to the decision of this Court in the case of *Emperor* v. *Ram Newas* (4). This was similarly a case of three men who with the same intent and object attacked another. They were armed with *lathis*. They inflicted serious injuries which resulted in death. All three of them were found guilty of the offence of murder. These cases no doubt are distinguishable from the case before us for here the matter was a sudden one, it sprang up suddenly and the injuries were inflicted in the heat of passion. We think that the case falls within Exception 4 of section 300

(2) 21 Ind. Cas. 1005; 35 A. 560; 11 A. L. J. 926; 14 Cr. L. J. 685.

(3) 14 Ind. Cas. 649; 9 A. L. J. 180; 13 Cr. L. J. 265.

(4) 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615.

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of the Indian Penal Code. We, therefore, alter the conviction in the present case from one under section 325 of the Indian Penal Code to one under section 304 of the Indian Penal Code and in view of the circumstances of the case, we do not think it necessary to enhance the sentences that have been passed.

Conviction altered.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL ACQUITTAL APPEAL No. 59/3 OF 1917.

March 22, 1918.

Present:—Mr. Crouch, A. J. C., and Mr. Fawcett, A. J. C.

EMPEROR—APPELLANT

versus

RAMLO AND OTHERS—ACCUSED—OPPOSITE.

Penal Code (Act XLV of 1860), ss 79, 147, 448—Husband carrying away wife by force against her will—Offence, nature of—Husband, right of, to use force to compel wife to live with him—Restitution of conjugal right, suit for.

Both under the English and Indian Law, although it is the duty of a wife to reside and cohabit with her husband, the husband has no right to use force or violence to enforce this right even when the wife's refusal to live with him is without any reasonable cause. [p. 808, cols. 1 & 2.]

There is nothing in Hindu or Muhammadan Law to justify a husband in using force or restraint to compel his wife to live with him, instead of having resort to a Civil Court for restitution of conjugal rights. Nor can such action be justified under section 79 of the Penal Code. [p. 803, cols. 1 & 2.]

Where a Hindu husband in company of several associates forcibly entered the house of a third person and took away by force his married wife from there against her will:

Held, that the husband and his associates were guilty of offences under sections 147 and 448, Indian Penal Code. [p. 808, cols. 1 & 2.]

Appeal by the Local Government against an order of acquittal passed by the Additional Sessions Judge, Hyderabad.

Mr. *E. Raymond*, Public Prosecutor for Sind, for the Crown.

Mr. *Lalchand Hassomal*, for the Accused.

JUDGMENT.—This is an appeal by the Local Government against an order of acquittal under sections 147 and 448, Indian Penal Code, in respect of accused Nos. 2 (Ramlo), 3 (Nanji), 4 (Gaju) and 7 (Pitho) passed by the Additional Sessions Judge of Hyderabad in an appeal against their convictions under those sections by the Sub-Divisional Magistrate, Mirpur Khas. Notices have not yet been served on Gaju and Pitho and the appeal has, therefore, been heard only in respect of the other two.

The facts alleged are as follows:—Pitho's wife Jivat was said to have been enticed away by two men against whom Pitho filed a complaint under section 498, Indian Penal Code, in the Court of the First Class Magistrate, Jamesabad. On the 11th September 1916, there was a hearing of that case at which Jivat was present, having been called as a witness. After her examination she applied to the Court for Police protection on the ground that the complainant and his party were going to take her away by force. The Magistrate wrote a letter to the Sub-Inspector asking him to see that no force was used to her and ordered a Police constable by name Mahomed Parial to escort her to the Sub-Inspector or wherever she wanted to go. In accordance with her desire he went with her to the house of a P. W. D. Overseer Allahbux, where the then accused's Counsel, Mirza Farukhbeg, had put up. He refused to keep her with him as he feared serious consequences, seeing a crowd of Kolhis, to which community the present accused belong, had collected and assumed a threatening attitude. The Policeman, however, asked Mirza to let her remain in the house until he got more Police from the Thana to assist him and Mirza assented to this. As soon as the Policeman left, a large number of Kolhis (among whom the accused are said to have been) rushed into the house. Jivat thereupon ran into an inner apartment and closed its door from inside. The Kolhi offenders, however, broke it open and forcibly removed her with them. Some of them were armed with hatchets, some with *lathis* and some with sticks. The accused Ramlo and Nanji with 12 others were accordingly charged with rioting under section 147, Indian Penal Code, and house trespass under section 448, Indian Penal Code.

The Additional Sessions Judge did not

upset the conviction on the only grounds specified in the memorandum of appeal to him, *viz.*, that the identity of the appellants was not satisfactorily established and that it was proved that they were elsewhere at the time: but did so on the ground that Pitho had the right to compel his wife to accompany him even though it was against her will and that he was justified in calling upon his associates to help him in removing the woman from what he calls the "wrongful custody" of Mirza and Allahbux. He gives no authority for this view and is clearly wrong. Mr. Lalchand who represented Ramlo and Nanji admitted he could not support it, at any rate as regards the offence under section 147, Indian Penal Code.

The general English Law is that though it is the duty of a wife to reside and cohabit with her husband, yet the husband is not entitled if his wife refuses to live with him, even without any reasonable cause, to restrain her by force or to keep her in confinement. Halsbury's Laws of England, Volume XVI, page 318, Article 627. This was established by the case of *Reg.* v. *Jackson* (1), overruling a supposition to the contrary which previously existed and which has probably led to the Additional Sessions Judge's decision. The law in India is clearly the same. Sections 339, 340 and 350, Indian Penal Code, make no exception in favour of force or restraint by a husband to his wife such as is provided for in the case of rape (section 375); and the only possible exception applicable is section 79, Indian Penal Code. To fall under this, it would have to be shown that a husband is, under Hindu or Muhammadan Law, justified in using force or restraint to compel his wife to live with him inspite of the general English Law and the provisions of the Penal Code already mentioned. This point is discussed in Wilson's Digest of Anglo Muhammadan Law, Edition 1895, pages 48—50, and 2nd Edition, page 154, and his conclusion is against any such exception in favour of a Muhammadan husband. In the present case the husband is a Hindu and no greater protection from the ordinary criminal law can be claimed for him. No doubt, as ruled in *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (2), Hindu Law (as does English Law) imposes on a wife the duty of residing with her husband wherever he may choose to reside; but there is certainly no authority for the proposition that he can enforce his right to demand that his wife shall live with him by violence instead of by resort to a civil Court for restitution of conjugal rights.

As regards the offence under section 448, Indian Penal Code, Mr. Lalchand submitted that the primary intent of the trespassers was not to intimidate, insult or annoy any person in possession of the property but to carry away the woman. Her forcible removal was, however, an offence and the trespass was, therefore, done with intent to commit an offence and so falls under the definition of criminal trespass. In the cases *Queen-Empress* v. *Rayapadayachi* (3) and *Gaya Bhar* v. *Emperor* (4), which are relied on by the Additional Sessions Judge, the intent was to do an act which was not an offence (*viz.*, sexual intercourse with an adult unmarried woman) and these consequently have no application to the present case.

The main facts alleged which have been recapitulated above are clearly proved by the evidence in the case and have not been questioned by Mr. Lalchand or by the Additional Sessions Judge in his judgment. The only remaining question is, whether it is proved that Ramlo and Nanji were among the persons who entered the house and took part in the forcible removal of Jivat.

Against them is the evidence of Jivat, who was in the best position to identify her assailants as the affair happened about sunset. She states that they and two others named by her broke open the door of the room in which she was and took her out. She further says that Ramlo had a knife in his hand. We are asked to discredit her testimony on two grounds. The *first* is that according to the record of her statement to the Police she said that all the Kolhis entered the room.

(1) (1891) 1 Q. B. 671; 60 L. J. Q. B. 346; 64 L. T. 679; 39 W. R. 407; 55 J. P. 246.

(2) 28 C. 751; 5 C. W. N. 673.

(3) 19 M. 240; 1 Weir 537; 6 Ind. Dec. (N.S.) 872.

(4) 35 Ind. Cas. 979; 38 A. 517; 14 A. L. J. 719; 17 Cr. L. J. 419.

Jivat as to this explains that what she really said was that all the Kolhis entered the house and that she did not say that all entered the room, but only some came there. This is certainly more probable for, as the number of Kolhis who entered the house is alleged to have been 40 or 50, it would be almost a physical impossibility for all of them to enter the room without impeding the ones who took an active part in the removal of the woman. Having regard to the informal way in which Police statements are recorded it is not unlikely that a mistake was made of the kind alleged by Jivat, and this cannot be taken as a discrepancy which really discredits her subsequent testimony. *Secondly*, reliance is placed on the defence evidence of the Honourable Mr. Bhurgri and Mr. Nur Mahomed as to the alleged statement of Jivat to them. The former states that she said that "Pitho and 2 others whose names she did not know had carried her away from a house", while the latter deposes that she said Pitho had taken her away and there were two other Kolhis with him whom she did not name. But Mr. Bhurgri's statement that she said she could not name the two others is not supported by Mr. Nur Mahomed and it is very unlikely that she would not know the Kolhis in question. She might have said that Pitho had taken her away because she knew it was done at his instigation; and as to the number who took her from the room it is only a reduction by one of the number stated at the trial. Thus even accepting the evidence of the Honourable Mr. Bhurgri and Mr. Nur Mahomed the woman is not seriously discredited, and the discrepancy in their evidence is sufficient to throw doubt on the accuracy of their memories.

Jivat's testimony is corroborated by Alladito, who says he saw Nanji and three other men carrying away Jivat and by Mirza and Allahbux, who both name Ramlo as known to them previously and having been among the Kolhis who entered the house. No substantial reason for discrediting them on this point has, in our opinion, been advanced by Mr. Lalchand. They appear to be disinterested witnesses who have given their evidence without any bias either against accused or in favour of thePolice case.

In addition there is the testimony of a large number of prosecution witnesses who merely said they identified all the accused as present without naming any particular ones. This evidence is not so trustworthy and has not been much relied on by the Public Prosecutor.

According to Jivat whose evidence on the point is not contradicted, Ramlo is a brother-in law and Nanji a cousin of Pitho. Nanji is also Patel of the Kolhis and Ramlo is the Kamdar of the Honourable Mr. Bhurgri. It is, therefore, not unlikely that they would assist Pitho and take a leading part in this organised attempt of the Kolhis there to get forcible possession of Jivat's person.

No identification test was held by the Police, but as remarked in *Punhu* v. *Emperor* (5) the weight to be attached to the identification of an accused by any particular witness generally depends more on the opportunities he had to observe him and on his general credibility than on the evidence that he actually picked out the accused from a number of other men. In this case we think Jivat's identification of Ramlo and Nanji corroborated by the other evidence mentioned is amply sufficient to prove that they took part in the rioting and house trespass charged against them.

We, therefore, reverse the acquittal and convict them under sections 147 and 448, Indian Penal Code. The two accused took a leading part in an organised criminal act of defiance to the authorities which calls for a deterrent punishment. We restore the concurrent sentences of six months' rigorous imprisonment passed on them by the First Class Magistrate.

Order of acquittal reversed.

Order reversed.

(5) 27 Ind. Cas. 905; 8 S. L. R. 203; 16 Cr. L. J. 233.

RAGHUNATH *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 236 OF 1918.
May 23, 1918.
Present—Justice Sir P. C. Banerji, KT.
RAGHUNATH AND OTHERS—ACCUSED—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), as amended by Act I of 1917, ss. 3, 4—Keeping common gambling house—Being found in gaming house—Proof—Presumption.

In order to sustain the conviction of an accused person for keeping a common gambling house it is necessary for the prosecution not only to prove that the accused owned the house, or was the occupier of it, and that instruments of gambling were kept or used in it, but that they were kept or used for the profit of the accused. In the absence of evidence to show that profit or gain was actually made, a conviction cannot be maintained upon mere suspicion [p. 810, col. 2.]

Where it is not established that a particular house is a common gaming house, the presence of the accused in that house can raise no presumption against them, and even if the house is a common gaming house, no presumption will arise against them unless it can be shown that gambling was going on at the time when they were present. [p. 810, col. 2; p. 811, col. 1.]

Criminal revision from an order of the First Class Magistrate, Meerut.

Mr. *Nihal Chand*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicants have been convicted under the Gambling Act III of 1867, as amended by Act I of 1917. Raghunath has been convicted under section 3, the others under section 4 of the Act. The case against these persons was that they were carrying on wagering or betting on *sattas* relating to the sale of opium. Raghunath was charged with keeping a common gambling house. Under Act I of 1917 wagering or betting has been included in the definition of "game," and any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming is included in the expression "instrument of gaming." What happened was this. The Police raided the shop of Raghunath where he deals in cloth. They found the other accused (and some others) assembled there, sitting round a lighted lamp and some writing was being done by one of the persons assembled. The Police seized a number of papers which were found in that room. They also found money in a box of Raghunath and loose silver pieces and money in the possession of the other accused. It was stated that the papers which were discovered were papers used for the purpose of betting and were, therefore, instruments of gambling. What the papers really were it is difficult to say. They contained writings which were in cypher. One witness, namely, Kundan Lal (prosecution witness No. 6), attempted to explain what some of the papers meant. If his statement is correct the papers show that they related to betting. The paper which was being written at the time the Police raided the house of Raghunath has not been produced or proved. I have considered the evidence and have heard the arguments addressed to me on behalf of the accused and the Crown. It is very difficult to say whether the papers found did in fact relate to wagering or betting. With the exception of one paper the others did not show that this betting, if any, was going on after the passing of Act I of 1917, which made betting an offence under the head of gambling. Having regard, however, to the nature of the papers, it may be assumed that they related to gambling In order, however, to sustain the conviction of Raghunath for keeping a common gambling house it was necessary for the prosecution to prove not only that he owned the house, or was the occupier of it, and that instruments of gambling were kept or used in it, but that they were kept or used for the profit or gain of Raghunath. There is not a particle of evidence to show that he made any profit or gain out of the transactions which might have taken place in his house. It is possible that he made some profit, but in the absence of evidence to show that profit or gain was made he could not be convicted merely upon suspicion. Therefore, in my opinion, his conviction for keeping a common gaming house as defined in Act I of 1917 cannot be sustained. As regards the other accused there is no evidence whatever that they were engaged in betting or wagering when the Police raided the house. As it has not been established that the house was a common gaming house, their presence in that house can raise no presumption against them and even if the house was a common gaming house, no presumption will arise against them unless it can be shown that gambling

was going on at the time when they were present. As to this there is no evidence whatever. It is probable, as I have said above, that gambling (that is betting or wagering) used to be carried on in Raghunath's house; but that alone would not justify his conviction or the conviction of the other accused, in the absence of evidence showing that his house was a common gaming house within the definition of that expression in the Act and that the other accused gambled in that house. Under these circumstances the conviction must be set aside. I allow the application, set aside the conviction of the accused and the sentence passed on them and direct that the fines, if paid, be refunded. I also direct that the moneys seized in the house be returned to the persons from whose possession they were seized.

Application allowed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 26 OF 1917 AND APPEAL No. 722 OF 1917.

January 14, 1918.

Present:— Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

EMPEROR—PROSECUTOR

versus

KABILI KATONI—ACCUSED.

Confession, retracted, value of—Ill-treatment by Police, allegation of—Burden of proof—Trial by Jury—Functions of Jury in appraising value of confession.

The question of the relevancy and admissibility of a confession is for the Judge to decide. When he has decided that it is relevant and it has been laid before the Jury, it is for them to appraise its value as evidence and one test which they will have to apply is whether it appears to them to have been freely and voluntarily made. [p. 811, col. 2.]

An accused person who at his trial retracts his confession recorded by the Magistrate, alleging that it was the outcome of ill-treatment and inducement by the Police, should prove his allegations. [p. 811, col. 2.]

Reference made by the Sessions Judge, Assam Valley District, dated the 6th December 1917.

Babus *Jatindra Mohan Chowdhuri* and *Gogan Chand Boral*, for the Accused.

Mr. *Orr*, for the Crown.

JUDGMENT.—The accused Kabili Katoni has been found guilty by the unanimous verdict of the Jury of the murder of one Mangal Singh and has been sentenced to death by the Sessions Judge of the Assam Valley District. The case has come before us under section 374 of the Criminal Procedure Code, and there is also an appeal by the accused to this Court.

It was argued that there had been such a misdirection by the learned Sessions Judge as vitiated the verdict of the Jury and that the accused was entitled to a new trial. The passage relied upon was that where the learned Judge was dealing with the burden which lay upon either side to prove such facts as they asserted. "In this case" (he said) "it is for Kabili to satisfy the Jury that he was ill treated by the Police or that inducements were offered." On 12th September 1917, Kabili had made a detailed confession before a Magistrate. To that confession he adhered, with some slight differences and additions, before the Committing Magistrate on 27th September. On 5th December 1917, before the Court of Sessions he retracted his confession. He said that after his arrest the Police tied his hands behind him and kept him in confinement; they ill-treated him in various ways and pressed him to tell everything and make a confession; as the Police ill-treated him he repeated the story they told him. Further, he said that he was brought to the Magistrate by two constables, who told him that he would be released if he told the Magistrate everything they instructed him to say; that he confessed to the Magistrate through fear of the Police; and that his statement to the Magistrate was false. Now the question of the relevance and admissibility of the confession is for the Judge to decide; when he has decided that it is relevant, and it has been laid before the Jury, it is for them to appraise its value as evidence, and one test which they will have to apply is whether it appears to them to have been freely and voluntarily made. Speaking generally, the burden of proving any fact which he asserts is upon the accused. In this case, if he alleged ill-treatment by the Police or any inducement by them to him to confess he should have done something to prove it. Here the prosecution tendered the confession and examined the Magistrate recording it to show that it was voluntarily made. Not a question was asked of the Magistrate in cross-examination to suggest the contrary, nor was a question

asked of the Sub-Inspector who had had charge of the case throughout to suggest that there had been any improper conduct on the part of the Police by way of either ill-treatment or inducement. Fifteen days after the confession the accused adhered to it before the Committing Magistrate. It was not until the trial in the Court of Session that the accused withdrew his previous statements. It cannot be said that the direction of the learned Judge was erroneous, still less that it vitiated the verdict. The charge must be read as a whole, and later on the learned Judge was careful to impress upon the Jury that it was only if they found the statement to have been voluntarily made that they could take it into account as evidence. He left it to the Jury to decide whether in the circumstances the confession should be regarded as genuine or not. There seems to be no force in the contention that the Jury were misdirected by the Judge.

Turning to the facts, which we are entitled, and indeed bound, to consider under Chapter XXVII, Criminal Procedure Code, they are very simple and it is unnecessary to recapitulate them, as they are set out clearly and succinctly in the charge to the Jury. The story told by Nepali Lalung clearly implicates Kabili, Rabiram and himself in the murder of Mangal Singh. The question is whether it can be accepted as the true version of the matter. Nepali was on his own showing an accomplice and was tendered and accepted a pardon under section 337, Criminal Procedure Code. It was essential that his evidence should be corroborated in material particulars. The Jury evidently were of opinion that it was, and also the Judge, as he accepted the Jury's verdict. We see no reason to differ. In the first place we have the confession of the accused Kabili which appears to have been freely and voluntarily made. It differs from Nepali's story in some important particulars. Nepali describes Rabiram the brother of Kabili as being present and taking a leading part in the murder. Kabili's confession makes no mention of Rabiram, but this was, no doubt, from a desire on his part to screen his brother. Rabiram was also put upon his trial but was acquitted by the Jury, presumably because there was nothing against him but Nepali's statement. Then Nepali states that Mangal and Kabili went away in Dasibar's boat and that he followed in another boat and joined them afterwards; while Kabili says that Mangal and Nepali were in Dasibar's boat, and that he joined them afterwards. Dasibar corroborates Nepali. The motive for the crime spoken to by Nepali is corroborated both by Kabili's confession and by the evidence of Namala, the wife of Sat Singh, with whom Mangal is said to have had an intrigue. Kabili adds on this point that both Mangal and he used to visit Namala. It would appear at first sight that Nepali's story was improbable, inasmuch as he poses as a close friend of Mangal Singh. Why then should he for a paltry sum of Rs. 20, which does not appear to have been paid, join with Kabili and Rabiram in murdering Mangal Singh deliberately and in cold blood? It may be that Nepali has not told the whole truth on the question of motive. Something of that kind is indicated by Kabili, when in his confession he stated that Mangal Singh and Nepali Lalung also had quarrels between them. But Nepali has never sought to exculpate himself with regard to the share which he took in the actual murder. After giving the case our best consideration, we find it to be a true case against Kabili Katoni. There appear to be no mitigating circumstances, which would justify the infliction of the lesser sentence. The murder was most cruel and deliberate. We accordingly dismiss the appeal and confirm the sentence of death.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 56 OF 1918.

CRIMINAL REVISION PETITION No. 43 OF 1918.

July 17, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KUTTI CHAMI MOOTHAN AND OTHERS —ACCUSED—PETITIONERS

versus

RAMA PATTAR—COMPLAINANT —RESPONDENT.

Penal Code (Act XLV of 1860), s. 295—'Defile',

JALALUDDIN PESHAWARI *v.* EMPEROR.

meaning of—Entry of members of Moothan caste into precincts of temple open to non-Brahmins—Offence.

The word 'defile' in section 295, Indian Penal Code is not confined to the idea of making dirty but is also extended to ceremonial pollution, which however must be proved.

Where the accused, who belonged to the Moothan caste in Malabar and claimed the status of Vaisyas, entered into the Nallambalam of a temple which was open to non-Brahmins:

Held, that their act did not amount to 'defiling' the temple within the meaning of section 295, Indian Penal Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Palghat Division, in Criminal Appeal No. 113 of 1917, confirming the conviction and sentence passed on the accused in Calendar Case No. 203 of 1917, on the file of the Court of the 2nd Class Magistrate of Alathoor.

Mr. *K. P. Laksmana Rau*, for Mr. *Doraiswamy Ayyar*, for the Petitioners.

Mr. *K.* P. *Kesava Menon*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.

SADASIVA AIYAR, J.—The accused belong to the "Moothan" caste, which is one of the divisions of the Sudra caste. There is nothing to show that their caste status is less high than that of Nairs and on the other hand while most Nairs are content to call themselves Sudras, Moothans have been trying to claim the status of Vaisyas as following the profession of trade; their women are called Chettichiyars and some of them have adopted the Vaisya surname "Gupta".

The prosecution theory that while a Nair's entry into the Nallambalam of the temple does not pollute the temple or the idols in it, the entry of a Moothan does so is *prima facie* improbable and I may say it almost amounts to an absurdity.

The contention that the particular custom in this temple is to make such entry an act of pollution, is sought to be proved by the evidence of Brahmin and Nair witnesses who gave no reason for their extraordinary opinion, which is clearly of very little worth

I would set aside the conviction and sentences and order the fines to be refunded.

NAPIER, J.—I agree. I accept the contention that the word 'defile' cannot be confined to the idea of making dirty but must also be extended to ceremonial pollution, but it is certainly necessary to prove pollution. The caste of the accused is not one of the polluting castes, *vide* Malabar Gazetteer, page 117. Neither is the act alleged, one confined by right to Brahmins as was the case in *Sivakoti Swami* (1) where a goldsmith touched the idol It is simply presence in that part of a temple which is open to non-Brahmins but is alleged not to be open to the caste of the accused. In my opinion this is not 'defiling' within the meaning of section 295 of the Indian Penal Code.

M. C. P.

Conviction quashed.

(1) 1 Weir 253.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 524 OF 1918.

July 17, 1918.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

JALALUDDIN PESHAWARI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Bengal Excise Act (V B. C. of 1909), ss. 46, 83 (a)—Offence under s. 46—Complaint by Police Officer below rank of officer-in-charge of Police Station, legality of—Magistrate, jurisdiction of, to take cognizance of offence—Criminal Procedure Code (Act V of 1898), ss. 530 (p), 537.

On the report of a Junior Sub-Inspector of Police below the rank of an officer-in-charge of a Police Station, a Magistrate took cognizance of a case under section 46 of the Bengal Excise Act and convicted the offender:

Held, (1) that the Magistrate's proceedings were void under clause (*p*) of section 530, Criminal Procedure Code, inasmuch as he was debarred by section 83 *a*) of the Bengal Excise Act from taking cognizance of the case on such a report or complaint; [p. 815, col. 1.]

(2) that the defect in the proceedings was not a mere irregularity to which section 537, Criminal Procedure Code, applied, as that section presupposed a trial by a Court of competent jurisdiction. [p. 815, col. 1.]

Rule against the order of the Chief Presidency Magistrate, Calcutta.

FACTS appear from the judgment.

Mr. *Langford James* (with him Babus *Manoj Mohan Bose*, *Manmohan Bose* and *J. M. Mittra*), for the Petitioner.—This is a Rule

to show cause why the conviction and sentence of the petitioner under section 46 of the Bengal Excise Act of 1909 should not be set aside. The provisions of section 83 of the Bengal Excise Act not having been complied with, the whole proceeding is invalid. Mr. R. K. Mukerjee, on whose complaint the accused was sent for trial, was not an officer authorised or empowered to send up the accused for trial. The defect is not one which can be cured by section 537 of the Criminal Procedure Code, because the trial must be held by a Court of competent jurisdiction. Here everything was done without jurisdiction and so the conviction cannot stand. Refers to section 530 of the Criminal Procedure Code.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown, submitted that in the Presidency town, cases were generally sent to the Magistrate by the order of the Assistant Commissioner of Police or Deputy Commissioner of Police, and in this case the accused was sent for trial by the order of the Deputy Commissioner of Police, and Mr. R. K. Mukerjee was the formal complainant.

[Mr. *Langford James*:—Mr. R. K. Mukerjee had no authority to institute the complaint.]

He was a Sub-Inspector not below the rank of an officer-in charge of the Thana. Refers to section 4 of the Code of Criminal Procedure in which the expression "officer-in-charge of a Police Station" has been defined. Refers also to section 19 of the General Clauses Act (X of 1897). Refers also to rule 18 of the Excise Manual, Volume II, page 249. Even assuming that there had been any defect in the procedure that was cured by section 537 of the Criminal Procedure Code.

Mr. *Langford James*, briefly replied.

JUDGMENT.—This Rule was issued on the Chief Presidency Magistrate of Calcutta to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside on the ground specified as ground (*c*) in the petition. Ground (*c*) is in these terms: "For that the whole trial was irregular and invalid inasmuch as the junior officer Mr. R. K. Mukerjee was not legally competent to send up this case to the Magistrate". The petitioner, it appears, has been convicted and sentenced under section 46 of the Bengal Excise Act, 1909. Clause (*a*) of section 83 of the Act lays down that no Magistrate shall take cognizance of an offence referred to in section 46 except on his own knowledge or suspicion, or on the complaint or report of an Excise Officer or an officer empowered in this behalf by the Local Government. Now, the only complaint or report which we can find in this case is the document marked Exhibit A. The heading is "Report of serious case of section E Town on the 10th day of April 1918". The document purports to be signed by R. K. Mukerjee. In the first column the name of Sub-Inspector R. K. Mukerjee appears again as the name of the complainant. It may be that Sub-Inspector R. K. Mukerjee had been authorised by one of his superior officers to make this complaint or report, but we can see no reason for saying that the case was not instituted by the report or complaint made by him or that the Magistrate did not take cognizance of the case on that report or complaint. The Sub Inspector is not an Excise Officer and the question therefore is whether he was "an officer empowered in this behalf by the Local Government" within the meaning of section 83 (*a*). Turning to Chapter X of Volume II of the Excise Manual we find a number of rules or instructions issued by the Board of Revenue. Rule 18 refers to section 83 (*a*) and states that the officers empowered by the Local Government are Police Officers not below the rank of officers-in-charge of a Police Station. The rule quotes a Government notification which was not placed before us, and there is no reason for supposing that the effect of the notification is not accurately reproduced. There is no definition of "officer-in-charge of a Police Station" in the Excise Act but the term is defined in the Criminal Procedure Code [section 4 (*h*)]. In the present case in our opinion Sub-Inspector R. K. Mukerjee was an officer below the rank of an officer-in-charge of a Police Station. He was a Sub-Inspector attached to the Jorasanko Police Station, but at all material times he appears to have been subordinate to Sub-Inspector Masud Hossein who was the officer-in-charge of the Station. The mere fact that both officers were Sub Inspectors is not sufficient.

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Mr. Orr, appearing for the Crown, has urged that this objection to the trial was not taken in the Court below until the evidence had all been recorded. But it was taken at that stage and it was open to the Magistrate then to take additional evidence, if there was any doubt as to a question of fact on which his jurisdiction depended. He did not take that step. Apparently he had no doubt as to the facts and no suggestion seems to have been made that the facts were not as we have stated them. He seems to have thought that he had no power to quash the whole proceedings. He had power, however, if it was shown to him that the proceedings had not been legally instituted and that he had no jurisdiction to hear the case, to acquit the accused on that ground. The defect was not a mere irregularity to which section 537 of the Criminal Procedure Code applies. Apart from anything else, that section presupposes a trial by a Court of competent jurisdiction. Here the Magistrate's proceedings are void under clause (*p*) of section 530. He had tried an offender whom he was not empowered to try. In the circumstances he was debarred by the Act from taking cognizance of the case.

We may mention that this is the second time within a few days in which the authority of a Police Officer to make a complaint or report under section 83 (*a*) of the Bengal Excise Act has been brought in question before us, and we are of opinion that in such cases the complaint or report should show on its face that it is made by some officer who has the requisite authority.

The result is that this Rule is made absolute and the conviction and sentence are set aside on the ground that the Magistrate's proceedings are void. The petitioner will be discharged from his bail-bond.

Rule made absolute.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION NO. 110 OF 1918.
May 22, 1918.
Present:—Justice Sir P. C. Banerji, KT.
SHEO SAMPAT PANDE—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4, 195, 476—Penal Code (Act XLV of 1860), ss. 193, 210—"Complaint", what is—Sanction to prosecute—Perjury, trial for, without sanction or complaint, legality of.

Accused, who held a decree against the complainant, recovered in execution of the decree a sum larger than was due thereunder. The complainant thereupon applied to the Court for sanction to prosecute the accused. No sanction was granted, nor was any action taken under section 476 of the Criminal Procedure Code. The presiding officer of the Court, however, addressed to the Magistrate of the district a letter in which he stated all the facts and concluded by soliciting orders in the case. The Sub-Divisional Officer through whom the letter was submitted, instead of sending it on to the District Magistrate, himself ordered the prosecution of the accused and tried and convicted him under sections 193 and 210 of the Penal Code:

Held, (1) that the letter addressed to the District Magistrate did not amount to a complaint within the meaning of section 476 of the Criminal Procedure Code; [p. 816, col. 2.]

(2) that no sanction having been granted under section 195 of the Criminal Procedure Code and there being no complaint under section 476 of the Code, the trial and conviction of the accused were illegal. [p. 816, col. 2.]

Criminal revision from an order of the Sessions Judge of Gorakhpur.

Mr. *Peary Lal Banerjee* (with him Mr. *N. P. Upadhyaya*), for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicant Sheo Sampat, who is an old man of seventy, has been convicted under sections 193 and 210 of the Indian Penal Code under the following circumstances. Sheo Sampat brought a suit in the Revenue Court against one Barbu for arrears of rent. He claimed Rs. 16-11-0 as principal and interest; an *ex parte* decree was passed in his favour on the 29th of September 1916 for Rs. 9-4-0 and Rs. 2-5-0 costs, total Rs. 11 9-0. The judgment-debtor, Barbu, made an application to have the *ex parte* decree set aside. This application was granted. The case was re-heard and on the 24th of May 1917 a decree was made for Rs. 8-3-0 which included costs. On the 19th of May 1917, Sheo Sampat filed an application for execution of the decree. In that application the date of the decree was erroneously mentioned as the 20th of June 1917 and the amount claimed was put down as Rs. 16-11-0. He took out attachment of some property of the judgment-debtor. Meanwhile the judgment-debtor deposited the full amount of the decree. In pursuance of the order of attachment of the property of the judgment-

SHEO SAMPAT PANDE *v.* EMPEROR.

debtor some bullocks were attached by the Amin. The judgment debtor paid the Amin Rs. 17-5-6 which was the amount mentioned in the warrant of attachment, and this amount was received by Sheo Sampat who granted to the judgment-debtor a receipt in full for the aforesaid sum of Rs. 17-5-6. Subsequently he filed an application in the Court which was executing the decree, stating that he had made a mistake and that the amount due to him was only Rs 8 3 0 and no more. Three days before the date of that application the judgment-debtor had applied to the Court to sanction the prosecution of Sheo Sampat. No sanction was granted. The Assistant Collector of the second class, who was the Tahsildar in whose Court the execution proceedings were held, did not take action under section 476 of the Code of Criminal Procedure, but on the 6th of October 1917 he addressed to the Magistrate of the district a letter in which he stated all the facts and concluded by soliciting orders in the case. This letter was intended to be submitted to the District Magistrate through the Sub Divisional Officer, Mr. Gurney. Mr. Gurney instead of sending the application to the District Magistrate himself ordered the prosecution of Sheo Sampat and issued process against him. He himself tried the case and convicted heo Sampat and sentenced him to two years' rigorous imprisonment and a fine. This conviction was upheld by the lower Appellate Court.

The first contention in revision is that the trial was without sanction and was, therefore, illegal. The offences of which the applicant Sheo Sampat has been convicted are offences referred to in section 195 of the Code of Criminal Procedure. Therefore it was absolutely necessary either that sanction for the prosecution was granted or that a complaint was made by the officer before whom the offence was committed, or some officer to whom he was subordinate. As I have already stated, no sanction was granted and as no proceedings were taken under section 476 it cannot be said that a complaint was made under that section. There remains, therefore, the question whether the letter of the 6th of October 1917, addressed to the Magistrate of the district, amounted to a complaint within the meaning of that expression as defined in the Code of Criminal Procedure. I find it very difficult to hold that it was a complaint. All that the Tahsildar did was to state the facts of the case. He did not ask that any action should be taken by the Magistrate, nor did he intend that the Magistrate should proceed according to law against Sheo Sampat. The only thing stated in the letter after stating the facts was "I beg to solicit orders." From this it may be inferred that he asked the Magistrate of the district, who also happened to be the Collector to whom the Tahsildar was subordinate, to instruct him as to what action he should take in the matter. It would be stretching the meaning of the expression "complaint" to hold that the Tahsildar by writing this letter made a complaint and intended the letter to be treated as a complaint against Sheo Sampat with a view to the Magistrate taking action. If that had been the intention, he would not have solicited orders which apparently meant orders to him to take some action in the matter. Under these circumstances I am unable to agree with the learned Sessions Judge that there was a complaint by the Tahsildar in this case, and that consequently the Magistrate who tried the case should take cognizance of it. In my opinion, as there was no complaint, the trial was illegal and the conviction must be set aside.

I have also considered the merits of the case. I am unable to hold that the accused Sheo Sampat intentionally made a false statement in his application for execution. The statement contained in that application was no doubt false but I am not satisfied that he knew that the statement was false, or believed that it was untrue, and that he made the untrue statement intentionally. In this view the conviction of Sheo Sampat cannot be maintained.

I allow the application, set aside the conviction and sentence and direct that the fine, if paid, be refunded. The applicant need not surrender to his bail. The bail bond is discharged.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 5 OF 1917.

October 16, 1917.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Dr. *Sheikh* MAHOMED YAKUB—APPELLANT

versus

Musammat RADHIBAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, rr. 1, 3—Guardians and Wards Act (VIII of 1890), ss. 17, 19 (b)—Withdrawal of suit after decree, whether permissible—Compromise regarding removal of guardian duly appointed by Court, legality of—Hindu Law—Father, rights of, as natural guardian, whether affected by conversion to other religion—Caste Disabilities Removal Act (XXI of 1850), s. 1.

The procedure of withdrawal from a suit under Order XXIII, rule 1, of the Civil Procedure Code applies only to pending suits, before a decree has been made. [p. 817, col. 2.]

An application for guardianship duly made under the Guardians and Wards Act, and on which an order appointing a guardian has been duly made, cannot be withdrawn under Order XXIII, rule 1, Civil Procedure Code, by the applicant during the course of an appeal filed by the opponent, in spite of both the appellant and the respondent being consenting parties to the withdrawal. [p. 817, col 2; p. 819, col. 1.]

Nor can the respondent's withdrawal be recorded as a compromise under Order XXIII, rule 3, Civil Procedure Code, inasmuch as its effect would be to withdraw from the determination of the Court the consideration of the welfare of the minor and to defeat the provisions of sections 40 and 42 of the Guardians and Wards Act. [p. 818, col. 1.]

Section 19 (*b*) of the Guardians and Wards Act recognizes the natural right of the father, but as the section is controlled by section 17 of the Act the paramount consideration in appointing a guardian is the welfare of the minor. [p 818, col. 2; p. 819, col. 1.]

That portion of the Hindu Law which disqualifies a father, on account of the loss of caste involved in his conversion to any other religion, from becoming the guardian of his children after his conversion having been abrogated by Act XXI of 1850, the mere fact of conversion of a Hindu father to Islam is not, *per se*, sufficient to deprive him of his natural rights of guardianship over his children. [p. 819, col. 1.]

Appeal against the order of the District Judge, Hyderabad.

The Hon'ble Mr. *Fazal-i-Hussein*, assisted by Mr. *T. G. Elphinston*, for the Appellant.

Mr. *Abdul Rahman Mahomed Yakub*, for the Respondent.

JUDGMENT.

PRATT, J. C.—This is an appeal by Dr. Wassanmal *alias* Sheikh Mahomed Yakub against an order of the District Judge, Hyderabad, appointing his wife Radhibai guardian of the persons of four of their minor children—two girls aged 13 and 7 and two boys aged 4 and 2 years respectively.

The appellant, who was a Hyderabad Amil, was converted to Islam on the 6th August 1916 and his wife the respondent thereupon applied to the District Judge to be appointed guardian of these children.

The order under appeal was made on this application of the respondent and the appellant contends that his conversion does not affect his natural right to be guardian of his children and that the District Judge erred on the merits in deciding that he was not fit to be their guardian.

Subsequent to the order of the District Judge the respondent Radhibai returned to the protection of her husband and her Counsel states that she withdraws her application to be appointed guardian. It is contended that we should give effect to this withdrawal by setting aside all orders that have been made on her application.

The procedure provided in the Civil Procedure Code is applicable, so far as may be, to proceedings under the Guardians and Wards Act VIII of 1890. But Order XXIII, rule 1 (1), does not allow a plaintiff who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. The case of *Satyabhamabai* v. *Ganesh* (1) is an authority on the point, and it was there said that rights actually vested and created by the decree cannot be annulled by the plaintiff's withdrawal of his own free will and without the consent of the Court. There have been conflicting decisions as to whether a plaintiff-appellant can in appeal withdraw with leave of the Court under Order XXIII, rule 1 (2), from a suit which has been dismissed. But we think the correct view is that taken in *Eknath Ronoji* v. *Ranoji Bawaji* (2) that this procedure only applies to pending suits and before the decree has been made. The effect of these two cases is that withdrawal with or without leave of the Court from a suit or of a suit does not enable a party in appeal to get rid of the decree.

No doubt here the party seeking to get rid of the order of the lower Court is the party in whose favour the order has been made, but that does not affect the question for the same line of reasoning applies. A party in whose favour a decree

(1) 29 B. 13; 6 Bom. L. R. 533.

(2) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R, 237.

or order is passed could get it set aside by adjustment or compromise under Order XXIII, rule 3. If the respondent's withdrawal be regarded as a compromise under which the appellant is declared guardian, then in my opinion that would not be a lawful compromise and the Court should not record it. Its effect would be to withdraw from the determination of the Court the consideration of the welfare of the minors and it would defeat the provisions of section 40 of the Guardians and Wards Act, under which the guardian cannot be discharged without leave of the Court, and of section 42, which empowers the Court in that event to appoint another guardian.

The appeal must, therefore, be heard and decided on the merits.

Under section 19 (*b*) the District Judge could not appoint the mother guardian unless he found that the father was not fit. The District Judge considers that up to the date of his conversion the appellant was fit to be guardian of his children and has based his order solely on events that occurred at the time of the conversion.

These events are those deposed to by Radhibai. On the evening that he embraced Islam the appellant took his wife and children out for a drive on the pretext of giving them an outing. He took them to a house where he confined them and separated the mother from the children. Then in the morning he brought Radhibai back to his brother's house and left her there and disappeared with the children. This evidence has been believed by the District Judge, and we think it more probable than the suggestion that the children were removed without appellant's knowledge by some of the Hindu relations. We have also no doubt that the appellant withheld the children from the Court and wilfully disobeyed orders made from time to time for their production. The telegrams from Kashmore in particular show that the appellant was aware of the whereabouts of the children.

On these facts the District Judge says the appellant was guilty of cruelty in separating the children from their mother, that he subordinated the children's interests to a fanatical zeal for their conversion and that he withdrew the children from the guardianship of the Court.

These do not appear to me to be sufficient reasons for depriving the father of his natural rights. If he is condemned for cruelty in separating the children from the mother, allowance must be made for his fear that the mother would separate the children from him. I think what was operating upon his mind was not fanaticism but fear of the Hindu relations.

The District Judge refers to a dictum of Bowen, L. J., in the case of *Agar-Ellis*, *In re: Agar-Ellis* v. *Lascelles* (3), where withdrawal of a ward from the jurisdiction of the Court was instanced as a case where the Court would interfere with the rights of the father. But the learned Judge was there referring to the partial restriction on the rights of the father when he is restrained by the Court from taking a ward of the Court out of jurisdiction. This is made clear by the corresponding passage in the judgment of Cotton, L. J., at page 333 of the same report. The case is one which does not support the District Judge's order, for it proceeds on the ground that the Court should not, except "in very extreme cases," interfere "with the discretion of the father but should leave to him the responsibility of exercising the power which nature has given to him by the birth of the child."

I shall not, however, refer to English cases for two reasons. In the first place, as pointed out by my brother Crouch in the interlocutory jugment in this matter, the *dicta* of English Judges refer to different social conditions. And in the second place, the whole law is contained in Act VIII of 1890 which is a consolidating Act. As said by Lord Herschell, in *Bank of England* v. *Vagliano* (4): "The purpose of such a Statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

If we refer to the Act the law is perfectly simple. Section 19 (*b*) recognizes

(3) (1883) 24 Ch D. 317; 53 L. J. Ch. 10; 50 L. T. 161; 32 W. R. 1.

(4) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

the natural right of the father, but this is controlled by section 17 according to which the paramount consideration is the welfare of the minor. If a reference is necessary on this point I would mention the cases of *Skinner* v. *Orde* (5); *In the matter of Saithri* (6) and *In re Gulbai and Lilbai* (7).

It is suggested that as section 17 refers to what is consistent with the law to which the minor is subject, Hindu children cannot be subjected to the guardianship of a Muhammadan father. But the father is guardian under Hindu Law and that portion of Hindu Law which disqualifies the father on account of the loss of caste involved in his conversion is abrogated by Act XXI of 1850.

Thus the question whether the appellant is a fit person to be guardian of his children must be decided by considerations affecting the welfare of the minors. Now after the District Judge made his order the main ground on which Radhibai's application had been made was removed by her return to her husband, for the appellant is now able to provide a home for his children.

The question of the appellant's conduct at the time of his conversion I have already dealt with. There remains only the question of religion.

The mere fact of conversion is not *per se* a reason for declaring the father unfit, for the Courts cannot say that one religion is better than another.

But the girl of 13 and perhaps also the girl of 7 are old enough for Hindu beliefs and Hindu ritual to have made some impression on their minds. Their conversion would be a break in the continuity of their spiritual development. It would also have the effect of breaking the ties of relationship and affection connected with their Hindu life. But now that the mother has returned to live with the father a breach with Hindu relations is, I am afraid, inevitable. And as to religion the parents have agreed that the children shall make their own selection when older. This is not an ideal arrangement but is perhaps the best possible in the circumstances.

As the parents are living together and are able to provide a home for the children, I think the welfare of the children will be promoted by their living in that home. The elder girl who is old enough to express an intelligent preference wishes to live with her parents. I think we should allow the family to resume its normal life and should refrain from passing any order which might disturb the harmony of the family by impairing the authority of the father as head of the family and natural guardian of his children.

Although the respondent has not contested the appeal, we have heard two Hindu relations who have opposed it with a heat which betrays the *odium theologicum*. They suggest that the appellant might at some future time drive Radhibai out of his house and deprive the children of her care. I cannot believe there is any ground for this suggestion but if the appellant does break up the children's home, the respondent will be able to renew her application.

I would accordingly reverse the order of the District Judge and make no order as to costs.

CROUCH, A. J. C.—I concur. The word "suit" in Order XXIII means, I consider, the attempt to gain an end by legal process, and the withdrawal by the plaintiff from such an attempt cannot have the effect of depriving any other party of rights conferred by any order passed by the Court in the suit, or relieve the plaintiff himself of any duties so imposed. Once a person has, on his own petition, been appointed a guardian, the question whether or not the guardianship should be terminated is one for the Court to decide, and a mere statement that he withdraws his petition cannot change the special status of the minor which has been created by the Court.

If this Court were now dealing with the case on the original side, there can be no doubt that it would be not only unnecessary but improper to remove the father from his position as guardian and appoint the mother. The mother is content to live with her husband and the children, so far as they are competent to

(5) 14 M. I. A. 309; 10 B. L. R. 125; 2 Suth. P. C. J. 521; 3 Sar. P. C. J. 34; 20 E. R. 802.
(6) 16 B. 307; 8 Ind. Dec. (N. S.) 683.
(7) 32 B. 50; 9 Bom. L. R. 923.

express an opinion, raise no objection to residing with their parents, under the usual conditions. The father has been guilty of robbing, which amounts to such misconduct as in law renders him unfit to be guardian; the mother has shown herself to be a person of resolute character and strong convictions, with a powerful backing in her religious opinions. The mere possibility that the father's influence may override that of the mother, and that the children may at some future time be forced to adopt an uncongenial religion, forms no good ground for taking the very serious step of depriving the father of that authority which is vested in him by law and which he is anxious to retain and transferring it to the wife who is unwilling to accept it. The case as presented to us in appeal is essentially different from that with which the lower Court had to deal, and, though in ordinary cases I consider that great weight should be attached to the opinion formed by the trying Court of the fitness or unfitness of a person to be guardian, I have no hesitation in the present case in agreeing to an order reversing that of the lower Court.

Order reversed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 39 OF 1915.

August 17, 1917.

Present:—Justice Sir John Woodroffe, KT., and Justice Sir Syed Shamsul Huda, KT.

RAJANI KANTA MOOKERJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 104H, 111A - Specific Relief Act (I of 1877), s. 42, suits under—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 120.

Section 104H of the Bengal Tenancy Act refers only to suits by persons aggrieved by an entry of a rent settled in Settlement Rent Roll prepared under sections 104F to 104H of the Act, or by an omission to settle such rent. [p. 822, col 2]

Where in a suit, which was described in the plaint is one under section 104H and section 111A of the Bengal Tenancy Act and section 42 of the Specific Relief Act, the reliefs claimed by the plaintiffs were *inter alia* the following:—

(*ka*) That the plaintiffs may be declared as occupancy *raiyats*.

(*kha*) That the land of schedule *cha* below may be declared as included in the right which the plaintiffs may be held to have.

(*ga*) That proper rents may be fixed of the lands in the possession of the plaintiffs and time for payment of the said rent may be fixed.

(*gha*) That the tenants under the plaintiffs may be held to have no rights as settled *raiyats* or occupancy *raiyats*.

(*una*) That the tenants under the plaintiffs may be declared to be *korfa* tenants (under-tenants):

Held, that so far as relief (*ga*) was concerned, the suit was one under section 104H of the Bengal Tenancy Act and was governed by the special law of limitation provided by that section, but that the claim for other reliefs was outside the scope of that section, and to that extent the suit was one under section 42 of the Specific Relief Act, as provided by the proviso to section 111A of the Bengal Tenancy Act, to which the limitation applicable was that provided by Article 120 of Schedule I of the Limitation Act. [p. 822, col. 2; p. 823, col. 1.]

Appeal against the decree of the Subordinate Judge, Noakhali, dated the 8th December 1914.

Babus *Gunada Charan Sen* and *Satish Chandra Bhattacharyya*, for the Appellants.

Babus *Ram Charan Mitra* and *Ramesh Chandra Sen*, for the Respondent.

JUDGMENT.—The facts of this case are shortly these. In the course of a proceeding under Chapter X of the Bengal Tenancy Act for settlement of rents and preparation of Settlement Rent Roll in accordance with the provisions of section 104 of that Act in respect of a Mahal called Char Khundkar bearing Touzi No. 1516 of the Noakhali Collectorate, plaintiffs claimed that they were occupancy *raiyats* in respect of all the lands described in schedule *cha* of the plaint. The Revenue Officer, however, held that plaintiffs were tenure-holders and only in respect of lands included in schedule *ga* covering an area of 1,309 *bighas* 9 *cottas* 8 *chittaks*, and he assessed the rent payable by the plaintiffs on the footing of their being tenants of that class by giving them an allowance of 30 per cent. on the assets. The plaintiffs being recorded as tenure-holders, those holding under them were recorded as occupancy *raiyats*. Against these orders of the Revenue Officer passed prior to the final publication of the Record of Rights, under rules framed

by the Local Government, an appeal lay to the Commissioner of the Division and the plaintiffs filed an appeal to the Commissioner of the Chittagong Division, who heard arguments but did not deliver judgment. On the 30th of August 1909, while the appeal was still pending before the Commissioner the record was finally published. Meanwhile, the Local Government framed new rules whereby the authority of the Director of Land Records was substituted for that of the Commissioner of the Division for the purpose of hearing appeals under section 104G and although nothing was said in the rules regarding pending appeals, the Commissioner of the Chittagong Division sent the appeal to the Director of Land Records for disposal. The parties seem to have acquiesced in the transfer of the appeal to the Director of Land Records, who heard the parties and came to the conclusion :—

(*i*) That the plaintiffs' *jote* covered an area slightly in excess of 1,309 *bighas* 9 *cottas* and 8 *chittaks*.

(*ii*) That the plaintiffs were tenure-holders.

(*iii*) That those holding under the plaintiffs were occupancy *raiyats*.

(*iv*) That the rent entered as payable to the plaintiffs by the tenants holding under them should in certain cases be raised.

(*v*) That 30 per cent. on the assets allowed to the plaintiffs by the Revenue Officer was a correct basis for assessing the rent payable by the plaintiffs and should stand.

The decision of the Director of Land Records on points (*i*) and (*iv*) involved an alteration in the record as finally published. For this and for certain other questions which arose under Regulation VII of 1822, with which we are not concerned, the Director of Land Records referred the case to the Board of Revenue under section 104G (2) of the Bengal Tenancy Act as well as under the provisions of the said Regulation. This order of the Director of Land Records is dated the 15th of April 1910. The judgment of the Board of Revenue is dated the 2nd of May 1911, and it affirms the decision of the Director of Land Records on all the points.

The present suit is brought by the plaintiffs for a declaration that they are occupancy *raiyats* and not tenure-holders, that they are occupancy *raiyats* in respect of all the lands described in schedule *cha* of the plaint and not in respect of lands of schedule *ga* only, that the assessment of rent made on the basis of their being tenure-holders and the refusal of the Revenue Authorities to recognize their tenancy in respect of the remaining lands of schedule *cha* was illegal, that the Revenue Authorities were wrong in not fixing a time from which such rent was to take effect. The reliefs claimed by the plaintiffs are the following :—

(*ka*) That the plaintiffs may be declared as occupancy *raiyats*.

(*kha*) That the land of schedule *cha* below may be declared as included in the right which the plaintiffs may be held to have.

(*ga*) That proper rent may be fixed of the lands in the possession of the plaintiffs and time for payment of the said rent may be fixed.

(*gha*) That the tenants under the plaintiffs may be held to have no right as settled *raiyats* or occupancy *raiyats*.

(*una*) That the tenants under the plaintiffs may be declared to be *korfa* tenants (under-tenants).

(*cha*) That a decree may be passed for costs in Court with future interest.

(*chha*) That a decree may be passed granting any other relief which the plaintiffs are entitled to get in the fair judgment of the Court.

The suit was described in the plaint as one under section 104H and section 111A of the Bengal Tenancy Act and section 42 of the Specific Relief Act. The learned Subordinate Judge, without entering into the merits of the case, has dismissed the suit on the ground of limitation. He holds that the suit is one under section 104H of the Bengal Tenancy Act and not having been brought within six months from the date of the certificate of final publication of the Record of Rights or within six months from the date of the disposal of the appeal by the Board of Revenue is

barred by the special limitation provided in that section.

On appeal, it has been urged before us—

(*a*) That the plaintiffs were not aware of the date on which the Board of Revenue gave their decision and that, therefore, the date of decision should, for the purpose of limitation, be deemed to be the date on which the plaintiffs became aware of such decision and that, as a matter of fact, they came to know of it after a copy of the judgment was forwarded to the Commissioner on the 13th of October 1911.

(*b*) That the Commissioner of the Division was wrong in not deciding the appeal himself and its transfer to the Director of Land Records was illegal and as the Commissioner to whom the appeal lay has passed no decision on the appeal, the suit cannot be said to have been filed more than six months after such decision.

(*c*) That the suit is not one under section 104H and, therefore, the special limitation provided by that section does not apply.

As regards the first and the second points, it appears to us that the Commissioner having transferred the appeals to the Director of Land Records and the plaintiffs, who were the appellants, having raised no objection to such transfer, but having on the other hand acquiesced in his jurisdiction by appearing and arguing the appeal before him, should not be allowed to raise the objection now. Even if plaintiffs' contention is correct, they must be held to have abandoned their appeal to the Commissioner and the suit, if it is one under section 104H, would still be barred. The Director of Land Records delivered his judgment on the 15th of April 1910, and if he was the final appellate authority the suit filed on the 12th of April 1912 was clearly out of time.

Assuming, however, that the appeal to the Director of Land Records was not finally disposed of until the Board of Revenue gave their decision on the recommendations made by the Director, we still think that the date of such decision must be taken to be the 2nd of May 1911, *i. e.*, the date which it purports to bear and that the date of plaintiffs' knowledge is wholly immaterial. Plaintiffs have not shown that there has been any error in dating the judgment and we must presume that it has been correctly dated.

As regards the third point, we are of opinion that except in so far as the plaintiffs ask for proper rent to be fixed for lands regarding which their tenancy has been recognised and for a date to be fixed from which such rent is to take effect, the other reliefs claimed in the suit are outside the scope of section 104H. That section only refers to suits by a person aggrieved by an entry of a rent settled in a Settlement Rent Roll prepared under sections 104F to 104H or by an omission to settle such a rent. Therefore, in so far as the plaintiffs are aggrieved by the rent settled as payable by them as tenure-holders in respect of lands of schedule *ga* and desire to have such entry corrected, the suit falls within the scope of section 104H and has rightly been held to be barred by limitation. It may also appear at first sight that as regards lands as to which the plaintiffs' right as tenants has been negatived, the case is one of omission to settle a rent, but it cannot be said that so far as the plaintiffs are concerned they are aggrieved by such omission. They are aggrieved not by the omission to settle their rent, but by the omission to recognise their tenancy. We, therefore, think that the plaintiffs' claim for reliefs other than the one marked *ga* is not barred by limitation. It is true that the declarations asked for, if granted, would afford grounds for alteration of entries as to rents but the mere fact that under the law plaintiffs cannot get such an alteration effected by means of this suit, is not enough to deprive them of the right to get these declarations which may be of value to them apart from the question of correction of the Settlement Rent Roll regarding the rent entered in it or omitted from it. These declarations are not necessarily ancillary to the prayer for settlement of a new rent.

We, therefore, hold that relief claimed in paragraph *ga* is barred under section 104H, but that the claim for other reliefs is outside the scope of that section and to this extent the suit is one under section

42 of the Specific Relief Act, to which the limitation applicable is that provided by Article 120 of the First Schedule of the Limitation Act. The right to maintain such a suit under certain conditions is expressly saved by the proviso to section 111A of the Bengal Tenancy Act. The view we take is supported by a decision of Chitty and Chatterjea, JJ., in the case of *Promoda Nath Roy* v. *Asir-ud din Mandal* (1).

The question whether the suit is otherwise competent and is properly framed to enable the Court to grant any of the reliefs asked for, is one which we need not consider at this stage.

Upon this view of the case we dismiss the suit with regard to prayer *(a)*, but as regards the other prayers we set aside the decision of the Court below and remand the case for the trial of the other issues. Costs will abide the result.

Case remanded.

(1) 11 Ind. Cas. 262; 15 C. W. N. 896.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 376 OF 1915.

April 29, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

THE BHARATPUR STATE—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

*Escheat—Resident in village dying without heirs—*Zemindar, *rights of*—Wajib-ul-arz, *entry in, value of*—*Grant, construction of—Burden of proof.*

A *sahukar*, who was the owner and occupier of a house situate within the limits of Mouza *S* and also within the limits of the town of *G*, died without leaving heirs and the Secretary of State took possession of the house and its site as the ultimate heir to the property of a deceased person. The plaintiff claimed the site as the Zemindar under the Settlement of 1850, by which the Government had conferred upon him revenue-free proprietary rights over the soil of Mouza *S*, and asserted that the deceased was owner only of the materials of the house with a right of residence therein but had no right to transfer the site or the right of residence. The *wajib-ul-arz* of the Mouza provided that residents of the Mouza had no proprietary rights in anything except the materials of the houses, that they could not sell the site or the right of residence in the sites and that in the event of the death of an occupier of such a house, without legal heirs, the proprietor of the Mouza would be entitled to possession of the house along with the site. The defendant contended that the house in suit, being situated within the limits of a town, was not subject to the ordinary law governing the relations between occupiers of houses and the ground landlord in the inhabited sites of agricultural villages:

Held, (1) that unless the defendant could show that the effect of the Settlement of 1850 was not to grant to the proprietor in the *mahal* in the village any substantial rights of ownership in respect of what was described in the papers of that Settlement as the *abadi* appertaining to the *mahal*, the defendant could not successfully maintain that the residents possessed anything more than a limited interest in the houses occupied by them or in their sites; [p. 827, col. 2.]

(2) that upon the evidence, as between the parties to the suit, it must be held that the plaintiff had successfully discharged the burden of proof which lay upon him and that the deceased did not possess an absolute interest alienable at his will and pleasure in respect of the property in suit but merely a limited interest which could not be the subject of escheat to the Crown. [p. 827, col. 1.]

First appeal from a decree of the Subordinate Judge of Muttra.

Messrs. *Motilal Nehru* and *Baldeo Ram Dave*, for the Appellant.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—This is an appeal by an unsuccessful plaintiff, the Bharatpur State, against the Secretary of State for India in Council, in which the plaintiff's claim was for possession of a certain house. The house in question was admittedly situated within the limits of a village known as Mauza Sakitra. Without going further into the arguments which have been addressed to us on the point, I am content to say that I accept the argument of the defendant respondent to the effect that it is also situated within the limits of the town of Gobardhan. The last owners and occupiers of this house mentioned either in the plaint or in the written statement were two persons of the name of Dip Chand and Mansa Ram, who were Sahukars by profession and resided and carried on business in the said house. It is common ground that both these persons are now dead and have left no heirs entitled to inherit their property. The de-

fendant, acting through the Collector of Muttra, has taken possession of this house and its site in assertion of his claims as ultimate heir to the property of a deceased person The plaintiff's claim is that he is the owner of the site on which the house stood, that Dip Chand and Mansa Ram were no doubt the owners of the materials of the house and had a right of residence therein, which could have descended to their heirs if any. Nevertheless, according to the plaintiff's case, Dip Chand and Mansa Ram had no transferable interest in respect of the site or the right of residence thereon, and were, therefore, in respect of this house merely the owners of a limited interest. With regard to the question of law on which this claim is based there has been no argument before us. Both parties are agreed that the law on the subject is correctly laid down in the case of *Tulshi Ram Sahu* v. *Gur Dayal Singh* (1). It is conceded on behalf of the defendant-respondent that if Dip Chand and Mansa Ram possessed in respect of the property in suit merely a limited interest, then this interest of theirs could not be the subject of escheat to the Crown and the claim of the plaintiff as owner of the soil cannot be resisted. The case for the defendant, however, is that the house in suit, being situated within the limits of a town, is not subject to the ordinary law governing the relations between occupiers of houses and the ground landlord in the inhabited sites of agricultural villages in these provinces, and that as a matter of fact Dip Chand and Mansa Ram could have sold the house in suit at any time with the right of occupation and residence and that the purchaser would thereby have obtained a good title, which could not have been contested by the Bharatpur State. The plaintiff has rested his case mainly upon two sets of documents, the Settlement Papers prepared in the year 1850, which are printed at pages A14—A23 of our record, and *secondly*, a certified copy of the *wajib-ul arz* or Record of Rights of Mauza Sakitra prepared at the Settlement of 1877 A. D. The learned Judge of the Court below has found that, on a true interpretation of the terms of that *wajib-ul arz* the custom intended to be laid down is that all residents in houses situated within the limits of Mauza Sakitra, even though their houses may form part of the town of Gobardhan, have no proprietary right in anything except the materials of the houses, they cannot sell the site, or sell the house along with a right of residence on the said site; and in the event of the occupier of such a house abandoning the same, or dying without legal heirs, the proprietor of Mauza Sakitra, that is to say, the Bharatpur State, will be entitled to possession of the house along with its site. Nevertheless the learned Subordinate Judge has come to the conclusion that the custom thus stated in the *wajib-ul-arz* of 1877 is not correctly stated and is not a custom binding as between the parties to this litigation. He says that the document in question as it stands is not a record of custom at all but merely a claim preferred on behalf of the proprietor of the Bharatpur State by his agent. It does not purport to have been signed by any person representing the interests of Dip Chand and Mansa Ram, would not have been binding upon them and would not even have formed a particularly strong piece of evidence against them, in the event of litigation between the Bharatpur State and any transferee of theirs. From this the Court below has gone on to hold that the conditions laid down in this document are not binding on the defendant and that, in view of other evidence on the record, it must be taken to be proved that Dip Chand and Mansa Ram, along with all other residents in the town of Gobardhan, possessed an absolute right of transfer in respect of the houses occupied by them, On this ground the Court below has affirmed the right of escheat claimed by the Secretary of State as defendant and has dismissed the plaintiff's suit. In the memorandum of appeal before us a point is taken as to the alleged wrongful exclusion of certain documentary evidence by the trial Court, but it has been admitted in argument that this plea cannot be pressed. For the rest, the appellant's case is that he is entitled to succeed under the terms of the village Record of Rights and that, failing this, he would, in any event, be entitled to succeed on the ground that he is the proprietor

(1) 7 Ind. Cas. 231; 33 A. 111; 7 A. L. J. 1011 (F.B.).

of the site and must be presumed to possess in respect of any house standing upon his land the ordinary rights of proprietors of agricultural lands in respect of the inhabited sites appertaining to the Mauzas of which they are the owners. A great deal of the argument before us at the hearing of this appeal was devoted to the question whether this Mauza Sakitra, or more especially the particular *mahal* of Mauza Sakitra in which the disputed house is situated, was or was not to be regarded as a purely agricultural village. The most important documentary evidence on this point is to be found in the Settlement Papers of the year 1850, to which reference has already been made. It appears that in that year the land of Mauza Sakitra was settled by Government with the Bharatpur State in a somewhat peculiar manner. The village was divided into two *mahals* of 15 *biswas* and of 5 *biswas*, of which the former alone was assessed to revenue. With regard to the smaller *mahal* of 5 *biswas* a revenue-free grant was made in favour of the Bharatpur State, subject only to certain small payments on account of road cesses and *chaukidari* dues, or local Police charges. The papers before us contain a complete description of the land appertaining to this revenue-free *mahal* of 5 *biswas*. I note more particularly that the cultivated area of this *mahal* amounted to a little less than 41 per cent. of the whole: that even if the land described as "old fallow" be added to the cultivated area, the total of the two comes to barely over 53 per cent. of the whole. Almost 22 per cent. of the entire area consists of groves and the rest is made up of thoroughfares, inhabited sites, tanks and unculturable land. Taking this description of the land along with the oral evidence, by which it is fully established that the inhabited site of village Sakitra forms, and has long formed, an integral part of the town of Gobardhan, I should be quite prepared, if the case turned upon it, to hold that the house in suit was not situated upon land forming part of the inhabited site of an ordinary agricultural village, so as to make the principles laid down by this Court in respect of the proprietorship of land in such village sites applicable in themselves to the land now in suit. What impresses me, however, on the other side is that this is a litigation between the owner of Mauza Sakitra and the Government, that is to say, the very authority which granted to him revenue-free proprietary rights over the soil of this 5 *biswas mahal* of Mauza Sakitra. I take it from the defendant's own case that in the year 1850, when this grant was made, the only inhabited site appertaining to Mauza Sakitra consisted of houses, shops and the like which formed part of the town of Gobardhan. Nevertheless Government took a portion of this town and, treating it as the inhabited site or *abadi* of Mauza Sakitra, granted it to the Bharatpur State as forming part of the revenue free *mahal* of 5 *biswas* in the said Mauza. Presumably Government meant something by making this grant and by including in the area so granted that portion of the town of Gobardhan in which the house now in dispute is situated. In an agreement which was taken from the Bharatpur State at the Settlement of 1850 a number of details are given regarding the inhabited area included in the 5 *biswas mahal*. It is stated that there is a Katra, or large enclosure, in which there are a number of houses or shops, which have been constructed by the proprietor of the land, that is to say by the Bharatpur State, that all the other houses at that moment standing have also been constructed by the same and that the Bharatpur State is not merely the owner of the soil but the owner of all the houses and of the aforementioned Katra standing in the *abadi* belonging to the 5 *biswas mahal*. It is asserted that the proprietor has every right in respect of the same and that, as regards the waste land then in existence, no one will be entitled to build upon it without his permission. The agreement in question appears to have been propounded by a duly authorised agent on behalf of Maharaja Balwant Singh, Raja of Bharatpur, and it is endorsed as having been accepted and ordered to be placed upon the record. At the subsequent Settlement of 1877 A. D., an elaborate paragraph was drawn up and inserted in the Record of Rights of Mauza Sakitra regarding the inhabited land appertaining to the village. This shows that there was no other inhabited site appertain-

ing to the said village except that portion of the town of Gobardhan in which the house now in suit is situated. Nevertheless it was provided that if the cultivators, whether possessing occupancy rights or tenants at will, and also the *riaya*, or tenants generally, have built any houses, cattle sheds or other enclosures on this *abadi* site, their rights in the same are limited to the materials. They can sell the materials if they like, but not the site; and the meaning of these provisions I take to be that they have no transferable right of residence. There are other provisions in which more general words are used, such as "*bashindgan*" (residents) and in which the word *asami* is used for tenant in place of *riaya*. In this connection it is expressly provided that, if any "*asami*" dies without an heir, the house occupied by him will pass to the Bharatpur State as proprietor of the site. The question of the interpretation of these provisions has been before the Courts on other occasions. A good deal of reliance is placed on behalf of the defendant-respondent on the result of a litigation which took place in the year 1906. The judgment is printed at page 6 of the book before us and in this judgment reference is made to the result of a previous litigation of the years 1874-75. Broadly speaking, it is sufficient to say that in this former litigation individual residents in the town of Gobardhan, and in that part of the town which forms the *abadi* of the 5 *biswas mahal* of Mauza Sakitra, succeeded in asserting against the Bharatpur State, the present plaintiff, a right to sell their houses together with a right of residence in the same. The decision in the suit of 1906 proceeds upon a certain interpretation of the provisions of the *wajib-ul-arz* of 1877, according to which those provisions are limited in their application to agricultural tenants. In the present case the learned Subordinate Judge has refused to accept that interpretation. He holds that the words in the *wajib-ul-arz*, as they stand, are wide enough to include all residents (*bashindgan*) in houses situated on the *abadi* in question. The point has been argued again before us, but I feel no hesitation in agreeing with the interpretation put upon this document by the Court below. I think the word "*riaya*" in itself is very general and is intended to extend the provisions in question to persons other than the occupancy and non-occupancy cultivating tenants spoken of immediately before. I think also that the word *asami* is wide enough, especially in this particular context, to include all residents of the *abadi*, even though not cultivating tenants or even agriculturists. What has determined the decision of this case in the Court below has been the evidence of a number of instances in which residents of houses situated within the area in suit, that is to say, within the *abadi* of the 5 *biswas mahal* of Mauza Sakitra, have exercised a right of transfer in respect of their houses, along with the right of residence in the same. In two of the instances already referred to, the rights of the tenants in question were affirmed against the Bharatpur State after litigation. Evidence has also been given of at least four instances in which, on the death of the owner or occupier of a house within the area in question without leaving any heir, the right of escheat was successfully asserted on behalf of the Crown, apparently without any opposition by the Bharatpur State. Moreover, as the learned Subordinate Judge correctly points out, the evidential value of such a document as this *wajib-ul-arz* of 1877 as against the occupiers of houses within the area in question at the time when this document was drawn up is not great. There is nothing in the document itself to show that any enquiry was made from these persons as to whether the rights recorded in favour of the proprietor of the soil, and to the prejudice of themselves, in this document were admitted by them to exist. The case, however, seems to be altogether otherwise in a litigation in which the contesting party is the Secretary of State for India in Council, that is to say, the Government itself. The Government made the original grant of this 5 *biswas* revenue free *mahal* in the year 1850; and if it did not intend to convey to the grantee, namely, the Bharatpur State, in respect of that portion of the site of the town of Gobardhan which was included in the *mahal* of 5 *biswas* of Mauza Sakitra, the ordinary rights of a

proprietor of an agricultural village in the inhabited site of such a village, it is difficult to see what rights it intended to confer by the grant of the particular area forming this inhabited site. It accepted at the time from the representative of the Bharatpur State a document which expressly admitted full ownership on the part of the said proprietor in respect of all existing houses on the *abadi* in question and recognised the justice of his claim that no one should in future build any house upon the unoccupied land appertaining to the said *abadi* without permission. Then at the Settlement of 1877 a Record of Rights was drawn up under the direction of Government and included in the Settlement Papers, in which, as I hold, the right now claimed by the plaintiff in respect of the land in question is once more recognised. I do not wish to complicate what seems to me a tolerably straightforward case by suggesting that these Settlement Papers of 1850 and 1877 can be used so as to estop the Government, that is to say the defendant in this suit, from asserting that the papers in question were incorrectly prepared and that the rights acknowledged in these papers in favour of the plaintiff never in fact existed. I think, however, that it is very difficult for the defendant to get round these documents, otherwise than by proving some definite case of adverse possession on the part of the deceased owners through whom the defendant claims. It is not suggested that any case of this sort can be set up. On the evidence as it stands, as between the parties to this present suit, I think it must be held that the plaintiff has successfully discharged the burden of proof which lay upon him, and that Dip Chand and Mansa Ram did not possess an absolute interest, alienable at their will and pleasure, in respect of the property now in suit, but merely a limited interest which cannot be the subject of escheat to the Crown. The Full Bench case of this Court, *Tulshi Ram Sahu* v. *Gur Dayal Singh* (1), to which reference has already been made, was a case of the devolution of a fixed rate tenancy; but the arguments there used seem to me to apply with a great deal of cogency to the facts of the present case. I would almost go so far as to say that, unless the defendant can show that the effect of the Settlement of 1850 in favour of the Bharatpur State was not to grant to the proprietor of the 5 *biswas mahal* in village Sakitra any substantial rights of ownership in respect of what was described in the papers of that settlement as the *abadi* appertaining to this *mahal*, the defendant in the present suit cannot successfully maintain that Dip Chand and Mansa Ram possessed anything more than a limited interest in the house in question and in its site. Practically it seems to me that in taking possession of this house the defendant is derogating from the grant made in 1850 in favour of the Bharatpur State. The fact that there have been 3 or 4 other instances of similar encroachments on the part of the defendant, which have not been contested by the plaintiff, cannot take away from the plaintiff rights in respect of the land now in suit, if those rights are sufficiently established, as I hold them to be, by the plaintiff's documents of title, namely, the Settlement Records of 1850 and of 1877. In my opinion, therefore, we must accept this appeal, set aside the decree of the Court below and decree the plaintiff's claim as brought with costs throughout, including in this Court-fee on the higher scale.

WALSH, J.—I think this is a clear case. Mr. Motilal Nehru's argument on the document of September 1850 is well founded. That document seems to me consistent only with the existence at sometime or another of an old agricultural village, and it is clearly proved that this house was in that village. The indications of an agricultural village, unless I am much mistaken, are overwhelming.

Village customs, uncultivated land, a former settlement, and field maps are referred to from time to time. Fairs are said to take place. There are no village expenses but the Raja's Karinda manages the village. The income from *sewai* items is taken by the weighmen on behalf of the Raja. No taxes are fixed but blankets are taken from the shepherds every year and various contributions in kind are raised from a carpenter, a blacksmith and a barber. The duties of the *chamars* are elaborately defined; and the whole thing

seems to me to contain overwhelming internal evidence of the character of the collection of houses, and of the cultivated and uncultivated lands, with which it deals. The corresponding *khasra* speaks of the tenants residing in the village, including the carpenter already referred to, and by a singular coincidence a person of the same name, carrying on business as a *bania*, who bears a suspicious resemblance to the person through whom it is suggested that the Government are now entitled to escheat. This person's house is in a Katra (which I understand to be, whether in village or in town, a nondescript collection of every kind of house) in this village and I am satisfied that the house in question, which it is admitted on the part of the Government is 100 years old, was situated in that Katra at that date. The map is even more significant. It shows the position of the tank which has been much spoken of, and of the serial No. 1, and it also shows what, I am satisfied, at that date was the south-east boundary of this *abadi* where it abutted upon the town of Gobardhan. I think the judgment of the Court below, reading between the lines, proceeded upon the assumption that this was really common ground as the case was contested in the Court below. It is perfectly clear that the point now relied upon on behalf of Government was not specifically raised by the defence and that paragraph 3 of the defence, which contains the real contention of the Government, dealt with the class of the property or class of occupier, and not with the geographical situation of the building. The *wajib-ul-arz* has been dealt with by my brother. I accept his construction of the words which I do not myself profess to understand, but if this is correctly translated it would clearly bear the meaning which has been put upon it by the learned Judge in the Court below. The view I take about these documents is this; not that they are necessarily binding on the Government, not that the Government could not prove by affirmative evidence that the real state of facts was something quite different, or that there is any estoppel, but that as against the Government they contain entries which the Government must be taken to have accepted as an accurate record of the then existing state of facts. They raise a very strong presumption of fact and they get rid of the difficulty which so constantly attends the discussion of the meaning of *wajib ul-araiz* in this country when no body is left alive to testify to the true facts, and each contending party relies on something or another tending either to strengthen or to qualify the effect of the *wajib-ul-arz*. The plaintiff, therefore, starts with what I may call a trump card. The Government Advocate attempted to get rid of the effect of this piece of evidence in two ways, *firstly*, by the description and history of the condition of the town of Gobardhan contained in the Gazetteer; *secondly*, by the evidence of sales and dealings largely coming from the side of the plaintiff and admittedly quite inconsistent with the plaintiff's case. Assuming for the moment that every statement in the Gazetteer is correct and that we are entitled to take judicial notice of its contents as facts established without other proof, it seems to me that every one of them is quite consistent with the plaintiff's case. They do not speak in the present tense of the existing conditions from an earlier date than 1884 but I will assume, as appears to be the fact, that there was always in or about this tank, which has great historical associations and great attractions for itinerant pilgrims, a town which through the growth of pilgrimage, commerce, fairs and so forth and through local development, generally called progress, has overrun and in substance, so far as identity is concerned, submerged its humbler neighbours. Towns in England, I do not know if it applies to India, frequently owe their development to people who wish to live near them and not in them. Everything points to the remains of this village having been submerged in the superior growth and development of the old town which apparently was originally only a neighbour. However that may be, I agree with the contention made on behalf of the appellant that once it is established that rights of this kind to property have existed they cannot be affected by a change in the character of the neighbourhood only. I think the sales to some extent admitted on the plaintiff's

side, and for the rest proved by the defendant's witnesses, are quite intelligible upon the same footing. In fact in a conglomerate neighbourhood of this kind it is not unnatural to find instances entirely inconsistent with one another within a very short distance. The Government Advocate said that there was really no evidence on behalf of the plaintiff of any similar transaction to that which he is setting up in this case. I think in that respect he was wrong. There is no documentary evidence and it is certainly surprising that the plaintiff has failed to produce any. But there is positive and direct evidence of a considerable amount given by the plaintiff's Vakil or Agent, or Pleader, whoever he may be, of possession by the plaintiff Raja, which it is alleged has been recovered under similar circumstances to those relied on by the plaintiff in this case. Nothing would have been easier for the Government than to give direct evidence contradicting these allegations. In the absence of some evidence I think it must be taken to be proved that the Raja as Zemindar has, in previous cases in this *abadi*, resumed possession of houses which apparently were not occupied by persons who could be correctly described as agricultural tenants.

I always speak with hesitation about questions of custom because there are few questions about which misconception so easily arises. It seems to me that this case at any rate is a question of contract between the original Zemindar and the former occupiers of this property, and the question of what that contract was is one which we are called upon to presume in the absence of direct evidence about it. But if it does turn upon a question of custom, the learned Judge of the Court below has found in favour of the plaintiff in spite of everything that has been said in support of the contrary by the Government Advocate. The learned Judge of the Court below rightly said that the plaintiff was bound to prove the existence of the custom if he relied upon it, and went on to hold that it did exist, and then by an unfortunate misdirection, for which I can find no explanation in the judgment instead of giving effect to that finding, went on to say that "the general customary law of escheat to the Zemindar no longer holds good in Gobardhan." If that means anything it means what Mr. Motilal argued is not the law, namely, that owing to the changed condition of the neighbourhood the former rights of the Zemindar have been lost. That ground is clearly fallacious and I see no other ground upon which the decision for the defendant can be supported. I agree, therefore, with my brother that this appeal must be allowed.

BY THE COURT.—We allow this appeal, set aside the decree and order of the Court below and decree the plaintiff's suit with costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2305 OF 1916.

June 17, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

KAMAL BAIDYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GANESH CHANDRA BISWAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B.C. of 1885), s. 182—Homestead, occupation of, for more than twelve years—Occupier, whether becomes raiyat—*Settled* raiyat.

Before a person can become a settled *raiyat* of a village he must be a *raiyat*. Mere occupation of a homestead in a village for more than twelve years would not make the occupier a settled *raiyat* of the village. [p. 830, col. 1.]

Appeal against the decree of the Sub-Judge of 24-Pergannahs, dated the 3rd August 1916, reversing that of the Munsif, Basirhat, dated the 22nd January 1915.

FACTS appear from the judgment.

Babu *Probadh Chandra Roy*, for the Appellants.—The appeal arises out of a suit for ejectment from a land held by the defendant under a *kabuliyat*. The defence is that the defendant is a settled *raiyat* of the village and has acquired a right of occupancy and, therefore, not liable to eviction. Although under the terms of

the *kabuliyat* the defendant is to vacate the land on the expiry of the term, yet he refuses to do so on the ground that he has acquired a right of occupancy in the land and so is not liable to ejectment. My submission is that under section 182 of the Bengal Tenancy Act the defendant has, by holding the homestead land for over twelve years, acquired a right of occupancy in the agricultural land in suit held by him under the lease for a term. The defendant is a settled *raiyat* of the homestead land, and, therefore, as soon as he begins to hold the agricultural land he acquires an occupancy right in it. Refers to sections 20 and 21 of the Bengal Tenancy Act.

Babu *Surendra Chandra Sen* (with him Babu *Hem Chunder Sen*), for the Respondents.—A tenant of homestead land is not a settled *raiyat*. To acquire occupancy right by virtue of section 21 the defendant must first of all be a settled *raiyat*. At the time when the defendant took the lease he was not a *raiyat* within the meaning of section 5 of the Bengal Tenancy Act, so section 182 has no application to the case.

Babu *Probodh Chandra Roy*, in reply.

JUDGMENT.—This was a suit in ejectment, and the only question was whether the defendants had acquired occupancy rights in the land which would protect them from eviction. The lower Appellate Court found that though the defendants had a homestead in the village for over 30 years, they had no land in the village other than the land on which they entered under the *kabuliyat* in 1906 and that, therefore, they had not acquired any such rights. Before they could become settled *raiyats* in the village they would have to be *raiyats*, and that they entirely failed to prove. Section 182 of the Bengal Tenancy Act does not help the appellants. The appeal must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 51 OF 1918.

July 24, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

PULE BISHUNATH RAI—DEFENDANT—APPLICANT

versus

BRAMHANAND SWAMI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 151, 152—Mortgage decree making mortgaged property liable for mortgage as well as sub-mortgage—Amendment of decree, application for, dismissal of—Revision.

Plaintiff mortgagee brought a suit on his mortgage and obtained a decree. From the judgment it appeared that the Court intended that the property should be sold for the amount of the plaintiff's mortgage, interest and costs but finding that the plaintiff had made a sub-mortgage, it directed that the sub-mortgagee should get the amount of her mortgage out of the proceeds of the sale before the plaintiff was paid. But the decree as drawn up directed the property to be sold not only for the amount of the plaintiff's mortgage but also for the amount of the sub-mortgage, that is to say, that the defendant was made liable not only for the mortgage which he had created but also for the sub-mortgage which the mortgagee had created. The defendant, therefore, applied for amendment of the decree in order to bring it into accordance with the judgment, but the Court dismissed the application:

Held, that the decree as drawn up was quite incorrect and unjust and that the refusal of the Court to amend the decree amounted to a refusal to exercise jurisdiction vested in the Court, and that the High Court was, therefore, entitled to interfere in revision. [p. 831, col. 1.]

Civil revision from an order of the Additional Subordinate Judge of Benares, dated the 29th November 1917.

Mr. *Gokul Prasad* (for whom Mr. *Bhagwati Shankar*), for the Applicant.

Mr. *Radha Kant Malviya*, for the Opposite Party.

JUDGMENT.—This application in revision arises under the following circumstances. A suit was brought to realise the amount of a mortgage. It appears that the plaintiff had made a sub-mortgage. The Court decreed the plaintiff's claim. Reading the judgment it is absolutely clear that the Court intended that the property should be sold for the amount of the plaintiff's mortgage, interest and costs but finding that the plaintiff had made a sub mortgage it directed that the sub-mortgagee should get the amount of her mortgage out of the proceeds of the sale before the plaintiff was paid. There seems to be

very little doubt that the decree as drawn up directed the property to be sold not only for the amount of the plaintiff's mortgage but also for the amount of the sub-mortgage, that is to say, the defendant and the defendant's property was being made liable not only for the mortgage which the defendant had made but also the sub-mortgage which the plaintiff had made. Nothing could possibly be more unjust and unequitable and it is impossible to read the judgment as having any such meaning. An application was made by the defendant to bring the decree into accordance with the judgment, pointing out this and another alleged error as to interest. We may point out that there had been an actual report made by the office of the Court that the amount of the sub-mortgage had been added to the amount of the plaintiff's mortgage in the decree by mistake. The only order which the Court below has made is to state that an amendment is "uncalled for." We think that under the special circumstances of this case this amounted to a refusal to exercise a jurisdiction vested in the Court. We allow the application and direct the lower Court to take up the application of the defendant for amendment of the decree and to proceed to deal with it according to law, paying due regard to what we have stated above. We have mentioned that there was another allegation about interest, that the decree was not in accordance with the judgment in respect of interest also. We have not gone into this matter but the lower Court will do so when the case goes back. The lower Court must take up the judgment and the decree and see whether the latter is in accordance with the former. The applicant will have his costs, including in this Court fees on the higher scale.

Application allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 293 OF 1916.

May 27, 1918.

Present :—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT

LAKSHMI PRASANNA MOJUMDAR —JUDGMENT-DEBTOR—APPELLANT

versus

RAJINDRA PODDAR—DECREE HOLDER —RESPONDENT.

Execution—Sale, postponement of, on judgment-debtor undertaking to waive objections—Objections, whether can be raised after sale—Estoppel.

A judgment-debtor who gets an execution sale of his properties postponed by giving an undertaking that he would not raise any objection on the ground of illegality or irregularity, cannot, after the sale has taken place on the postponed date, ask to set it aside on the ground of any illegality or irregularity of which he was cognisant at the time he gave his undertaking. [p. 832, col. 2.]

Appeal against the order of the Subordinate Judge, Noakhali, dated the 21st June 1916.

FACTS appear from the judgment.

Babu *Troilukhya Nath Ghose*, for the Appellant.—This is an appeal from an order of the Sub-Judge refusing to set aside a sale on the ground that the judgment-debtor waived his right to object to the sale on the ground of illegality or irregularity. There cannot be such a waiver. See *Dhanukdhari* v. *Nathuni Sahu* (1).

[FLETCHER, J.—The facts in the case of *Dhanu dhari* v. *Nathuni Sahu* (1) do not correspond to the facts of this case. Give me a case where the judgment debtor undertook to waive all irregularities and illegalities of sale.]

I submit the facts of that case were similar. There also the judgment-debtor undertook to waive all irregularities.

[FLETCHER, J.—But here the waiver is much wider.]

A person cannot waive his right to object to illegalities which might take place in a sale in execution of a decree.

[FLETCHER, J.—The question is whether the undertaking covered present illegalities and irregularities or referred to those subsequent to the issue of the sale proclamation?]

At the time of sale I made an application I said I did not know that there was any sale proclamation. What has been waived is a mixed question of law and fact.

(1) 6 C. L. J. 62; 11 C. W. N. 848.

It has been laid down in the case of *Dhanukdhari* v. *Nathuni Sahu* (1) that it should be determined from the Court's order as to how far the waiver extended. What was waived by my client in the lower Court, must be decided from the circumstances of the case and not from the petition or judgment.

[FLETCHER, J.—It was not an agreement with any party but you gave an undertaking to the Court to waive illegalities and irregularities in the sale. In *Dhanukdhari* v. *Nathuni Sahu* (1) the waiver was with regard to objections to sale proclamation, but here there was an undertaking to waive objections to all illegalities and irregularities. Therefore the facts in this case are quite different from those in *Dhanukdhari* v. *Nathuni Sahu* (1). You waived every irregularity and illegality, fraudulent or otherwise. It is nowhere stated in your application that you were not aware of these illegalities and irregularities.]

At least my submission is that I did not and I could not waive my right to set aside the sale on the ground of fraud. There is nothing in the application of waiver to show that I waived all objections to irregularities or illegalities previous to the publication of sale, even those which were the outcome of fraud.

Babu *Rupendra Lal Roy*, for the Respondent, not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the judgment debtor against the decision of the learned Subordinate Judge of Noakhali, dated the 21st of June 1916. The point lies in a very narrow compass and it is this: The properties of the judgment-debtor had been attached and were to be brought to sale on the 17th April 1916. On that date, the judgment-debtor put in a petition to the Judge asking that the sale might be postponed and that it might take place on the next sale day without a fresh proclamation of sale and the attachment subsisting. The petition shows that the Court was not satisfied with that and required that the judgment-debtor should add a further undertaking to the petition, namely, that the judgment-debtor should not raise any objection on the ground of illegality or irregularity. That being added, the Court granted a postponement of the sale and the properties were not sold until the 16th May. Then the properties having been sold, the judgment-debtor preferred a petition on the 17th June 1916 to the Judge asking that the sale should be set aside on the ground of illegality and irregularity. The learned Judge took the view that there was a distinct breach of the undertaking given to the Court on the footing of which the judgment-debtor obtained a postponement of the sale. I think the learned Judge was right; and for this reason: whatever view may be taken of the terms of the undertaking given on the 17th April 1916, it is quite clear that that undertaking covered all illegalities and irregularities of which the judgment debtor was then aware. In the present case, there is no allegation by the judgment-debtor that he was not aware of the matters stated in his petition at the time he gave his undertaking to the Court on the 17th April 1916. It is quite clear that as regards all matters, at least of which he was cognizant at the time, he gave his undertaking on the 17th April, the judgment-debtor waived his right to object. The case of *Dhanukdhari* v. *Nathuni Sahu* (1), that has been cited before us, is clearly distinguishable. In that case, the learned Judge found that the judgment-debtor could not waive his objection as regards certain particulars on the ground that he had been kept out of knowledge of them by the fraud of the decree-holder, which is a totally different case from the present. The facts in the present case seem to be extremely simple. I think the learned Subordinate Judge came to a correct conclusion that, on the allegations made by the judgment-debtor, he precluded himself from going into these matters. That being so, the present appeal fails and must be dismissed with costs, one hundred rupees.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1395 OF 1916.

July 2, 1918.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Ryves

WAZIR ALI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ALI ISLAM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 148, applicability of—Mortgage—Redemption, suit for, by purchaser of portion of equity of redemption—Limitation—Mortgagee, possession of, nature of—"Co-mortgagor," who is.

All persons who step into the shoes of the original mortgagor are co-mortgagors for all purposes. [p. 833, col. 2.]

A suit by a purchaser of the equity of redemption in a part of the mortgaged property for redemption of his share of the property against a purchaser of another portion of the mortgaged property who has redeemed the whole of the property is governed by Article 148, Schedule I of the Limitation Act, and the period of limitation is sixty years from the date on which the mortgage became capable of redemption. [p. 833, col. 1.]

The possession of a mortgagee must be deemed to be that of the person entitled to the equity of redemption. [p. 834, col. 1.]

Second appeal from the decree of the District Judge, Azamgarh dated the 24th August 1916.

Mr. *M. L. Agarwala*, Dr. *S. M. Sulaiman*, the Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendra Nath Sen*, for the Appellants.

Mr. *Gokul Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption brought under the circumstances mentioned in detail in the judgment of the Court below. It is unnecessary to repeat all the facts and it is sufficient to say that on the 21st of December 1864 one Iradut Ullah made a usufructuary mortgage of certain shares in four villages, one of which was the village Gangapur. The present suit is for the redemption of that village. The equity of redemption in one of the mortgaged villages, namely, Pul Ratni, was sold by auction and purchased by one Mazhar Ali in 1874. He sold it in 1882, and the share which he purchased ultimately came to one Sarju Singh. In 1887, Sarju Singh brought a suit for redemption and got a decree for redemption of all the four mortgaged villages and obtained possession in 1891. The present appellant Wazir Ali is the purchaser of the rights of Sarju in Gangapur and he is in possession by virtue of his purchase. In 1873 the share in Gangapur was purchased at auction by Kali Charan, defendant No. 15, who sold it to the plaintiff on the 11th of October 1913. By virtue of this purchase the plaintiff brought the present suit on the 18th of May 1915 for redemption of Gangapur as against Wazir Ali, who is in possession of that village He has made other persons parties to the suit and one of these is *Musammat* Saidan Bibi, the second appellant, the widow of Iradut Ullah, the mortgagor. The Court of first instance decreed the claim and the decree of that Court was confirmed by the lower Appellate Court.

The first contention raised before us on behalf of the appellants is that the claim is time-barred. This point is concluded by the authority of the Full Bench decision in *Ashfaq Ahmad* v. *Wazir Ali* (1). This case has been followed in subsequent cases by this Court and we as a Divisional Bench are bound by it. Following that ruling we must hold that the limitation applicable to a suit of this description is that provided by Article 148, namely, sixty years from the date on which the mortgage became capable of redemption It is contended that the word "co mortgagor" should not be extended to purchasers of the equity of redemption. We are unable to agree with this contention. All persons who have stepped into the shoes of the original mortgagor are "co-mortgagors" for all purposes and, therefore, the rule laid down in the Full Bench case is applicable to the present case, which is that of a purchaser of the equity of redemption in a part of the mortgaged property.

The learned Counsel for the appellant referred to the case of *Jai Kishen Joshi* v. *Budhanand Joshi* (2). That case so far from helping him seems to us to be against his contention. That case was decided on the ground that the representative of the mortgagor who had redeemed the mortgage had asserted a proprietary title and claimed adversely to the true owner. It was held that in a case of

(1) 14 A. L. A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec (N. S.) 373 (F. B.).

(2) 34 Ind. Cas. 244; 14 A. L. J. 41; 38 A. 138.

that description Article 144 would apply but one of the learned Judges who decided the case observed as follows at page 47* of the report:—

> "If Jaidat had not dealt further with the property but had merely taken possession and held it, the plaintiff would [under the ruling of this Court in *Ashfaq Ahmad* v. *Wazir Ali* (1)] have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jaidat on payment of his share of the debt."

We are accordingly of opinion that the Court below was right in holding that the limitation applicable to the case was that provided by Article 148 and that the suit was not barred by limitation.

It was next contended that the suit should be deemed to be one for a declaratory decree as regards the title of the plaintiff or his vendor Kali Charan. This contention is, in our opinion, untenable as the suit is not for a declaratory decree but for consequential relief, namely, redemption of the mortgage and possession of the property. For the purpose of maintaining the suit it was necessary for the plaintiff to ask the Court to declare his title.

The last contention put forward was that as Kali Charan did not bring a suit to assert his title within twelve years of the date of his purchase, that title must be deemed to have become extinct. This contention has no force inasmuch as Kali Charan had no occasion to bring a suit to establish his title. The mortgagee was in possession and the possession of the mortgagee must be deemed to be that of the person entitled to the equity of redemption.

For these reasons the appeal must, in our opinion, fail. We dismiss it with costs.

Appeal dismissed.

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*Page of 14 A. L. J.—*Ed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 137 OF 1916.

September 17, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

SUBBA RAO AND OTHERS—DEFENDANTS Nos. 3, 4 AND 5—APPELLANTS

versus

P. SWAMIA PILLAI AND OTHERS—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Mitakshara—Decree against undivided father, execution of, against sons' shares—Liability of sons in absence of proof of immorality or illegality—Antecedent debt—Attachment of property—Intention of decree-holder, when material—Proof of immorality, nature of.

An execution creditor is entitled to sell the whole of the estate of a joint Hindu family consisting of a father and his sons and governed by the Mitakshara Law in execution of a decree obtained against the father alone, unless it is shown that the debt for which the decree was obtained was incurred for illegal or immoral purposes. [p. 836, col. 1.]

Where joint family property including the shares of two undivided sons was attached and sold in execution of a decree obtained against the father on a pro-note executed by him, and the sons preferred a claim for the release of their shares which was dismissed and subsequently brought a suit for a declaration that their share of the property could not be attached and sold in execution of the decree:

Held, that in the absence of proof that the debt in respect of which the decree was obtained was (i) incurred for illegal or immoral purposes or (ii) borrowed by the father solely to enable him to sell the whole property including the sons' shares, the decree-holder was entitled in execution to proceed against the whole of the property including the shares of the sons. [p. 836, cols. 1 & 2.]

Per *Krishnan, J.*—It is only when it is doubtful what was attached and sold in Court-auction, as, for example, when the property attached and sold was "the right, title and interest of the judgment-debtor" that the intention of the attaching creditor becomes important. [p. 835, col. 2.]

If the father's debt in execution of which the shares of the sons are also attached was contracted merely for the purpose of enabling the father to sell the whole property including his sons' shares and if the father suffered a decree to be passed in furtherance of that purpose, the decree-holder cannot be permitted to sell the shares of the sons. [p. 836, col. 2.]

Evidence to show that the father led an immoral life will not be sufficient to exclude the father's right to sell the joint property. There must be evidence to show that the particular debt in question was contracted for an immoral purpose. [p. 836, col. 2.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 47 of 1915, preferred against the decree of the Court of the District Munsif, Sriranagam, in Original Suit No. 125 1913.

Mr. *T. R. Venkatarama Sastriar*, for the Appellants.

Mr. *P. S. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.

SPENCER, J.—I am unable to follow the District Judge when he proceeds upon the assumption that the 1st defendant, in executing his small cause decree, attached only the father's interest in the property. If this were so, the plaintiffs had no cause of action to put in a claim petition for the release of their three-fourths share, and when that failed, to institute the present suit to establish their title against the execution creditor. The District Judge failed to see that his assumption destroyed the very foundation of the plaintiffs' claim and that their suit must consequently fail. There is no doubt, however, that both parties considered that the entire estate had been attached. In his written statement the 1st defendant asserted the liability of the sons to pay the debts of their father, if not tainted with illegality and immorality. No doubt he at first maintained that the property was the father's self-acquisition, but the fact that he also pleaded the sons' liability to pay their father's debts showed that he did not abandon his claim against the entire property, if it turned out to be ancestral. At the trial the 1st defendant failed in his attempt to prove that the property was the self-acquisition of the 2nd defendant; the plaintiffs also on their part failed to prove that the debt was incurred for an immoral purpose, as they had only general evidence of their father's immoral conduct.

But this failure of the plaintiffs to establish their contention that the debt was an immoral one must be regarded as fatal to their whole suit. As observed by the Privy Council in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1), "in every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

(1) 39 Ind. Cas. 252; 44 C. 524 at pp. 532, 533; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. A. 1 (P. C.).

The 1st defendant obtained the decree in Small Cause No. 326 of 1912 upon two promissory notes executed in his favour by 2nd defendant for what became due from him for the rent of certain lands that he took on lease from the 1st defendant. This fact is asserted in 1st defendant's written statement in this suit; it appears also in 2nd defendant's written statement in the Small Cause suit (Exhibit 1) and has not been controverted by the plaintiffs. Thus there was in existence in this case an antecedent debt, to discharge which the ancestral property of the family could be validly alienated by the father.

We allow the second appeal and restore the decree of the District Munsif dismissing the suit. Respondents Nos. 1 to 3 will bear their own and appellants' costs in this and in the lower Appellate Court.

KRISHNAN, J.—The plaintiffs-appellants are the sons of the 2nd defendant against whom the 1st defendant had obtained a decree on two promissory notes executed by him. In execution of that decree the 1st defendant had attached the plaint property describing it as 2nd defendant's own property. The sons filed a claim petition to have their share released, but it was dismissed. Thereupon they filed the present suit for a declaration that the 1st defendant was not entitled to execute the decree against their share in the property and for an injunction.

The question whether the property was self-acquired or ancestral has been settled, it being found that it is the ancestral property of the family. On this finding the District Judge decreed the plaintiffs' suit holding "that the 1st defendant showed no intention to proceed against it as ancestral property in which he held the sons' share also liable for their father's debt." His judgment cannot be supported. It is only when it is doubtful what was attached and sold in Court-auction as, for example, when the property attached and sold was described as "the right, title and interest of the judgment-debtor" that the intention of the attaching decree-holder becomes important. Here the whole property has been attached including the shares of the plaintiffs, and that is the

footing on which they themselves filed the claim petition and have now brought this suit. If plaintiffs' shares had not been attached, there would be no cause of action for the claim petition or for this suit, both of which refer only to their shares. Before the plaintiffs' shares can be released from attachment, what has to be decided is whether those shares are not liable to be sold for the decree-debt. The description of the property attached as the debtor's own is immaterial in this connection. It is settled law that an execution creditor is entitled to sell the whole of the estate of the joint Hindu family, consisting of a father and his sons and governed by the Mitakshara Law, in execution of a decree obtained against the father alone, unless it is shown that the debt for which the decree was obtained was incurred for illegal or immoral purposes. It is sufficient to refer to the latest statement of this law by the Privy Council in the case of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1). Their Lordships say, "The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." The recent ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2) to which our attention has been drawn, that the pious obligation of the son to pay his father's debt arises only after the death of the father, does not affect this question, as the father has power to sell joint property of his son and himself for an antecedent debt of his to pay off that debt, when the debt was not incurred for an illegal or immoral purpose and the Court can in execution of a decree for that debt exercise the same power and direct the sale of such joint property. No doubt if the father had borrowed the original promissiory note debts merely for the purpose of enabling him to sell the whole property including his sons' shares and allowed the decree to be passed in furtherance of that purpose, the case may be one where there is only a colourable and not a "real dissociation in fact" between the debts and the final sale. In such a case the power to sell will not arise, under the Privy Council ruling above quoted. But such a position does not arise on the facts here, as it is not alleged that the 2nd defendant had any such purpose.

It follows, therefore, that as in the present case the plaintiffs did not give any evidence to show that the debts in question were incurred by the 2nd defendant for any illegal or immoral purpose, their suit must fail. They complain before us that they had evidence to show that their father led an immoral life and that the Munsif shut out such evidence; but such evidence is quite insufficient, in the absence of evidence that the particular debt was incurred for an immoral purpose, to exclude the father's right to sell the joint property. See *Sri Narain* v. *Raghubans Rai* (3). The exclusion of evidence by the Munsif has, therefore, led to no prejudice to the plaintiffs and is, therefore, no ground for second appeal. It was also urged that they had evidence to prove that they lived separately from their father and had nothing to do with the promissory notes. That evidence was equally immaterial, as they did not allege any division from the father.

I agree, therefore, that the decree of the District Judge must be reversed and that of the Munsif be restored with costs, here and in the Court below, of the appellants.

M. C. P.

Appeal allowed.

(2) 39 Ind. Cas. 280; 39 A. 437; 6 L. W. 213; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 44 I. A. 126 (P. C.).

(3) 17 Ind. Cas. 729; 17 C. W. N. 124; 25 M. L. J. 27; (1913) M. W. N. 768 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1874 OF 1916.

July 30, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

RAM FAQIR—PLAINTIFF—APPELLANT

versus

BINDESHRI SINGH AND ANOTHER —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 11—Res judicata—*Cross-appeals—Appeal from one decree, whether maintainable—Suit of Small Cause nature deciding question of title—Subsequent suit involving same question, whether* res judicata.

Plaintiff brought a suit claiming possession of a half share in each of two groves Nos. 2 and 123, situate in different villages. His suit was dismissed in respect of grove No. 2 and decreed in respect of grove No. 123. There were appeals both by the defendant and by the plaintiff. The latter's appeal was dismissed and the defendant's was allowed, the case being remanded. The plaintiff appealed to the High Court against the order of remand:

Held, that the failure of the plaintiff to appeal against the order, dismissing his own appeal to the lower Appellate Court, did not debar him from appealing against the order remanding the suit in the defendant's appeal. [p. 838, col. 1.]

Plaintiff brought a suit against the defendants to recover his share of the price of two trees cut down by the defendants, on the ground that he was entitled to a moiety share in the grove. The suit was one of the nature cognizable by a Court of Small Causes, but was instituted in the Court of the Munsif, who tried it as a regular suit and decided that the plaintiff was entitled to a half share in the grove. In a subsequent suit by the plaintiff to recover possession of his half share in the grove:

Held, that under Explanation II to section 1 of the Civil Procedure Code, the question of the plaintiff's title to a half share in the grove was *res judicata*. [p. 839, col. 2.]

Second appeal from a decree of the Officiating Second Additional Subordinate Judge, Jaunpur.

Mr. *Gokul Prasad*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises the plaintiff, who is the appellant in this Court, claimed possession of a half share in each of two groves, together with damages. The groves are situated in different villages and may be described by the serial numbers in the village papers under which they are referred to in the judgments of the Courts below. One grove was numbered 123 and the other was numbered 2. The Court of first instance in substance dismissed the plaintiff's claim in respect of grove No. 2, but it decreed his claim for grove No. 123. There was an appeal by the plaintiff against the decree of the Court of first instance, in so far as that decree dismissed his claim for grove No. 2. There was also an appeal by the defendants against the same decree in so far as it allowed the plaintiff's claim for grove No. 123. The two appeals were heard together and a single judgment was written by which the questions raised in both the appeals were disposed of. Different decrees were passed. On the plaintiff's appeal the order was that this appeal be dismissed so that the decision of the Court of first instance, in so far as it was called in question by the plaintiff, was affirmed. On the defendants' appeal there was an order of remand arising out of certain pleadings and findings to be referred to presently. The appeal now before us is against the decision of the lower Appellate Court on the appeal filed by the defendants against the decree of the Court of first instance. When this appeal came up for hearing before a single Judge of this Court, two preliminary objections were raised. One of these was well founded so far as it went, that is to say, the defendants-respondents correctly urged that this appeal was not really a second appeal, but a first appeal from an order of remand, and should have been filed as such. This objection is of a technical nature and it has been disposed of by the referring of the appeal itself to a Bench of two Judges. We have jurisdiction to hear this appeal under the rules of this Court and a mere misdescription of the appeal as "Second Appeal No. so and so" instead of "First Appeal from Order," does not affect the merits of the case or the jurisdiction of this Court. The appellant will not, in any event, be entitled to recover costs in excess of what he would have had to pay on a first appeal from order, but that matter can be considered when the decree of this Court comes to be prepared. The other objection was that the plaintiff was not entitled to appeal against this order of remand, or against any other order or decree which the lower Appellate Court might have seen fit to pass on the de-

fendants' appeal unless he also appealed against the decision dismissing his own appeal about grove No. 2. Reliance is placed on a large number of authorities of this Court, out of which it is quite sufficient to refer to the decision in *Ram Lal* v. *Chhab Nath* (1), which is the foundation of the subsequent case-law on the subject. The case now before us is clearly distinguishable from any of these. In the appeal brought by the plaintiff against the decision of the Court of first instance no question was raised, and none could be decided, as to the rights of the parties in respect of grove No. 123. The Court simply determined the question of the respective rights of the parties to grove No. 2. Its decision on this point was final; it proceeded upon findings of fact and no second appeal could have been brought against it with the slightest prospect of success. The plaintiff was bound to acquiesce in the decision against him so far as grove No. 2 was concerned, but there was nothing in the decree by which his appeal to the Court below stood dismissed, which in any way affected or purported to affect his rights in respect of grove No. 123. It is not even as if it could be contended that the plaintiff was injuriously affected by the dismissal of his appeal, because that dismissal left the decision of the Court of first instance intact. The plaintiff had a decision in his favour about grove No. 123 and the order passed upon his appeal left that decision where it was. That decision has only been disturbed by the order of remand passed upon the appeal of the defendants in the Court below, and against that order the present appeal lies. It is clearly not barred either by the words of section 11 of the Code of Civil Procedure, or by any conceivable principle of *res judicata*.

We have now to consider the main point raised by the appeal itself, and for this purpose it is necessary to set out certain additional facts. In the year 1914 this same plaintiff had brought against these same defendants a suit in which he claimed damages amounting to Rs. 30, as his share of the price of two trees which the defendants had cut down in grove No. 123, on the ground that the defendants had appropriated the timber entirely to themselves in derogation of the plaintiff's rights as owner of a moiety share in the grove. This suit was a suit of the nature cognizable by a Court of Small Causes; but it was not instituted in such a Court. Presumably there was no Court of Small Causes in existence at Jaunpur, and this suit for damages was instituted in the Court of the Additional Munsif and was tried by him as a regular suit. In reply to the plaintiff's claim the defendants denied his title to a moiety share, or to any other share in grove No. 123. There was an issue on this point and that issue was decided in favour of the plaintiff. After also determining the further issue raised as to the amount of damages, the Munsif proceeded to give the plaintiff in that suit a decree for Rs. 20. Now in the present litigation the plaintiff once more sets up his title to the moiety share in grove No. 123. The suit has actually been brought in the very same Court which tried the suit of 1914, and the first issue for disposal is precisely the same issue as was tried out in the former suit, namely, the validity or otherwise of the plaintiff's claim to a moiety share in grove No. 123. The learned Additional Munsif held that he had himself once already decided this issue in a previous suit between the same parties, that decision operated as *res judicata* and the question could not be tried over again. This finding has been reversed by the learned Subordinate Judge on appeal. Holding that the question of title in respect of grove No. 123 was not *res judicata* in the plaintiff's favour by reason of the suit of 1914, that Court has remanded the case, so far as it concerned the plaintiff's claim to grove No. 123, for trial on the merits. The appeal being against this order of remand, what we have to determine is whether the decision in the suit of 1914 was or was not *res judicata* in the present litigation. On the wording of section 11 of the Code of Civil Procedure the case seems a clear one. The suit was between the same parties litigating under the same title. The same question was directly and substantially in issue in both the suits, and in the suit of 1914 it was decided in the plaintiff's

(1) 12 A. 578; A. W. N. (1890) 183; 6 Ind. Dec. (N. S.) 1114.

favour by a Court competent to try the subsequent suit now under consideration by us in this appeal. As a matter of fact both the suits, as we have already pointed out, were brought in one and the same Court, that is to say, the Court of the Additional Munsif of Jaunpur. The former was of a nature triable by a Court of Small Causes and the present suit is not. There is, therefore, this distinction, that in the suit of 1914 no second appeal would lie, whereas in the present suit a second appeal will lie, subject to the appropriate provisions of the law. The Second Explanation to section 11 of the Code of Civil Procedure has been inserted in the present Act (No. V of 1908), and it expressly provides that for the purposes of this section, the competence of a Court (that is to say, its competence to try any subsequent suit) shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court. This explanation would seem to have been expressly designed to set at rest the controversy sought to be raised on behalf of the present respondents. This view has been taken by a learned Judge of this Court in the only reported case we can find in which the question has been expressly considered and decided since the passing of Act No. V of 1908; namely. the case of *Musaddi Lal* v. *Jwala Prasad* (2). We have been referred to a number of older rulings of this Court, one of which is discussed by Mr. Justice Chamier in *Musaddi Lal* v. *Jwala Prasad* (2). All those decisions were passed before the Second Explanation to what is now section 11 of the Code of Civil Procedure had been enacted. It is quite true that, in order to apply the rule of *res judicata* at all, it must be found that the question of title was directly and substantially in issue in the suit of 1914. It has been contended before us that in some of the older decisions, as for instance in *Inayatkhan* v. *Rahmat Bibi* (3), in *Chet Ram* v. *Ganga* (4), it has been taken for granted that the decision of any Court in a suit of a Small Cause Court nature about a question of title should be regarded as merely incidental. In view of the change in the law effected by the passing of Act No. V of 1908, it seems unnecessary to discuss these older decisions. We find ourselves in entire agreement with the view taken by Mr. Justice Chamier in *Musaddi Lal* v. *Jwala Prasad* (2), which was a case in all essential matters on all fours with the present one. It is worth noting that we have been referred to one other case of this Court decided since the passing of the present Code of Civil Procedure, namely, the case of *Dulare Lal* v. *Hazari Lal* (5). That case is distinguishable from the present in one essential point. The suit for damages, the decision in which it was sought to plead as *res judicata* in a subsequent suit for the establishment of title, had been brought in a Court of Small Causes, and subsequently transferred to the Court of a Munsif. It was pointed out that, under the provisions of the Provincial Small Causes Courts Act itself, a suit would not change its nature when it was transferred from a Court of Small Causes to that of a Munsif, but that it would be tried by the Munsif only as a Court of Small Causes. This is the reason given by the learned Judge of this Court for holding, in the appeal before him, the decision in the suit for damages would not operate as *res judicata* in the subsequent suit for establishment of title. In that case the suit for damages was instituted in and was, in the eye of the law, tried by a Court of Small Causes, that is to say, by a Court which, independently altogether of any provisions as to a right of appeal, would not be a Court competent to try a subsequent suit for title. We are of opinion, therefore, that the decision of the lower Appellate Court on this question of *res judicata* was wrong and must be reversed. On this appeal, therefore, we set aside the order of remand which was passed on the appeal of the defendants in the Court below, and in lieu thereof we dismiss the appeal of the defendants to that Court. The plaintiff will be entitled to his costs in this and in the

(2) 16 Ind. Cas. 496; 10 A. L. J. 106.
(3) 2 A. 97; 1 Ind. Dec. (N. S.) 610.
(4) A. W. N, (1886) 44; 4 Ind. Dec. (N. S.) 1141.
(5) 26 Ind. Cas. 56; 12 A, L. J. 853,

ower Appellate Court, subject only to this qualification that he will not be entitled to recover as costs in this Court anything more than he would have paid on a first appeal from order. It may be pointed out that the result o the order which we now pass is that the decree of the Court of first instance is restored in its entirety. There is no possible question of an appellate decision resulting in the existence of two inconsistent decrees on one and the same litigation each of them apparently capable of independent execution. We mention this fact as further illustrating our decision upon the preliminary objection.

Appeal decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2261 OF 1916.

July 1, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

MONOHAR MUKHERJEE—PLAINTIFF—APPELLANT

versus

KALI DAS NANDI AND OTHERS—RESPONDENTS.

Chowkidari chakran *lands situate within* putni—*Resumption*—Putnidar, *title of*—*Rent*, *liability of* putnidar *to pay*.

Chowkidari chakran lands situate within the ambit of a *putni* belong, on their resumption, to the *putnidar*, and where the *putnidar* has been enjoying the services of the *chowkidar* before the resumption, he is not liable to pay for those lands any rent or cesses in excess of what the *zemindar* has to pay to the *chowkidari* fund, unless by the terms of the *putni* lease the *zemindar* is entitled to a profit in respect of such lands. [p. 841, col. 2; p. 842, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Burdwan, dated the 4th of August 1916, affirming that of the Munsif, 2nd Court at that place, dated the 19th of August 1915.

FACTS appear from the judgment.

Babu *Hira Lal Chuckerburty* (with him Babu *Taradas Chatterjee*), for the Appellant.—I beg to draw your Lordships' attention to a case reported as *Ranjit Singh* v. *Kali Dasi Debi* (1). There the suit was for a declaration of title in certain *chowkidari chakran* lands on the ground that the plaintiff acquired *putni* rights in them. It was held there that the *putnidars* were entitled to the possession of resumed *chowkidari chakran* lands. The question, therefore, is does the present Privy Council decision in *Ranjit Singh* v. *Kali Dasi Debi* (1) affect this decision? My submission is that the Privy Council decision does not state the terms under which the *putnidars* shall hold. The Privy Council decision does not touch the present point. No doubt we are bound by the Privy Council decision so far as it deals with this point. Again in the case in *Surendra Mohan Sinha* v. *Rajendra Nath Roy* (2) Your Lordships relied on the previous Privy Council case in *Ranjit Singh* v. *Kali Dasi Debi* (1) and discussed it at page 662*, and said that that case is not conclusive as to the terms under which the *putnidars* are entitled to hold possession of resumed *chowkidari chakran* lands. Therefore, it becomes necessary for me to refer to the earlier cases, which deal with this point. First of all I refer your Lordships to the case of *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (3). There the principle on which to assess the rent payable by *putnidars* to the Zemindar in respect to resumed *chowkidari chakaran* lands is laid down. The same principle is followed in a later case in *Harak Chand* v. *Charu Chandra Singha* (4). Again in *Rajendra Nath* v. *Hira Lal* (5) the same principle is accepted. In the *Kabuliat* the words * * * (*haree bari malguzari*) occur. These words mean proportionate rent. The word *malguzari* may sometimes mean rent with reference to the contract and not revenue So I am entitled to get something more than has been decreed in my favour according to the Privy Council rulings.

Babu *Bepin Behari Ghose* (with him Babu *Sajani Kanta Sinha*), for the Respondents.—

(1) 40 Ind. Cas. 981; 21 C. W. N. 609; 25 C. L. J. 499; 32 M. L. J. 565; 15 A. L. J. 390; 19 Bom. L. R. 462; 2 P. L. W. 1; (1917) M. W. N. 459; 6 L. W. 101 44 C. 841; 22 M. L. T. 489; 44 I. A. 117 (P. C.).

(2) 46 Ind. Cas. 435; 22 C. W. N. 660; 28 C. L. J. 160.

(3) 4 C. W. N. 814.

(4) 8 Ind. Cas. 766; 13 C. L. J. 102 at p. 107; 15 C. W. N. 5.

(5) 7 Ind. Cas. 554; 14 C. W. N. 995.

* Page of 22 C. W. N.—*Ed.*

The question must be decided according to the terms of the contract into which the parties entered. In section 51 of the Chowkidari Act (VI of 1870) it is laid down that if there is a contract the parties are bound by the contract. In *Ranjit Singh* v. *Kali Dasi Debi* (1) it has been held that parties are bound by their contracts. Therefore, the first question is whether these *chowkidari chakaran* lands were let out to me in *putni* by the Zemindar at the time of the *putni* lease and my friend concedes that such was the fact. In the Chowkidari Act the rights of parties who hold under the Zemindar are preserved and their only liability is to pay more rent for excess of land. *Kazi Newaz Khoda* v. *Ram Jadu Dey* (6) referred to. There Mr. Justice Rampini deals with this excess payment of rent and his Lordship says that the Zemindar cannot claim from the *putnidars* more in excess than he has to pay to the Government. At page 116 Mr. Justice Mukherjee holds the same view; see also *Nalinakhya Basu* v. *Bijoy Chand Mahatap* (7). My learned friend says *malguzari* means rent. This is the first time that I hear that the word *malguzari* also means payment of rent, whereas it only means payment of revenue. Wilson's Glossary referred to for the meaning of the word. *Mal* is contraction of *malguzari* and means revenue. It is not stated at what rate profits are to be given to Zemindars and hence it is idle for my friend to contend that the *putnidar* is liable to pay any additional rent for the resumed *chowkidari chakran* lands. Both in *Rajendra Nath* v. *Hira Lal* (5) and in *Harak Chand* v. *Charu Chandra Sinha* (4) there was an admission on behalf of the *putnidar*. Before *Ranjit Singh's case* (1) there was some doubt in the minds of *putnidars* as to whether they would get resumed *chakran* lands and hence they would always make offer to pay a certain amount of the profit to the Zemindar in order to get the *chakran* lands. But since that case has settled this point, the Zemindar cannot claim such profit any further if the *putnidars* stand upon their right and refuse to pay anything in excess of the Government assessment.

[WALMSLEY, J.—Before Act VI of 1870 was passed no one had any means of knowing as to what resumption would lead to.]

The resumption began long before the passing of that Act and the Government used then to settle such lands with the highest bidders.

Babu *Hira Lal Chackerburty*, in reply.—As regards the two cases which my friend cited, the judgment there proceeded entirely on a construction of the contract entered into between Zemindars and *putnidars*. As regards the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (6) that had been cited in all cases which I have cited. Therefore, my point is that that case has not conclusively decided the points which I have submitted. Then as regards the word "*malguzari*" my friend puts too narrow a construction on the word. It means both payment of rent and revenue, *i.e.*, any payment whether payable to the Zemindar or to the Government, and the word "*mal*" as opposed to "*lakheraj*" implies rent.

JUDGMENT.

WALMSLEY, J.—The suit out of which this appeal arises was brought by the plaintiff against his *putnidars* for a declaration that he was entitled to *khas* possession of some *chakran* lands which had been resumed or, in the alternative, for a declaration that the *putnidars* must pay him rent at the rate of Rs. 3 per *bigha*. Both the lower Courts dismissed the plaintiff's claim for *khas* possession, and with regard to his claim for rent, they limited him to the sum which the Zemindar had to pay to the *chowkidari* fund and cesses. The plaintiff has preferred an appeal to this Court. So far as his original prayer for *khas* possession is concerned, the case of *Ranjit Singh* v. *Kali Dasi Debi* (1) is conclusive against him. With regard to his other claim, the Courts below proceeded, *first*, on the wordings of the Pattahs granted to the *putnidars* and, *secondly*, on the fact that it was the *putnidars* who enjoyed the services of the *chowkidars* prior to the resumption. The Pattahs have been placed before us and the passages which relate to the matter of the *chowkidari chakran* lands and the contingency of resumption have been discussed in detail. It appears to me that the Courts below have put a right interpretation upon the words used in those Pattahs, and on that ground alone I think that the Zemindar's claim cannot be sus-

(6) 34 C. 109 at p. 112; 5 C. L. J. 33; 11 C. W. N. 201.

(7) 40 Ind. Cas. 395.

tained. The further fact that it was the *putnidars* who were enjoying the services of the *chowkidars* makes it even more impossible to allow the Zemindar more than has been awarded to him. On these grounds I think that the appeal should be dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 21 OF 1918.
July 30, 1918.

Present :—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MAHMUD ALI.—DEFENDANT—APPLICANT

versus

TAMIZ-UN-NISSA BIBI—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 41—Debt paid off by one of several heirs—Suit to recover share from co-heir—Jurisdiction of Small Cause Court.

Where one of several heirs of a deceased Muhammadan pays off a debt due by the deceased and then sues his co-heirs to recover their share of the debt, the suit is cognisable by a Court of Small Causes and is not excluded from its cognisance by Article 41 of Schedule II to the Provincial Small Causes Courts Act. [p. 844, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes, Bulandshahr.

FACTS appear from the following Referring Order of

ABDUL RAOOF, J.—This application for revision arises out of a suit brought by *Musammat* Tamiz-un-nissa against the defendant Mahmud Ali for a certain sum of money. The case as stated by the plaintiff in the plaint was this:—One Mahbub Ali died leaving as his heirs Mahmud Ali and Yakub Ali, brothers, *Musammat* Rasul-un-nissa, a sister, and *Musammat* Tamiz-un-nissa, a daughter. On his death he left certain property which was inherited by these heirs according to their shares under the Muhammadan Law. At the time of his death he was indebted, and among the creditors there was one Jas Ram who held two pro notes executed by Mahbub Ali. The plaintiff states that her share under the Muhammadan Law in the property left by the ancestor was five *sehams*. The share of Mahmud Ali and Yakub Ali, the brothers of Mahbub Ali, was two *sehams* each, and that of *Musammat* Rasul un-nissa, one *seham*. The plaintiff further states that she paid off the debt due to Jas Ram by executing a bond in favour of the sons of Jas Ram. In paragraph 3 of the plaint the plaintiff stated that having purchased the shares of Yakub Ali and *Musammat* Rusul un-nissa in the property left by Mahbub Ali, she became the owner of eight *sehams* and the defendant Mahmud Ali owned two *sehams* out of the entire property of 10 *sehams*. It is further stated that the defendant Mahmud Ali was, therefore, liable to pay the debts due from Mahbub Ali to the extent of 2/10ths, and it was to recover this 2/10ths of the debt paid off by the plaintiff to the sons of Jas Ram that this suit was filed. The suit was instituted in the Court of the Judge of Small Causes at Bulandshahr. One of the pleas raised in defence by the defendant was that the suit was not cognizable by a Small Cause Court. The defendant relied upon Article 41 of Schedule II of the Provincial Small Causes Courts Act. The Court of first instance, relying upon the ruling in the case of *Roshan Lal* v. *Ram Lal* (1), disallowed the plea and decided the suit upon the merits and gave a decree in favour of the plaintiff. The present application for revision has been filed against the decree of the Judge of the Small Cause Court. The decree of the Court below is given in these terms:—"The plaintiff's claim for Rs. 101-8-3, the amount in claim, and Rs. 32-14-0, costs of suit, be decreed against the estate of Mahbub Ali Khan, which is in the possession of the defendant." In the first ground of revision, the defendant-applicant repeats his ground of objection as to the jurisdiction of the Judge of the Small Cause Court, and in the second ground he raises the plea that as the plaintiff in her own plaint asks for a decree against the assets of Mahbub Ali, the suit was not cognizable by the

(1) 4 A. L. J. 543; A. W. N. (1907) 230.

Court of Small Causes. The case has been argued before me at some length on behalf of both the parties and a number of rulings have been cited by the Counsel on either side, to which I will refer later on. Dr. Sulaiman who appears for the applicant argues that upon the plaint filed by the plaintiff, it is clear that she based her claim upon the ground that the parties were sharers in a joint property which had come to the heirs of Mahbub Ali as his assets and that, therefore, they were all liable to pay the debts of Mahbub Ali proportionately according to their shares in the assets left by him. That being the nature of the suit, he argues that the suit was a suit for *contribution by a sharer in joint property* in respect of payment made by him of money due from a co-sharer. On the other hand Mr. Yusuf Hasan has argued that in order to make the Article applicable, it ought to be made clear that the payment in respect to which contribution was claimed, was made on account of the joint property. He also argues that the present suit can hardly be called a suit for contribution. He says the debt due to Jas Ram was not a debt for which the parties may be said to be jointly responsible. It was not a debt due upon a joint bond or under a joint decree, but it was a debt due against each of the heirs of Mahbub Ali separately on account of his share of liability attaching to him on account of having inherited assets from the common ancestor. It is difficult to decide what Article 41 contemplates by the words "a suit for contribution by a sharer in joint property." The cases which have been relied upon either side have no direct bearing on the facts of the present case. Mr. Yusuf Hasan has relied upon the case reported as *Bhairon* v. *Ram Baran* (2), which was a case of joint judgment-debtors; one of the judgment-debtors having paid off the money due on the joint decree sued the others for contribution. He has relied upon the case reported as *Roshan Lal* v. *Ram Lal* (1). That was also a case of a joint decree. He has also relied upon the case reported as *Bhairon* v. *Ram Baran* (2). That also was a case of a joint decree against co-judgment-debtors. On the other side Dr. Sulaiman has relied upon the cases reported as *Fatima Bibi* v. *Hamida Bibi* (3), *Bhatoo Singh* v. *Ramoo Mahton* (4), *Satya Bhushan Bandopadhyaya* v. *Krishnakali Bandopadhyaya* (5) and *Rajani Kanta Ghose* v. *Rama Nath Roy* (6). In the case reported as *Satya Bhushan Bandopadhyaya* v. *Krishnakali Bandopadhyaya* (5) the plaintiff came on the allegation that he was not liable to make any payment at all, but that he had made a payment for the benefit of the defendant. It was held in that case that the suit could not be said to be one for contribution at all, and, therefore, could not come under Article 41. In *Bhateo Singh* v. *Ramoo Mahton* (4) the facts were quite different from those of the present case and the rule there laid down was rather too broad. In the case reported as *Fatima Bibi* v. *Hamida Bibi* (3) the payment there made was certainly on account of the property jointly held by the parties. Joint tenants holding land jointly under a Zemindar were held jointly responsible for payment of rent, although they had by private arrangement divided the plots for their separate cultivation and one of the tenants had been made to pay the rent for the entire holding. When he sued for contribution, it was held that the suit came strictly within Article 41 and it was excepted from the cognizance of the Court of Small Causes also. As I have stated above, none of the cases relied upon by the parties have a direct bearing on the facts of this case. The point raised is of some importance and I think it will be better if it is decided by a larger Bench. I, therefore, refer this case to a Bench of two Judges.

Dr. *S. M. Sulaiman*, for the Applicant.

Mr. *S. M. Y. Hasan* (for whom Mr. *S. A. Haidar*), for the Opposite Party.

JUDGMENT.—The main point raised as a ground for revision is that the suit was one which was not cognizable by the Small Cause Court. It is contended that

(2) 28 A. 292; A. W. N. (1906) 6; 3 A. L. J. 6.

(3) 28 Ind. Cas. 587; 13 A. L. J. 452.

(4) 23 C. 189; 12 Ind. Dec. (N. S.) 125.

(5) 24 Ind. Cas. 259; 18 C. W. N. 1308; 20 C. L. J. 196.

(6) 27 Ind. Cas. 56; 19 C. W. N. 458; 20 C. L. J. 200.

it is excluded by Article 41 to the Schedule to the Small Causes Courts Act. We are satisfied that the suit brought by the plaintiff was not of the nature specified in Article 41 of the Act. We see no sufficient reason to interfere with the decree of the Small Cause Court in any other matter raised by the memorandum of appeal. We reject the application and make no order as to costs.

Application dismissed.

PATNA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 951 OF 1917.
July 25, 1918.
Present:—Justice Sir Ali Imam, Kt.
JAGESUR SINGH MAHAPATRA—
APPELLANT
versus
SRIDHAR SARDAR AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Limitation Act (IX of 1908), Sch. I, Arts. 138, 180—Suit by auction-purchaser to recover property purchased by him after confirmation of sale, maintainability of—Limitation.

A suit by an auction-purchaser for the recovery of possession of property which he has purchased at an auction sale which has been confirmed, is not a suit which is barred under section 47 of the Code of Civil Procedure. Such a suit is governed by Article 138 and not by Article 180 of Schedule I of the Limitation Act, and the period of limitation is twelve years after the confirmation of the sale. [p. 845, col. 1.]

Appeal from a decision of the District Judge, Manbhum-Purulia.

Mr. *Atul Krishna Ray*, for the Appellant.

Mr. *Abani Bhusan Mukerji*, for the Respondents.

JUDGMENT.—The plaintiffs and the *pro forma* defendant No. 4 and the predecessor-in-interest of the *pro forma* defendants Nos. 5 to 10 obtained a decree against the principal defendants in this case. In execution of the decree which was for rent, the property in suit was sold and the sale was confirmed on the 6th of May 1910. It appears that after the confirmation of the sale there was a partition in the family of the plaintiffs and the *pro forma* defendants. By the partition the property in suit was allotted to the plaintiffs. The plaintiffs now seek to obtain possession of this property as after the confirmation of the sale no action was taken and the principal defendants remained in possession. The principal defendants in paragraph 7 of the written statement have pleaded that although the sale had taken place and it was confirmed, yet the plaintiffs as a matter of fact continued to receive rent from them and that as such the relationship of landlord and tenant continued. The learned Munsif who decreed the suit of the plaintiffs has come to a distinct finding that there is no evidence to support the allegation in the written statement to the effect that the relationship of landlord and tenant had subsisted between the plaintiffs and the principal defendants after the confirmation of the sale. The principal defendants preferred an appeal to the learned District Judge of Manbhum-Purulia, who has set aside the decree given by the learned Munsif and has dismissed the suit. The points on which the lower Appellate Court dismissed the suit of the plaintiffs are the points of limitation and that of jurisdiction. A perusal of the judgment of the learned Judge shows that he is labouring under the impression that the present action is a proceeding in execution of the decree obtained for rent. He has treated this case as one that is governed by the provisions of the Chota Nagpur Tenancy Act, VI of 1908. It seems to me that the learned Judge has overlooked the fact that the action in question is in no way governed by that Act. If the relationship of landlord and tenant had continued to exist between the plaintiffs and the principal defendants, there might be something to say as regards the application of the provisions of that Act, but on this point the finding arrived at by the Trial Court is conclusive. The position of the parties, therefore, is that the auction-purchaser has instituted a regular suit for the recovery of possession of the property that he bought at an auction sale that was confirmed. In the circumstances it appears to me that sections 139 and 231 of Act VI of 1908 have no application.

The next question is, whether the suit is

barred under the general law of limitation. The learned Vakil appearing on behalf of the respondents has drawn my attention to Article 180 of the Limitation Act and has invited me to hold that under that Article the suit should be regarded as barred because of the provision of three years' limitation. I do not think that Article 180 of the Limitation Act was intended to apply to a case like this; on the contrary by reading the language of Article 138 of the Limitation Act it is quite evident that the present action is governed by that Article. The period of limitation provided by that Article is 12 years. The suit having been instituted within twelve years of the confirmation of the sale is, therefore, not barred by limitation.

In the course of his address the learned Vakil for the respondents also raised the question as to whether or not the suit is barred under section 47 of the Code of Civil Procedure. His contention is that to ask for delivery of possession is a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree, and that, therefore, under the provisions of that section a separate suit is not permissible. This view of the case receives no help from the clear and emphatic pronouncement of their Lordships of the Allahabad High Court in a Full Bench case reported as *Bhagwati* v. *Banwari Lal* (1). It has been held that a suit for the recovery of possession of a property which has been the subject of sale and the sale of which has been confirmed is not a suit which is barred under section 47 of the Code. It seems to me, therefore, that the learned Judge in dismissing the suit both on the ground of limitation as well as on the ground of jurisdiction has misconceived the nature of the action. In the circumstances the order of dismissal of the learned Judge is set aside, the appeal is decreed, and the decree awarded by the learned Munsif is restored. The appellants will get their costs throughout.

Appeal allowed.

(1) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1652 OF 1916.

August 1, 1918.

Present :– Mr. Justice Piggott and Mr. Justice Walsh.

RAUSHAN LAL AND OTHERS—DEFENDANTS —APPELLANTS

versus

KANHAIYA LAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Mortgage—Interest, payment of, by mortgagor—Limitation, extension of, against purchaser of equity of redemption.

A payment of interest due on a mortgage made by the mortgagor saves limitation under section 20 of the Limitation Act not only as against the mortgagor, but also as against a subsequent purchaser of a portion of the equity of redemption or a subsequent mortgagee of a portion of the mortgaged property. [p. 846, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Agra, modifying that of the Additional Subordinate Judge, Muttra.

Mr. *Nehal Chand* for Mr. *B. E. O'Conor* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellants.

Mr. *Narain Prasad Asthana* (with him Mr. *Surendra Nath Sen*), for the Repondents.

JUDGMENT.

PIGGOTT, J.—The essential point for determination in this second appeal lies within a very narrow compass. The plaintiffs sued to enforce a simple mortgage of January the 8th, 1891. They impleaded the mortgagors as defendants first party, one set of subsequent mortgagees as defendants second party and the present appellants, as purchasers of a portion of the equity of redemption, as defendants third party. The defendants of the first and second parties do not contest the suit, at any rate at this stage. The defendants third party contend that the claim is barred by limitation. *Prima facie* this suit instituted on 7th of November 1914 would be well outside the prescribed period of limitation for a suit on a simple mortgage of January the 8th, 1891. The plaintiffs' case is that limitation is saved under section 20 of the Indian Limitation Act (IX of 1908) by three payments on account of interest as such, the last of these payments is of a sum of Rs. 800 made on the 25th of November 1902. This payment is proved beyond doubt. It was made by means of a sale by the mortgagors to the prior mortgagees of certain property

other than that hypothecated in the simple mortgage-deed in suit. The consideration for the sale was a sum of Rs. 800. There was an express acknowledgment that on that date, namely, the 25th of November 1902 a sum of Rs. 1,400 was due as interest on the deed of January the 8th, 1891; in order to pay off a portion of this interest the property specified in the deed of November the 25th, 1902, was sold for a sum of Rs. 800 and the entire consideration was set off in part payment of the interest as above stated. The present suit is within limitation from the 25th November 1902 and it is not denied that section 20 of the Indian Limitation Act would apply as against the mortgagors themselves. The contention is that the provisions of that section cannot be applied so as to save limitation as against these appellants, who are subsequent purchasers of a portion of the equity of redemption. The appellants bought under a sale-deed of June the 24th, 1913, a portion of the property hypothecated under the plaintiffs' mortgage of January the 8th, 1891, along with certain other property with which of course this suit is not concerned. They paid the sum of Rs. 9,000 a large part of which was due to them on account of previous transactions between themselves and their vendors. They undertook, however, to pay off a certain older mortgage of the year 1911, which again seems to have been executed in satisfaction of an older mortgage of 1905, by which again a still older mortgage of December the 21st, 1899, was paid off; and under this mortgage a portion of the property now in suit was hypothecated. The appellants contend before us that they occupy two positions. They are not merely purchasers of a portion of the equity of redemption under their deed of June the 24th, 1913, but they are also entitled to stand in the shoes of the mortgagees under the deed of December 21st, 1899. Even this mortgage, however, is subsequent in date to the mortgage in suit, so that the real question for determination, namely, whether the payment of interst effected by the deed of November the 25th, 1902, does or does not save limitation as against these appellants, has to be determined upon the wording of section 20 of the Indian Limitation Act on substantially the same principles, whether we deal with these appellants as purchasers of the equity of redemption or as subsequent mortgagees in respect of a portion of the property in suit. We have not been referred to any reported case of this Court, but in the Calcutta High Court there is a good deal of authority and this authority seems to us, as to the learned Judge of the Court below, very strongly in favour of the plaintiffs-respondents. The important cases are *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (1) and *Domi Lal Sahu* v. *Roshan Dobay* (2). In each of these cases the transaction pleaded as extending the period of limitation was a payment on account of interest. Now on behalf of the appellants strong reliance has been placed on another case of the same Court decided a little before either of the two cases reported above. This is the case of *Surjiram Marwari* v. *Barhamdeo Persad* (3) to be found in Volume 1 of the Calcutta Law Journal Reports at page 337. The question there was of an acknowledgment by the mortgagor as saving limitation against a subsequent mortgagee. The learned Judges who decided that case relied partly on the wording of section 19 of the Indian Limitation Act and partly on an English case, that of *Bolding* v. *Lane* (4). That case was itself discussed shortly afterwards before the House of Lords in a case referred to in the subsequent Calcutta decisions, namely, the case of *Chinnery* v. *Evans* (5). The case of *Bolding* v. *Lane* (4) was not dissented from in *Chinnery* v. *Evans* (5), but it was distinguished against and explained. And it is quite clear that a distinction was drawn between the effect of a payment and the effect of a mere acknowledgment. This point has been very clearly brought out in another decision of the Privy Council, on appeal from the Supreme Court of Canada, in the case of *Lewin* v. *Wilson* (6).

(1) 32 C. 1077; 9 C. W. N. 868.
(2) 33 C. 1278; 11 C. W. N. 107.
(3) 1 C. L. J. 337.
(4) (1863) 1 De G. J. & S. 122; 32 L. J. Ch. 219; 9 Jur. (N. S.) 506; 7 L. T. 812; 11 W. R. 386; 46 E. R. 47; 137 R. R. 174.
(5) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 145 R. R. 79.
(6) (1886) 11 A. C. 639; 55 L. J. P. C. 75; 55 L. T. 410 (P. C.).

The words of Lord Hobhouse at page 645 of that report are worth quoting :—" It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding* v. *Lane* (4), be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment ; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights ; but not so if he only receives acknowledgment. If, therefore, we find that the Legislature has used different language about the two cases we must not readily conclude that it has done so by accident or without meaning it." This is probably the reason why the decision in *Surjiram Marwari* v. *Barhamdeo Persad* (3), although referred to in argument, was not discussed by the learned Chief Justice of the Calcutta High Court when deciding the case of *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (1). He felt that he was dealing with a different section of the Statute, and that a decision based upon section 19 of the Indian Limitation Act, whether correct or not, was not necessarily an authority on a case which turned on the wording of section 20 of the same Act. We have been referred to one or two other decisions substantially to the same effect, but we think that on the authorities and on the wording of section 20 of the Indian Limitation Act the decision of the Court below was clearly right and that this appeal must fail. It may be that the mortgagors dealt unfairly with these appellants on June the 24th, 1913, when they conveyed certain property to the latter without stating that a portion of this property was also subject, along with other property, to a simple mortgage of the year 1891 which was still in force. But it is to be noted that in the sale-deed above referred to in favour of the appellants there is no definite statement on the part of the vendors that the property which they are conveying is subject to no charge other than those specified in the deed itself, still less is there any express covenant of title or of indemnity. The question, however, of the rights and liabilities *inter se* of these appellants and their vendors, the persons impleaded as defendants first party in this suit, is not before us. The question is whether anything which took place between these parties in the year 1913, can affect the rights of the present plaintiffs in respect of their mortgage deed of January the 8th, 1891. If the question is put in this way it seems clear that the answer must be in the negative. The suit as brought is not barred by limitation, time being saved by the payment on account of interest effected by the sale of January the 25th, 1902. This appeal, therefore, fails, and we dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1257 OF 1916.

June 6, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

INDRA NARAIN RAY—PLAINTIFF—APPELLANT

versus

NABIN CHANDRA BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VII B. C. of 1885), ss. 161, 167 —Incumbrance—Mortgagee-purchaser of holding, interest of, whether incumbrance.

The interest of a mortgagee of a part of a holding who has purchased the holding in execution of his mortgage decree is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. Such a mortgagee-purchaser cannot be ejected by the purchaser of the holding in execution of a rent decree until his incumbrance is annulled under the provisions of section 167 of the Bengal Tenancy Act. [p. 848, col. 2.]

Banbihari Kapur v. *Khetra Pal Singh*, 13 Ind. Cas. 785; 38 C. 923; 16 C. W. N. 259, followed.

Appeal against the decree of the District Judge, Birbhum, dated the 9th March 1916, affirming that of the Munsif, Suri, dated the 23rd of January 1915.

THE MUNICIPAL BOARD OF BENARES *v.* GAJADHAR.

FACTS appear from the judgment.

Babu *Bepin Behari Ghose II* (with him Babu *Bankim Chandra Mukherjee*), for the Appellant.—The learned Judge has erred in holding that the sale in execution of the decree for rent was not a rent sale and it did not pass the holding but only the right, title and interest of the judgment-debtor, because the learned Judge thinks that the plaint in the rent suit did not comply with the provisions of section 148A of the Bengal Tenancy Act. If your Lordships be pleased to go through the plaint which is on the record, your Lordships will be satisfied that it did comply with the provisions of section 148A. The plaint, the decree, the sale proclamation show that at the sale the holding did pass.

As regards the question as to whether the defendant as purchaser of a portion of the holding in execution of a mortgage decree was the holder of an incumbrance which has been annulled by a proper notice, I submit that the finding of the Court of Appeal below is clearly wrong. Refers to the definition of 'incumbrance' in section 161 of the Bengal Tenancy Act. See also *Banbihari Kapur* v. *Khetra Pal Singh* (1). *Ashoy Kumar Soor* v. *Bejoy Chand Mohatap* (2). After the property has been sold, it cannot be said that the mortgagee has a lien on the property. I rely on the wording of section 161 of the Bengal Tenancy Act and the observation of Sir Lawrence Jenkins in *Abdul Rahman* v. *Ahmadar Rahman* (3).

Babu *Jyotish Chandra Sarkar*, for the Respondents, not called upon.

JUDGMENT.—This appeal will stand dismissed. Two grounds have been raised before us, and they are these: First of all, it is said that the present suit is a suit for possession of about 4 *bighas* of land, the plaintiff claiming through a purchase in execution of a rent decree. The plaintiff's claim was resisted by certain mortgagee-purchasers, who had a mortgage of this property which is a part of a holding and who had purchased in execution of their mortgage-decree. The foundation of the plaintiff's claim is that he is the purchaser in execution of a rent decree. Otherwise, he would only get the right, title and interest of the judgment-debtor. It is said that the rent suit is a special suit, namely, a suit brought by a co-sharer landlord under section 148A of the Bengal Tenancy Act. But the learned Judge has found that the plaintiff had failed to show that he had brought the case within the provisions of section 148A.

The second point is also equally against the plaintiff. In a case like the present, the defendant has got an incumbrance on the property because for the purpose of the present suit he in entitled, having regard to the decision in *Banbihari Kapur* v. *Khetra Pal Singh* (1), to fall back on his mortgage as a shield against the purchase of the plaintiff. If that be so, he cannot be ejected until his encumbrance is annulled under the provisions of section 167 of the Bengal Tenancy Act. We agree with the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed. The appellant must pay to the respondent his costs in this appeal.

Appeal dismissed.

(1) 13 Ind. Cas. 785; 38 C. 923; 16 C. W. N. 259.
(2) 29 C. 813 at p. 820.
(3) 31 Ind. Cas. 554; 43 C. 558; 19 C. W. N. 1217; 22 C. L. J. 356.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 53 OF 1918.

August 3, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

THE MUNICIPAL BOARD OF BENARES —DEFENDANT—APPELLANT

versus

GAJADHAR—PLAINTIFF—RESPONDENT.

U. P. Municipalities Act (II of 1916), s. 326—Suit against Municipality for declaration of title and injunction—Notice, whether necessary—Suit, maintainability of.

The defendant Municipality served a notice on the plaintiff, on 17th June 1916, requiring him to remove a platform which projected on to a public road. Plaintiff served a notice of action on the Municipality on 14th July 1916, and on the 4th August instituted a suit against the Municipality for a declaration that the platform was his ancestral property, and that the notice issued by the Municipality for the demolition thereof was invalid, and also prayed for an injunction:

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Held, (1) that the suit was in substance one for a declaration of title and was not a suit in which the only relief claimed was an injunction and that, therefore, the exemption contained in clause (4) of section 326 of the U. P. Municipalities Act was not applicable to it; [p. 849, col. 2.]

(2) that the suit having been commenced before the expiry of two months after the service of the notice prescribed by section 326 (1) of the U. P. Municipalities Act was premature and must be dismissed. [p. 849, col. 2.]

First appeal from an order of the Additional Subordinate Judge, Benares.

Mr. *Gokul Prasad*, for the Appellant.

Mr. *Saila Nath Mukerji*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit brought by the plaintiff against the Municipal Board. Later on we shall refer to the relief the plaintiff claimed before and after the amendment of the plaint. The dispute between the parties commenced by an application for leave to build or re-build a *chabutra* and *saiban*. The Municipality refused leave and there were various negotiations between the parties to which it is unnecessary for us to refer, except to say that no final agreement was arrived at between the parties. If a map which is on the record correctly describes the premises, it would appear that the *chabutra* projects on to a public road. All orders made by the Municipality on these applications for leave to build and re-build are subject to appeal as mentioned in the Municipalities Act of 1916 and they cannot be challenged in any other Court. Accordingly if the plaintiff's cause of action has anything to do with the orders which the Municipality made upon the application of the plaintiff he has no cause of action. It has been suggested on behalf of the plaintiff that the structure is very old. Even if this be true, the Municipal Board under section 211 of the Act have power to require the owner to remove the structure if it overhangs, projects or encroaches on a street or into or upon any drain, sewer or aqueduct therein. The present suit seems to have been founded on a notice which the Municipal Board caused to be served requiring the plaintiff to remove the *chabutra*. This notice was served on the 17th of June 1916. Section 326 of the Act provides that no suit shall be instituted against a Board in respect of any act done until after the expiration of two months after the notice prescribed in that section has been served. Now the act of the Municipality which gave rise to the present cause of action was the notice which they caused to be served in June 1916. Admittedly the notice of action served by the plaintiff was on the 14th of July 1916, and the suit was commenced on the 4th of August of the same year, that is, admittedly less than two months after the notice of action had been given. It would seem, therefore, that *prima facie* the plaintiff's suit was premature. As it originally stood it was clearly a suit for a declaration to establish the plaintiff's title to the land, and ancillary thereto an injunction. In order to avoid the consequence of the want of the prescribed notice under the Act, the plaintiff amended his plaint but only in respect of the relief asked for. His amendment is in reality an amendment in language only not in substance; he still asks for a declaration that the platform and the *saiban* is ancestral property of the plaintiff and that the plaintiff and his ancestors have been for a long time in possession and occupation thereof, that the Municipal Board has no right to get the same demolished and that according to law the notice issued by the Municipal Board regarding the demolition thereof is invalid and void, and then he prays that an injunction may be issued. The only exception to the provision requiring notice of action is to be found in clause 4 of section 326, which is as follows:—"Provided that nothing in sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding." Even after the amendment the suit is not a suit in which the *only* relief claimed is an injunction. Furthermore, from the very nature of the suit and the allegations made by the plaintiff and defendant respectively, it is absolutely clear that the object of the suit would not be defeated either by the giving of the notice or the postponement of the commencement of the suit. The real substance of the suit is the title to the land. Even if the Municipal Board had carried out their alleged threat to demolish the building as it stands, it could very easily be restored after the plaint-

iff had established his title. The total value placed upon the *chobutra* is the sum of Rs. 25. We think that the decree of the Court of first instance is correct and should be restored. We allow the appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 20 OF 1917.
May 31, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

ABDUL HAMID SADAGAR—DECREE-HOLDER—APPELLANT

versus

Srimati AKHINA KHATUN, DAUGHTER OF ABDUL RAHAMAN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (w), O. XLVII, r. 7—Review, order granting—Appeal, whether lies.

An order granting a review of judgment, though appealable under the provisions of Order XLIII, rule 1 (*w*), Civil Procedure Code, is subject to the limitations mentioned in Order XLVII, rule 7, of the Code, namely, that there can be an appeal only upon the grounds mentioned in that rule.

Appeal against the order of the Subordinate Judge, 1st Court, Chittagong, dated the 16th of December 1916.

FACTS material to this report are as follows:—

The plaintiff (the present respondent) instituted a suit that a certain Solenamah, dated 22nd August 1911, "be declared as based on false claim, illegal, fraudulent, false, fabricated, invalid, null and void and fit to be set aside." It was objected that the plaintiff not having prayed for any consequential relief, the suit was not maintainable. The Pleader for plaintiff prayed for time to insert the necessary prayer and amend the plaint. But before he could file the petition, the judgment was delivered and the suit dismissed.

An application for review was filed. It was argued that the prayer "for any other relief" included the necessary prayer for

consequential relief. *Gopi Narain Khanna* v. *Babu Bansidhar* (1) was relied upon.

On the ground of "sufficient reason" under Order XLVII, rule 1, the review was allowed.

Against the order granting the application for review this appeal was preferred.

Babus *Mohendra Nath Roy* and *Chandra Sekhar Sen*, for the Appellant.

Babu *Natish Chandra Lahiri* for Babu *Probodh Coomar Das*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant against the decision of the learned Subordinate Judge of the First Court at Chittagong, dated the 16th December 1916. The appeal is preferred against an order of the learned Judge granting a review of judgment. Such order, though appealable under the provisions of Order XLIII, rule 1 (*w*), is subject to the limitations mentioned in Order XLVII, rule 7, namely, that there can be an appeal only upon the grounds mentioned in that rule. It is quite clear that the present case comes within none of the grounds mentioned in Order XLVII, rule 7. That being so, no right of appeal is given to the appellant against the order of the learned Judge granting a review of the judgment. The present appeal fails and must be dismissed with costs.

Appeal dismissed.

(1) 9 C. W. N. 577 (P. C.); 27 A. 325; 2 A. L. J. 336; 2 C. L. J. 173; 7 Bom. L. R. 427; 15 M. L. J. 191; 32 I. A. 123; 8 Sar. P. C. J. 799.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 122 OF 1918.
July 4, 1918.

Present:— Mr. Justice Tudball and Mr. Justice Abdul Raoof.

Mahant DARSHAN DAS—OPPOSITE PARTY—APPELLANT

versus

THE COLLECTOR OF MEERUT AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Trust for religious purposes, mismanagement of—District Judge, power of, to interfere on application of private person—Procedure.

The Civil Procedure Code does not give a District Judge any power to interfere with the management

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of a religious trust unless and until a regular suit is filed in his Court, when it is open to him to exercise all the powers which the Code gives him in order to protect the property He has no power to interfere and to suspend a trustee from his post on the application of a private person who has called attention to the fact that a breach of trust appears to have been committed. The Civil Procedure Code lays down a regular procedure for suits in such cases and until the Court is moved in that way, it has no power of supervision to interfere and to pass orders. [p. 851, col. 2; p. 852, col. 1.]

Civil revision from an order of the District Judge, Meerut, dated the 9th February 1918.

Mr. *A. H. C. Hamilton*, for the Appellant.

Mr. *W. Wallach*, Officiating Government Advocate, and Mr. *H. K. Mukerji*, for the Respondents.

JUDGMENT.—The facts of this case may be briefly stated. One Puran Atal was the manager of a certain *gaddi*. It is an admitted fact that the *gaddi* in question is a trust for religious purposes. Puran Atal was removed from his position as trustee by the order of the District Judge of Meerut on the 7th of May 1909. The present appellant Darshan Das was appointed in his place and certain directions were given to him, among which was one that he should file accounts annually in the month of January. In 1913 two suits were brought against Darshan Das under section 92 of the Code of Civil Procedure both of which failed. In 1916 Puran Atal filed an application before the District Judge calling attention to the fact that Darshan Das had never filed any accounts and making certain allegations against him. The District Judge started an enquiry, in the course of which the Collector of Meerut applied through the Government Pleader asking the Court to make some arrangements for the better management of the *gaddi*. Notice was issued to Darshan Das and efforts were made to bring him into Court. For reasons with which we are not now concerned, he did not appear and the District Judge made an *ex parte* enquiry and finally passed the order of the 9th of February from which the present appeal has been preferred. The order was as follows:—"Mahant Darshan Das is prohibited from having any further dealings with the property of the *gaddi*. Proclamation will be made in the villages belonging to the *gaddi* that Darshan Das is prohibited from receiving rents or revenue acting in any way on behalf of the *gaddi* for the future." Certain gentlemen appeared and they were also appointed as a sort of committee to look after the estate, and the Judge suspended Darshan Das from his post pending the filing of a regular suit under section 92 of the Code of Civil Procedure. We also note that more than five months have passed and no attempt whatsoever has been made to file any such suit or to obtain the sanction which is necessary under section 92 for the filing thereof. A preliminary objection is taken that no appeal is allowed by the Code from the order which was passed. As far as we are able to judge the order has been passed without any jurisdiction whatsoever. The preliminary objection, therefore, has force, namely, that no appeal lies. At the same time we are asked to treat this as an application in revision and we think that in the circumstances of the case we ought to do so. If Puran Atal had shown any activity or energy in obtaining sanction or in bringing a suit under section 92 we might have been prepared to reject this appeal on the ground that no appeal lies and to have refused to treat this as an application in revision, because in all probability the matter would come before the Court at a very early date in a regular suit, but it is to the interest of Puran Atal to delay in bringing such a suit and already a delay of some five months has occurred. We, therefore, think it best that we should take up this matter in revision. As we have pointed out, the order is clearly without jurisdiction. There is no suit under section 92 pending before the District Judge. The Code gives him no powers to interfere in this matter unless and until a regular suit is filed in his Court, when it will be open to him to exercise all the powers as to the appointment of a Receiver, etc., the Code gives him in order to protect the property. We fail to see that he has any powers to interfere, as he has done in this case; and to suspend a trustee from his post on the application of a private person who has called attention to the fact that a breach of trust appears to have been commit,

ted. The Code lays down a regular procedure for suits on such facts as have been brought to the notice of the Court and until the Court is moved in that way, the Judge certainly has no power of supervision to interfere and to pass such an order. We, therefore, set aside in revision the order passed by the Court below suspending Mahant Darshan Das and prohibiting him from having anything to do with the estate. The Court below has also passed an order directing that the fees of the Government Pleader and the Collector's costs should be met from the *gaddi* funds. We can see no justification for such an order. That order will also be set aside. The Collector will have to bear his own costs. We think also that in the circumstances of this case, the other two parties to this matter should also bear their own costs throughout the litigation.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 749 OF 1917.

March 19, 1918.

Present :—Mr. Justice Phillips and Mr. Justice Krishnan.

RANGA PILLAI—PLAINTIFF—APPELLANT

versus

NARASIMMA AYYANGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage—Stipulation to redeem in any Chittirai month at end of 10 years—Covenant, nature and effect of

A mortgage-deed contained a stipulation that the amount due thereunder might be paid "at any cultivation season in the month of Chittirai after the stipulated period of 10 years":

Held, that there was no implied personal covenant to pay at the end of 10 years, which the mortgagee could enforce at once at the expiry of the period.

Second appeal against the decree of the Court of the Subordinate Judge, Madura, in Appeal Suit No. 39 of 1916, preferred against the decree of the Additional District Munsif, Dindigul, in Original Suit No. 48 of 1914.

Mr. *T. V. Muthukrishna Ayyar*, for the Appellant.

Mr. *K. S. Ramabadra Ayyar*, for the Respondents.

JUDGMENT.—It is contended for appellant that the words "at whatever cultivation season in the month of Chittirai in any year after the stipulated period of ten years, I may pay the principal amount, you shall at that time receive the amount" contain an implied covenant to pay at the end of ten years. This stipulation as to payment is one entirely for the benefit of the mortgagor, for it allows him to choose his own time for payment if he wishes to pay. To construe this as a personal covenant to pay at the end of ten years which the mortgagee could enforce at once would be to destroy the whole benefit of the stipulation so far as the mortgagor is concerned. We are not, therefore, prepared to read into the words a covenant which would destroy the whole effect of the express arrangement between the parties. There are no other recitals in the deed to suggest that there was any personal covenant, and, therefore, we agree with the Subordinate Judge's finding that there is none.

As this is the only point argued the second appeal is dismissed with costs.

Appeal dismissed.

M. C. P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1401 OF 1916.

July 19, 1918.

Present :—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

RAMZAN—PLAINTIFF—APPELLANT

versus

BHUKHAL RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 20—Mortgage of occupancy holding, validity of—Redemption, suit for, maintainability of.

Plaintiff purported to make a usufructuary mortgage of an occupancy tenancy, which was illegal

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having regard to the provisions of section 20 of the Agra Tenancy Act. He then brought a suit to redeem the property:

Held, that the suit was maintainable and that the plaintiff was entitled to get back the property on payment of the mortgage money.

Second appeal against the decree of the District Judge, Gorakhpur, reversing that of the Munsif, Deoria.

Mr. *J. N. Misra*, for Mr. *Bhagwati Shanker*, for the Appellant.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—In this case it appears that the plaintiff purported to make a usufructuary mortgage of an occupancy tenancy, which was illegal having regard to the provisions of section 20 of the Agra Tenancy Act. The present suit was instituted by the plaintiff in effect to redeem the property. The Court of first instance decreed the claim. The lower Appellate Court reversed the decree of the Court of first instance and dismissed the plaintiff's suit upon the ground that the mortgage was null and void. It seems to us that this decision is wholly wrong and inequitable. It might be that if the plaintiff came into Court and asked to get back his property without payment of the mortgage money at all on the ground of the illegality of the transaction, that the Court would put him upon terms of paying the mortgage money. Even this view is not universally taken, for one learned Judge at least has held that in such a case the owner of the occupancy tenancy could get back the property without paying the mortgage money. However, in the present case the plaintiff very honestly comes in offering to pay the mortgage money. In our opinion he is clearly entitled to get possession on so doing. We allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance, with this modification that we decree the plaintiff's costs in all Courts and that we decree that the time for payment be extended for six months from this date.

Appeal allowed; Decree modified.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2074 AND 2858 OF 1915.

March 7, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

SHYAMADAS ROY CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

IN No. 2074 OF 1915

RADHIKA PROSAD CHATTERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 2858 OF 1915

Srimati PANCH KAURI DEBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 6 (a), 38—Hindu Law—Reversioner, interest of, whether transferable—Widow, relinquishment of estate by, validity of—Alienation by widow, validity of—Legal necessity—Consent of reversioner, value of—Bona fide *transferee, position of—Joint heiresses, position and rights of—Separate possession and enjoyment of inheritance, effect of.*

A reversionary heir has a mere *spes successionis* which he cannot validly transfer. [p. 854, col. 1.]

If two widows or two daughters taking jointly the estate of their deceased husband or father make an arrangement for separate possession and enjoyment, the arrangement will not ordinarily deprive the survivor of her right to the whole estate or enable the ladies to confer a title on a third party which will not terminate at the latest with the life of that survivor. [p. 854, cols. 1 & 2.]

There can be no relinquishment by a Hindu female heiress of anything less than the entire estate. [p. 854, col. 2.]

The case-law of Bengal recognizes not merely the relinquishment by the widow of her husband's entire estate but the sale of the entirety to the next reversioner or with his consent to a third party. [p. 854, col. 2.]

A partial alienation of her husband's estate by a Hindu widow, even with the consent of the next reversioner, is not valid unless made for legal necessity. The consent of the next reversioner is merely strong presumptive evidence of necessity, but the presumption is not conclusive. [p. 855, col. 1.]

The propriety of an alienation with the consent of the next reversioner may come in question not only with reference to the conduct of the widow, whether or not she was justified by necessity, but also with reference to the conduct of the next reversioner, whether or not his conduct was honest. If in the absence of legal necessity he engineered the transaction to suit his own ends and for his own immediate gain, his consent would lose all its virtue. The transaction would stand no higher than a partial alienation in his favour, and would have to be judged from that standpoint. Nevertheless whatever might be said of the conduct of the widow or the next reversioner, the transferee, if he made due enquiry and acted *bona fide*, would acquire a good

title. Nor would the antecedent mismanagement of the estate affect him unless he was in some way a contributory party thereto. [p. 856, cols. 1 & 2.]

Appeals against the decrees of the District Judge, Burdwan, dated the 23rd of July 1915, reversing those of the Subordinate Judge, 2nd Court of that District, dated the 29th January 1914

Sir *Rash Behary Ghose*, Babus *Bepin Behary Ghose II* and *Jyotish Chander Sarkar* for Babu *Surendra K. Bose*, for the Appellants.

Babus *Dwarka Nath Chakrabarty*, *Bankim Chandra Mukherjee* and *Nakuleswar Mukerjee* for Babu *Kalidas Sarkar*, for the Respondents.

JUDGMENT.

No. 2074 OF 1915.

RICHARDSON, J.—Parbati Charan Roy Choudhuri died many years ago leaving him surviving a widow Mangala Debi, and two daughters Lakshmimani and Saraswati. His estate devolved first on his widow and on her death in 1849 on his two daughters jointly. Saraswati died in 1856 leaving a son Paresh, who died in 1873. The plaintiffs, the appellants before us, claim the property in dispute as the reversionary heirs of Parbati Charan when the succession opened on the death of Lakshmimani in June 1899. The defendants on the other hand set up a title under a conveyance executed by Paresh in their favour on the 11th December 1872. Now at that date Paresh was the reversionary heir of Parbati Charan expectant on the death of Lakshmimani. As such he had a mere *spes successionis* which he could not validly transfer. That was the view taken by the learned Subordinate Judge in the trial Court by whom the plaintiffs' suit was decreed. In the lower Appellate Court, however, the learned District Judge appears to have found that by some arrangement between Lakshmimani and Saraswati each was in enjoyment of a moiety of Parbati Charan's estate and that on the death of Saraswati her moiety came into the possession of Paresh, who with the consent and sanction of Lakshmimani dealt with it as his own. It is not disputed that if two widows or two daughters taking jointly the estate of their deceased husband or father make an arrangement for separate possession and enjoyment, the arrangement will not ordinarily deprive the survivor of the right to the whole estate or enable the ladies to confer a title on a third party which will not terminate at the latest with the life of that survivor [*Dharam Chand Lal* v. *Bhawani Misrain* (1), *Dol Koer* v. *Panbas Koer* (2) and *Chittar Kuar* v. *Goura Kuar* (3)]. But it is strenuously argued that the District Judge's finding amounts to this that Lakshmimani, by allowing Paresh to retain possession of Saraswati's moiety after her death, relinquished that moiety in favour of Paresh, who thus acquired an absolute title under and by virtue of the doctrine of acceleration. On the face of it the decision of the Full Bench in *Debi Prosad Chowdhry* v. *Golap Bhagat* (4) completely disposes of that contention, because according to that decision there can be no relinquishment of anything less than the entire estate.

It is argued, however, that the judgments of the learned Judges, and especially the propositions on which the late Chief Justice and Mookerjee, J., summed up their views, went beyond the actual point to be decided and are not entitled to the binding force which attaches to judicial precedents. I am not prepared to assent to that. In that case a widow had transferred by way of mortgage, with the consent of the next reversioner, a portion of the entire estate left by her husband. The case turned on the effect of such a transfer. It is said that the question might have been decided on the narrow ground that a transfer of a particular property, part of the entire estate by way of mortgage, is not a transfer of the whole estate even in that part, because the widow retains what is commonly known as the equity of redemption. But it is obvious that the case as put by Sir Rash Behary Ghose in argument for the respondent claiming under the transfer had a wider aspect and that the limited answer suggested would not have been a complete or sufficient answer.

The case law of Bengal recognises not merely the relinquishment by the widow of her husband's entire estate but the sale of the entirety to the next reversioner or with his consent to a third party [*Nobokishore*

(1) 24 I. A. 182; 25 C. 189; 1 C. W. N. 697; 7 Sar. P. C. J. 249; 1 Ind. Dec. (N. S.) 128 (P. C.).
(2) 8 C. W. N. 158.
(3) 18 Ind. Cas. 830; 34 A. 189; 9 A. L. J. 105.
(4) 19 Ind. Cas. 273; 40 C. 721 at pp. 738; 742; 17 C. W. N. 701; 17 C. L. J. 499.

Sarma Roy v. *Hari Nath Sarma Roy* (5)]. It was the recognition of such a transaction which caused the difficulty. Did the result depend on the consent of the reversioner or on the doctrine of relinquishment and what were the legal consequences ?

Sir Rash Behari Ghose contended for the broad generalization that, apart from any question of relinquishment, the widow and the next reversioner possessed between them a complete power of disposal over the whole or any part of the husband's estate. The Full Bench had to deal with that contention and they rejected it.

The power of the widow to sell the entire inheritance to the next reversioner or with his consent, was traced to a lax application of the doctrine of relinquishment and acceleration. It could only be supported, if at all, on the basis of a sort of fictitious relinquishment. But the fictitious relinquishment still resembled the true relinquishment in this that it must be a relinquishment of the entirety of the husband's estate.

It followed that *Nobokishore Sarma Roy's case* (5) was no authority for the validity of a partial alienation of the husband's estate, even with the consent of the next reversioner. It was held that a partial transfer, whether by way of sale or mortgage, had nothing to do with relinquishment. The term had no meaning in such a connection and so much had really been conceded by Sir Rash Behari Ghose himself [*Debi Prosad Chowdhry* v. *Golap Bhagat* (4)]. A partial transfer was a transfer and nothing more and could only be supported by necessity. The consent of the next reversioner was merely strong presumptive evidence of necessity [*Kalee Mohun Deb Roy* v. *Dhununjoy Shaha* (6), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7), *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (8)].

That, as I understand it, was the decision of the Full Bench on the case presented for their consideration and we are bound to follow and apply it.

In arriving at the decision the majority of the learned Judges expressly relied on the language of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* (9). The relevant passages in the judgments of Sir Lawrence Jenkins, C. J., Stephen, J., and Mookerjee, J., will be found at pages 750, 765* and 780* of the report. Harington, J., expressed a somewhat different view on the point (page 756*), but arrived at the same conclusion as the other members of the Bench as to the principle applicable to partial alienations (page 759*). Holmwood, J., concurred generally with the Chief Justice.

It is idle, therefore, for the learned Pleader for the respondents in the present case to rely upon the two subsequent cases which purport to follow *Nobokishore Sarma Roy's case* (5), namely, *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (10) and *Pulin Chandra Mandal* v. *Bolai Mandal* (11). These two cases were fully considered in *Debi Prosad's case* (4), where Sir Lawrence Jenkins, C. J., and Mookerjee, J., pointed out that the results arrived at were in part due to a misapprehension of the effect of *Nobokishore Sarma Roy's case* (5).

A few days after *Debi Prosad Chowdhry's case* (4) was decided, judgment was delivered by a Bench presided over by Mookerjee, J., in *Gopeswar Misra* v. *Gopini Baishnabi* (12). It was held that *Debi Prosad's case* (4) had settled the law relating to partial alienations and that *Pulin Chandra Mandal's case* (11) had been overruled. Apart from anything else we are bound by that view of the effect of the decision of the Full Bench.

In the present case, the result is plain. On Saraswati's death, Lakshmimani, apart from any arrangement which might be binding on her for her life-time, became entitled as the survivor to the entire estate. If she chose to leave half the estate in the hands of Paresh, that was not a relinquishment. Paresh, though he was the next rever-

(5) 10 C. 1102; 5 Ind. Dec. (N. S.) 737.
(6) 6 W. R. 51.
(7) 13 M. I. A. 209; 12 W. R. P. C. 47; 3 B. L. R. P. C. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R. 529.
(8) 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 19 C. L. J. 620; 27 M. L. J. 123; 16 M. L. T. 68; (1914) M. W. N. 430; 1 L. W. 533; 16 Bom. L. R. 425; 12 A. L. J. 711 (P. C.).
(9) 19 I. A. 30; 19 C. 236; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603.
(10) 22 C. 454; 1 Ind. Dec. (N. S.) 238.
(11) 35 C. 939; 12 C. W. N. 837; 8 C. L. J. 280.
(12) 21 Ind. Cas. 200; 17 C. W. N. 1062; 19 C. L. J. 318.

* Pages of 40 C.—*Ed.*

sioner, did not acquire an absolute title by acceleration and no alienation made by him could enure for a period longer than Lakshmimani's life.

In my opinion the judgment and decree of the District Judge in the suit out of which Appeal No. 2074 arises should be discharged and the decree of the Subordinate Judge decreeing the suit restored. The plaintiffs are entitled to their costs in this Court and the Court below from the defendants.

No. 2858 of 1915.

In the suit out of which Appeal No. 2858 arises the plaintiffs claim under a conveyance, dated the 14th November 1872, executed not only by Lakshmimani but by Paresh the then next reversioner. No doubt the fact that Paresh joined in the conveyance is strong presumptive evidence of necessity but the presumption is not conclusive. The trial Court held on a careful consideration of the evidence and the circumstances that it had been rebutted. The learned District Judge came to a different conclusion, but the reasons assigned by him in his judgment are unsatisfactory. He seems to be of opinion that the Privy Council in *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (13), "held that the consent of the reversioners will make the sale valid." It is hardly necessary to say that that is not the effect of the decision.

The propriety of an alienation with the consent of the next reversioner may come in question not only with reference to the conduct of the widow, whether or not she was justified by necessity, but also with reference to the conduct of the next reversioner, whether or not his conduct was honest. If in the absence of legal necessity he engineered the transaction to suit his own ends and for his own immediate gain, his consent would lose all its virtue. The transaction would stand no higher than a partial alienation in his favour and would have to be judged from that standpoint. Nevertheless whatever might be said of the conduct of the widow or the next reversioner, the transferee if he made due enquiry and acted *bona fide* would still be entitled to the benefit of the equitable rule laid down by the Privy Council in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (14) and now enacted in section 38 of the Transfer of Property Act. Nor would the antecedent mismanagement of the estate affect him unless he was in some way a contributory party thereto (Mayne's Hindu Law, section 636).

In the present case the Appellate Court has not correctly stated the law applicable. As to the facts, the express findings of the Subordinate Judge are not categorically displaced and the conclusions—so far as any definite conclusions are stated—seem to be based rather on *a priori* considerations than on an examination of the evidence.

If the case must, as I think, be remanded, it is undesirable to say more, except perhaps this that the question of necessity, as it arises here, must be considered with reference to the estate as a whole, not solely with reference to that portion of it which was in the actual possession of Lakshmimani or solely with reference to that portion which was in the possession of Paresh.

The appeal should, in my opinion, succeed to this extent that the decree of the Court below should be discharged and the case remitted to that Court in order that the appeal thereto may be re-heard.

WALMSLEY, J.—I agree.

Appeals allowed.

(13) 27 Ind. Cas. 674; 42 I. A. 64; 42 C. 876; 28 M. L. J. 565; 19 C. W. N. 370; 17 M. L. T. 115; (1915) M. W. N. 511; 13 A. L. J. 223; 21 C. L. J. 225; 17 Bom. L. R. 426; 2 L. W. 219 (P. C.).

(14) 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253*n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C J. 552; 19 E. R. 147.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1066 OF 1916.

June 4, 1918.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Ryves.

RATAN MOTI—PLAINTIFF—APPELLANT

versus

TILAK CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaration, suit for, maintainability of—Property in possession of third person—Further relief, whether can be asked.

RATAN MOTI *v.* TILAK CHAND.

Where on the death of a person several persons claim to be his heirs, and the property in dispute is in possession of a tenant who refuses to pay rent to either party until one party or the other establishes his title to the property, the possession of the tenant must be deemed to be on behalf of the rightful owner, and each of the claimants is entitled to bring a suit for a declaration of his title without suing for possession of the property in dispute. [p. 857, col. 2.]

Second appeal from a decree of the Additional Judge, Meerut.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Nihal Chand*, for the Appellant.

Mr. *S. A. Haidar* and Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This and the connected Appeal No. 1065 of 1916 arise out of a suit brought by *Musammat* Ratan Moti for a declaration that a sale-deed executed by Jagan Lal, defendant No. 3, in favour of Tilak Chand and Hushiar Singh, defendants Nos. 1 and 2, on the 14th of February 1911 is null and void as against her interest. The sale-deed relates to a shop which admittedly belonged originally to one Chunni Lal. Chunni Lal had a son Kunwar Sen, whose widow was *Musammat* Badamo. It is alleged by one party and denied by the other that Kunwar Sen predeceased his father, but the fact is admitted that after Kunwar Sen's death *Musammat* Badamo was in possession. It is alleged on behalf of the plaintiff that the affairs of *Musammat* Badamo were managed by her son-in-law, Fakir Chand. In 1881 *Musammat* Badamo made a gift in favour of Roshan Lal, the son of Fakir Chand by Badamo's daughter. Fakir Chand had another wife by whom he had another son, Mahabir defendant No. 5. Roshan Lal died in 1900 leaving his widow *Musammat* Parsandi defendant N. 4. On the 22nd of June 191), Parsandi made a gift in favour of the plaintiff. By virtue of this gift the plaintiff claims to be the owner of the property and she alleges that Jagan Lal had no right to sell it to Tilak Chand and Hoshiar Singh. The defendant Mahabir claims the ownership of the property by reason of his being the son of Fakir Chand who, he says, became entitled to it under the gift made in favour of Roshan Lal. Mahabir has, therefore, been arrayed as a defendant. The Court of first instance made a decree in the plaintiff's favour but the lower Appellate Court has reversed it without trying the suit on the merits but only on the ground that the plaintiff was entitled to further relief, that she ought to have claimed possession of the property and that as she had not done so section 42 of the Specific Relief Act barred the claim. The lower Appellate Court holds that the shop being in the possession of one Moti Lal who executed a rent agreement in 1906 in favour of Fakir Chand, the plaintiff must be deemed to be out of possession, and it must be held that Fakir Chand was in possession and after his death Mahabir Prasad (his son) is in possession.

The plaintiff has preferred this appeal and it is contended on her behalf that having regard to the circumstances of the case the only relief that she could have claimed was a declaratory decree. In our opinion this contention is well-founded. It has been found by the lower Appellate Court that a rent agreement was executed in favour of Fakir Chand; but it has also found that Moti Lal paid rent to *Musammat* Badamo so long as she lived and that after Badamo's death Moti Lal refused to pay rent to either party until one party or the other established his or her title to the property. This being the state of things, Moti Lal's possession cannot be said to be the possession of the defendant Mahabir. It is true that as between a landlord and his tenant the latter is estopped from denying the title of the former. But there is no question in the present case as between landlord and tenant. Therefore the numerous rulings which have been cited on behalf of the respondents do not seem to us to have any bearing on this case. Moti Lal having refused to pay rent to any one his possession can only be deemed to be possession on behalf of the rightful owner and, therefore, the Court in this case instead of dismissing the suit on a preliminary ground should have tried the question of title and determined whether title was in the plaintiff, or in Mahabir, or in the defendants Nos. 1–3. As no question of title has been tried it cannot be said that the possession of Moti Lal is the possession of Mahabir. The plaintiff could not

frame the present suit as a suit for possession inasmuch as the person in possession, namely, Moti Lal, has not denied her right and she has consequently no cause of action against him. Under these circumstances we are of opinion that the decree of the Court below is incorrect and must be set aside. We accordingly allow the appeal, discharge the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit it under its original number in the register and to try it on the merits bearing in mind the observations made above. Costs here and hitherto will be costs in the cause.

Appeal decreed; Cause remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1904 OF 1916.

January 22, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Aiyar.

THE MADURA, ETC., DAVASTANAM THROUGH ITS MANAGER P. S. ANANTHANARAYANA AYYAR OF MADURA—PLAINTIFF—APPELLANT

versus

CHENA KONDAMA NAICKEN—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss 46, 189—Jurisdiction of Civil and Revenue Courts in suits for rent—Execution of instrument by Collector conferring occupancy right on person not 'non-occupancy ryot, effect of.

Where there is no dispute about the rate of rent under the proviso to section 46 of the Madras Estates Land Act, there is nothing in section 189 or in the Schedule to the Act to oust the jurisdiction of the Civil Court or confer jurisdiction on the Collector as a Revenue Court [p 861, col. 1.]

Where the Collector acting under section 46 (3) of the Madras Estates Act executes an instrument conferring occupancy right on a person who is not a 'non-occupancy *ryot*,' he acts *ultra vires* and the jurisdiction of the Civil Court is not ousted. [p. 861, col 2.]

Second appeal against the decree of the District Judge, Madura, in Appeal Suit No. 404 of 1915, preferred against the decree of the District Munsif, Tirumangalam, in Original Suit No. 295 of 1915.

FACTS.—A suit was filed in the Court of the District Munsif of Tirumangalam to declare that the decision of the Sub-Collector of Dindigul in Miscellaneous Case No. 1 of 1914, dated 8th May 1915, was void and invalid and not binding on the plaintiff and that it did not confer any right on the defendant, and to recover Rs. 48-11-0 as damages.

The plaint allegations were these. The land in question was old waste land belonging to the plaintiff. In Faslies 1321 and 1322 defendant cultivated and enjoyed it unlawfully without taking the plaintiff's permission. Plaintiff gave 'Angami' Pattas to the defendant for the said Faslies, charging him with Rs. 14-13-6 for Fasli 1321 and Rs. 23-2-0 for Fasli 1322 for rent and damages for unauthorized cultivation. Defendant received those Pattas but refused to pay more than Rs. 11-12-5 per Fasli. Defendant had no right to the land. In Fasli 1323 defendant demanded the plaintiff to give him a permanent Patta but the latter refused to do so. He then applied to the Sub-Collector of Dindigul on the 29th August 1914 for a permanent Patta alleging some payment of *kist* to the Village Munsif for rent of Fasli 1313. The land had prior thereto been sold by the plaintiff in auction and it had been purchased by one Rangaswami Konan. Plaintiff contested the above application put in by the defendant to the Sub-Collector, on the ground that the defendant had no right to maintain it and the Summary Court had no jurisdiction to try it, but the Sub-Collector overruled these objections and decided the application in favour of the defendant on the 8th May 1915. An appeal against that decision made by the plaintiff was pending with the District Collector. "For the above reasons, the decision of the Sub-Collector is opposed to law and invalid and will not bind the plaintiff." Besides, under section 46 of the Estates Land Act, the Sub-Collector can only issue a Patta to the defendant and cannot make any decision. It did not appear that a Patta was issued to the defendant by the Sub-Collector. Yet as the defendant relied on the above decision, the suit was brought to declare that it was void and invalid and to recover the damages due to plaintiff for Faslies 1321-22.

The defendant stated as follows:—The plaint mentioned lands were not old

waste. Item No. 1 thereof was land belonging to the defendant for which the plaintiff had granted a permanent Patta. Item No. 2 was *ryoti* land, for which among others he put in a Darkhast to the plaintiff in December 1910 and obtained a Patta. Subsequently the plaintiff wanted to treat the said land as defendant's temporary occupation and refused to grant him a proper Patta. He, therefore, applied to the Sub-Collector of Dindigul under section 46 of the Madras Estates Land Act for grant of a proper Patta by Miscellaneous Application No. 1 of 1914, and the Sub-Collector decided it in his favour overruling the plaintiff's objection. No "Angami" Patta is recognised under the Estates Land Act. The defendant is not aware of the auction-sale referred to in the plaint or the alleged purchase by Rangaswami Kone. They are, even if true, invalid and of no effect as against the defendant. Rangaswami Kone never took possession of the plaint mentioned lands. This Court has no jurisdiction to try this suit. It cannot set aside an order of the Revenue Court made on a matter which was exclusively triable by it. The suit is *res judicata* by the decision of the Sub-Collector of Dindigul. The mesne profits claimed are excessive. The suit is barred by limitation and should be dismissed with costs.

The District Munsif dismissed the suit by the following judgment:—

"Miscellaneous Application No. 1 of 1914 on the file of the Court of the Sub-Collector of Dindigul was put in by this defendant under section 46 of the Madras Estates Land Act. Clause 2 of that section entitles a non-occupancy *ryot* of old waste, whose application for a grant of a permanent right of occupancy under the preceding clause is not accepted by the land-holder, to make the necessary deposit in the Collector's Office and apply to the Collector to confer on him such permanent right of occupancy, and the following clause empowers the Collector to comply with such application after giving notice to the land-holder and hearing him, if he appears, and making such enquiry as he thinks necessary.

The Sub-Collector duly issued notice of the above mentioned application to the present plaintiff, the landlord, who appeared and contested it and after making such enquiry as he thought necessary, he gave judgment to the applicant, the present defendant, with costs.

Now, it cannot be, and was not, contended that the Sub Collector had no jurisdiction to entertain or dispose of an application filed under clause 2 of section 46. What is stated by the plaintiff is that the defendant was not a "non-occupancy *ryot*" within the meaning of the said section but a mere trespasser, and the Sub-Collector ought not, therefore, to have applied that section in his favour or given judgment for him. This is the simple ground on which this Court is asked to declare that the Sub-Collector's decision is void and invalid.

The point above mentioned as to whether this defendant was a non-occupancy *ryot* or a mere trespasser was raised before the Sub-Collector in the above-mentioned application and decided by him in favour of this defendant before he proceeded to give judgment in his favour. That decision may be right or may be wrong. Assuming for the sake of argument, that it is wrong, the plaintiff may appeal against it (as admittedly he has done), but he cannot, it seems to me, maintain a separate suit to declare the judgment void and invalid. Even apart from any special provision of the Estates Land Act, it appears to be an elementary principle of law that a decision made in one proceeding cannot be declared void by a separate and independent proceeding on the simple ground that that decision is not correct (assuming the decision is not correct). A suit or proceeding may lie to declare the decision made in another suit or proceeding void, if it had been obtained by fraud or there was total absence of jurisdiction, or under an express provision of Statute as in cases of summary orders on claim petitions and the like, but no such considerations exist in the present case.

It also appears to me that the suit is barred by section 189 of the Estates Land Act, clause 3 of which provides that the decision of a Revenue Court in any suit or proceeding under the Act falling within the exclusive jurisdiction of that Court shall be binding on the parties thereto and persons claiming under them, in any suit

MADURA DEVASTANAM *v.* CHENA KONDAMA NAICKEN.

or proceeding in a Civil Court, in which such matter may be in issue between them. The application contemplated by clause 2, section 46, is within the exclusive jurisdiction of the Revenue Court and the decision therein that this defendant was a non-occupancy *ryot* and entitled to get a permanent right of occupancy is, therefore, binding on the plaintiff, who was a party thereto. And on this footing the plaintiff has no case in this Court.

For the above reasons I hold that this suit is not maintainable and dismiss the same with costs."

On appeal, the District Judge confirmed the Munsif's decree in the following judgment:—

"Plaintiff sued to declare that the decision of the Sub-Collector of Dindigul in Miscellaneous Case No. 1 of 1914 is void and invalid and not binding on plaintiff and does not confer any right on the defendant and to recover Rs. 48-11-0 damages.

The lower Court has held that it had no jurisdiction to try the suit.

The land in dispute is an old waste, and under section 46 of the Estates Land Act defendant applied to the Revenue Officer to confer on him a permanent right of occupancy therein. The Sub-Collector acting under section 46 (3) gave notice to the land-holder and after hearing him and making an enquiry conferred a permanent right of occupancy upon the defendant.

It is sought in this suit in the Civil Court to declare that that order is invalid on the ground that the Revenue Court had no right to maintain the application, as the defendant was not a non-occupancy *ryot*. Also that the order under section 46 (3) of the Collector conferring a permanent right of occupancy is not a judicial order, but an executive order and that, therefore, a civil suit will lie to establish that it is not binding on plaintiff.

There would be something in this argument if the wording of section 46 (3) were not as clear as it is, that notice is to be given to the land-holder and after hearing him and making such enquiry as is necessary, the Collector is to execute the instrument required. It is clear from this that the act is not a purely official one, but is an enquiry in which both sides are to be heard and a decision is to be arrived at, or in other words, the Collector is to constitute himself into a Revenue Court for the purpose of the section.

It is true that the order so passed has no appeal provided, but there is a right of revision to the District Collector still. The order of the Sub-Collector is a 'decision' and, therefore, it cannot be questioned by a Civil Court.

It is argued that section 189 shows that, as section 46 (3) is not within part A or B of the Schedule, it is a matter which is not taken from the jurisdiction of the Civil Courts.

But the wording of the section is very wide. 'Of the nature specified' is intended to include all suits and applications (this is an application) which in substance amount to proceedings of the character enumerated in the schedule [*Samiasi Kavundan* v. *Akkulammal* (1)].

It is to be noted that section 46, the proviso, is included in the A Schedule and section 46 (2) is a corollary of the proviso and, therefore, in substance amounts to proceedings of the character enumerated in the schedule.

I think it is well established law that suits do not lie in Civil Courts to obtain declarations that the decisions of Revenue Courts do not bind the plaintiff, provided the matter adjudicated upon falls within their exclusive jurisdiction even though such matter is not specified in the schedule, for it would amount to the Civil Court deciding matters which have been taken from them by Statute, *Thiruvengadam Pillai* v. *Ramanujulu Naidu* (2) and *Uman Shanker* v. *Bhagwan Din* (3).

In this case the Collector under section 46(3) had to decide whether the applicant before him (defendant here) had a right to a permanent Patta and had, in order to decide that, to decide whether he was or was not a non occupancy tenant. The Collector after his enquiry decided that he was a non occupancy tenant and therefore gave Patta.

This is a matter that the Collector has to decide in order to decide on giving or withholding the Patta and, therefore, it is

(1) 9 Ind. Cas. 278; (1911) 2 M. W. N. 339; 9 M. L. T. 282.

(2) 7 Ind Cas. 874; 8 M. L. T. 380; (1910) M. W. N. 512.

(3) 8 Ind. Cas. 568; 7 A. L. J. 1064.

a matter which once he has decided, the Civil Court cannot again decide as it would have to do for the purposes of this declaratory suit. The finding of the Revenue Court is binding on the Civil Court, and as the Revenue Court has found the defendant to be a non-occupancy tenant entitled to a permanent Patta, the Civil Court cannot re-open the question—it is *res judicata*.

I consider the lower Court was correct in finding that the suit was not maintainable in a Civil Court.

This appeal, therefore, fails, and is dismissed with costs."

The plaintiff preferred a second appeal to the High Court.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *L. A. Govindaraghava Aiyar* and *K. N. Kumaraswami Aiyar*, for the Respondent.

JUDGMENT.—Under section 189 (1) of the Madras Estates Land Act, jurisdiction is conferred upon the Collector to hear and determine, as a Revenue Court, the suits and applications specified in parts A and B of the Schedule to the Act, and there is a corresponding provision depriving the Civil Courts of jurisdiction in such matters. As regards section 46, part B of the Schedule confers upon the Collector jurisdiction to dispose, as Revenue Court, of applications for settlement of rent of land for the purpose of section 46 under the proviso to that section, and makes orders passed under that section appealable to the Court of the District Collector, if there is no dispute about the rate of rent under the proviso to section 46 (1), there is nothing in section 189 or in the Schedule to oust the jurisdiction of the Civil Court or confer jurisdiction on the Collector as a Revenue Court; and even if there is such a dispute, jurisdiction is only conferred with respect to it.

Under section 46 (3) the Collector may execute an instrument conferring a permanent right of occupancy upon the tenant, and the execution is to have the same effect as execution by the land-holder. The right to apply for a permanent right of occupancy is only conferred by the section on "a non-occupancy *ryot*", and the power conferred upon the Collector to execute an instrument conferring it is subject to the same limitation. If the Collector purporting to act under the section executes an instrument conferring occupancy right on a person who is not "a non-occupancy *ryot*", he is acting *ultra vires*; and, as the matter is one which he is not authorised to dispose of as a Revenue Court under section 189 read with the Schedule to the Act, the jurisdiction of the Civil Court is not ousted. The appeal must be allowed, the decrees reversed and the suit remanded for disposal according to law. Costs hitherto will abide.

Appeal allowed.

M. C. P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1925 OF 1916.

August 7, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUHAMMAD HUSAIN KHAN—PLAINTIFF—APPELLANT

versus

HANUMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 91—Agra Tenancy Act (II of 1901), s. 10—Mortgage of sir plots—Sale of proprietary rights by mortgagor—Mortgagor, whether can redeem.

Plaintiff executed a usufructuary mortgage of certain *sir* plots. Subsequently his proprietary rights in the land were sold and were purchased by the defendants, who later on also purchased the mortgagee rights in the *sir* plots. Plaintiff brought a suit to redeem the usufructuary mortgage executed by him:

Held, that as soon as the plaintiff's proprietary rights were sold he became an ex-proprietary tenant of the *sir* plots under section 10 of the Agra Tenancy Act, and that as the mortgage stood between him and his right to occupy the land as an ex-proprietary tenant, he was a person who had an interest in the property within the meaning of section 91 of the Transfer of Property Act and was, therefore, entitled to redeem it. [*p.* 862, col. 1.]

Second appeal from a decree of the District Judge, Gorakhpur.

Mr. *Kamalakanta Varma*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit for redemption. The facts may

be very shortly stated for the purpose of explaining the question which we have to decide.

In the years 1898 and 1899 two usufructuary mortgages were made. The property mortgaged was *sir* plots. Later on, after the year 1902, the mortgagor's proprietary rights were sold and purchased by the defendants or some of them or the predecessors of some of them. Subsequently the defendants (or some of them) purchased the mortgagee rights. It is unnecessary to discuss which of the defendants purchased which of the mortgagee rights. Then the present suit was instituted to redeem the mortgage of 1898. The Court of first instance decreed the claim. The lower Appellate Court reversed the decree of the Court of first instance and dismissed the suit. On the case coming before a single Judge of this Court it was referred to a larger Bench.

The argument in favour of the defendants is that the plaintiff having lost his proprietary right has ceased to have any interest in the property and he cannot, therefore, redeem. It is said that what he mortgaged was his proprietary right in the *sir* plot. When the proprietary right was sold the right to redeem the mortgage (if any) was transferred to the vendee of the proprietary right. This is the argument. I consider that the contention is not well founded. As soon as the proprietary rights of the mortgagor were sold, he became entitled to the rights which the Tenancy Act gives to an ex-proprietor in respect of his *sir* land, that is, the right to occupy the *sir* land at a preferential rent so long as that rent is paid and the statutory conditions fulfilled. The mortgage of 1898 stood between the mortgagor and his right to occupy the *sir* land as an ex-proprietary tenant and in my opinion he was a person who had an interest in the property within the meaning of section 91 of the Transfer of Property Act. In my opinion if the mortgagor, or his representative, of the mortgage of 1898 had gone to the original usufructuary mortgagee, and if that usufructuary mortgagee had never parted with his mortgagee rights, the mortgagee would have no answer to the claim for redemption upon payment of the mortgage money. If the original mortgagee would have had no defence to such a suit I cannot see that the purchaser of mortgagee rights, even if he has also acquired the proprietary rights, has any answer to a suit for redemption. I would allow the appeal and restore the decree of the Court of first instance.

TUDBALL, J.—I fully agree. When the appellant's proprietary rights were sold the law reserved to the ex-proprietor one out of his bundle of rights, so that he certainly still retains an interest in the property mortgaged sufficient in my opinion to enable him to redeem

BY THE COURT.—We allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment to three months from this date.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 397 OF 1918.

April 2, 1918

Present:- Mr. Justice Oldfield.

MALRAJU LAKSHIMI VENKAYAMMA RAO GARU – DEFENDANT No. 3—PETITIONER

versus

MEKA VENKATARAMIAH APPA RAO BAHADUR GARU AND OTHERS—PLAINTIFFS NOS. 2 AND 3 AND DEFENDANTS NOS. 2 AND 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35 (2), O. XXIII—Costs—Remand by Appellate Court—'Costs to abide and follow result,' meaning of—Withdrawal of suit—Order of trial Court silent as to costs in Appellate Court—Discretion of Court.

An order of remaud by an Appellate Court contained a direction that costs before it should abide and follow the result:

Held, that the meaning of the direction was that such costs should be paid to the party in whose favour the litigation might end, and where the suit is withdrawn, effect should be given to the consequences of such withdrawal mentioned in Order XXIII, Civil

Procedure Code. The trial Court has no discretion to refuse such costs.

The word 'event' means nothing but the outcome or result of the proceedings and includes the description applicable to the withdrawal of a suit and its consequences with reference to Order XXIII, Civil Procedure Code.

Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Subordinate Judge of Kistna at Ellore, dated the 16th December 1916, in Original Suit No. 10 of 1905 (Original Suit No. 21 of 1903 on the file of the District Court, Godavari).

Mr. *P. Nagabhushanam*, for the Petitioner.

Dr. *Swaminadhan* and Mr. *Chenchiah*, for the Respondents.

JUDGMENT.—The question raised relates to an award of costs. As regards the Rs. 100 awarded, as I read the order, for costs incurred before it, the lower Court seems to have exercised its discretion and it is not shown to have done so in any respect unjudicially. With such an exercise it is not open to me to interfere in revision.

There is, however, in the order no reference to the costs incurred by 3rd defendant in this Court or to the fact that the order of this Court, remanding the case, directed that costs before it should abide and follow the result. It is urged on the one hand that the lower Court had no choice but to give effect to this order; on the other that (1) it has used its discretion to refrain from doing so; (2) there was nothing in this Court's order by which that discretion was taken away. Reference to the lower Court's order shows that it did not mention expressly or impliedly costs in this Court and that, to judge by its tenor, only costs before itself were in its mind. This Court's decree is in a usual form and there is no reason in the present case for refusing its ordinary effect to the wording or for holding that the learned Judges concerned did not mean costs before them to be paid to the party or parties, in whose favour the litigation might end. It is said that when a litigation ends, as this has done, in the withdrawal of the plaintiff's claim, there is no 'event' which costs can abide and follow. But the authorities relied on in *Myers* v. *Defries* (1), *Myers* v. *Defries* (2) and *Howell* v. *Dering* (3) do not support this conclusion. They relate to the effect of findings on issues and the identification of such findings with the "event". That is, they involve attempts to define "event" in a connection and for a purpose different from that now in question. Speaking more generally, however, Buckley and Kennedy, learned Judges in the last case referred to, fully recognise that the 'event' was nothing but the outcome or result of the proceedings and there is no reason why the word should not be the description applicable to the withdrawal of a suit and its consequences with reference to Order XXIII, Civil Procedure Code. Taking this view, I hold that the lower Court ought to have given effect to this Court's order as to costs and that it did not do so.

It is then necessary to mention that a preliminary objection has been made, that no appeal lies. I do not deal with the objection on its merits, because in the absence, as I hold, of any attempt by the lower Court to apply itself to this part of defendants' claim, there was clearly a failure on its part to exercise jurisdiction and if there is no appeal, defendants will suffer distinct prejudice by the lower Court's order and have no remedy against it. I, therefore, decide to treat the appeal in the alternative as a revision petition and to modify the lower Court's decree by inserting in it as payable to 3rd defendant, who alone is appealing here, provision for the payment to her by plaintiffs of the costs incurred by her in this Court in Appeal Suit No. 111 of 1910, in addition to the amount already awarded. Plaintiffs and 3rd defendant will pay and receive proportionate costs in these proceedings, on the basis that they are in revision and not appeal. Defendant No. 2, who has appeared here, will bear his own costs.

Order varied.

M. C. P.

(1) (1879) 4 Ex. D. 176; 48 L. J. Ex. 446; 40 L. T. 795; 27 W. R. 791.

(2) (1880) 5 Ex. D. 180; 49 L. J. Ex. 266; 42 L. T 137; 28 W. R. 406.

(3) (1915) 1 K. B. 54; 84 L. J. K. B. 198.

DATA DIN *v.* NANKU.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1656 OF 1916.

July 26, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

DATA DIN—PLAINTIFF—APPELLANT

versus

NANKU AND OTHERS—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Mortgage decree against father—Son "exempted" from decree, effect of—Execution against son's estate—Objection by son allowed—Suit against son for declaration, maintainability of.

A suit was instituted against a father and son on the basis of a mortgage. The son put forward the plea that there was no family necessity. The Court gave a simple money decree against the father, which stated that the son was "exempted" and that he should get his costs from the plaintiff. The latter executed the decree against the father's estate, and that having proved insufficient, he sought to attach and sell the son's estate. The son objected in execution and his objection was allowed. Thereupon the plaintiff brought the present suit seeking a declaration that the son's property could be sold in execution of the decree on the principle of the pious obligation of a son to pay his father's debts:

Held, (1) that the effect of the decree was to dismiss the suit as against the son with costs;

(2) that under section 47 of the Civil Procedure Code the order on the son's objection in execution was final and that the suit was barred under that section.

Second appeal from a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad.

Mr. *Haribans Sahai* (with him Mr. *Gajadhar Prasad*), for the Appellant.

Mr. *Kanhaya Lal*, for the Respondents.

JUDGMENT.—This appeal arises under the following circumstances. A suit was instituted against a father and son on the basis of a mortgage. A plea was put forward on behalf of the son that there was no family necessity. The result of the suit was that the Court gave a simple money decree against the father and held that the son was not liable, and in the decree stated that the son was "exempted" and that he should get his costs from the plaintiff. We may pause here to say that we consider that this was exactly the same as if the Court had by the decree expressly dismissed the suit with costs as against the son. The plaintiff-decree-holder executed the decree against the father's estate. That having proved insufficient he sought to attach and sell the son's estate. The son objected in execution and his objection was allowed. Thereupon the plaintiff brought the present suit seeking a declaration that the son's property could be sold in execution of the decree on the principle of the pious obligation of a son to pay his father's debts. The learned Judge of this Court, on being informed that a difficult question of Hindu Law, particularly having regard to certain remarks of their Lordships of the Privy Council in the recent case of *Sahu Ram Chandra* v. *Bhup Singh* (1) arose, referred the appeal for the decision of two Judges.

On behalf of the respondent it has been pointed out that this question of law really does not arise because the allowing of the son's objection in execution was final and the present suit cannot be brought. Under section 47 all matters relating to the execution and discharge of the decree arising between parties to the suit must be disposed of in execution and not by a separate suit. There had been some conflict of authority previous to the passing of the Code of Civil Procedure of 1908. This Court had held that the parties must not only be parties to the suit but they must be parties to the decree. Any conflict of authority has been set at rest by the explanation which has been added to section 47, namely "for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit." It was contended on behalf of the appellant that this explanation does not apply where a defendant has been merely "exempted." We think there is no force whatever in this contention. The expression in the decree exempting a particular defendant was probably an inaccurate expression, but the operation of the decree was to dismiss the suit as against that particular defendant. We dismiss the appeal with costs.

Appeal dismissed.

(1) 39 Ind. Cas. 280; 39 A. 437; 15 A. L. J. 437; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 706 OF 1917.

April 24, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

THE PUBLIC PROSECUTOR—APPELLANT

versus

MADDILA MUTAYALU AND ANOTHER—ACCUSED.

Penal Code (*Act XLV of* 1860), *ss.* 372, 373, *scope of*—"*Letting to hire*", "*obtaining possession*," *meaning of*—"Kanyarikam" *ceremony, performance of, whether within the section.*

Under sections 372 and 373, Indian Penal Code, there must be making over of possession of the minor girl either by sale or by hire or by some similar arrangement in order that a case may come within the mischief of the law. [p. 866, col. 1.]

Reg. v. *Arunachellam*, 1 M. 164; 1 Weir 358; 1 Ind. Dec. (N. S.) 109, *Padmavati, Ex parte*, 5 M. H. C. R. 415; 1 Weir 356; *Public Prosecutor* v. *Kannammal*, 18 Ind. Cas. 257; 24 M. L. J. 211; 13 M. L. T. 13:; 14 Cr. L. J. 33; (1913) M. W. N. 207, *Srinivasa* v. *Annasami*, 15 M. [illegible]3; 1 Weir 366; 5 Ind. Dec. (N. S.) 577 and *Public Prosecutor* v. *Rajammal*, 12 Ind. Cas. 654; (1911) 2 M. W. N. 479; 10 M. L. T. 501; 12 Cr. L. J. 566, distinguished.

Where the only evidence against the accused was that he performed the *kanyarikam* ceremony, *i. e.*, the nuptials of a minor girl and had sexual intercourse with her for 3 days successively, but the girl continued to live with her parents who never parted with possession of her to the accused:

Held, that these facts were not sufficient to support the conviction of the accused under section 373 of the Penal Code and the conviction of the girl's parents under section 372 of the Penal Code. [p. 866, col. 2.]

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sessions Judge, Ganjam, in Criminal Appeals Nos. 25 and 26 of 1917, on his file (Calendar Case No. 39 of 1917 on the file of the Court of the Sub-Divisional Magistrate, Berhampore).

FACTS appear from the judgment.

Mr. *E. R. Osborne* (Public Prosecutor), for the Crown.—The order of acquittal is wrong and is based on an erroneous view of the law. The Kanyarikam ceremony performed by the 2nd accused was to effectuate an immoral purpose. The ceremonial has the effect of permitting the man who does it to use the bed of the girl for 3 successive days. That is tantamount to taking possession of the girl on hire for a short period and is within the mischief of sections 372 and 373, Indian Penal Code. The house where the 2nd accused had sexual congress with the girl was rented by him. The case is analogous to the dedication to temples as Dasis.

Mr. *T. Prakasam*, for the Accused.—Sections 372 and 373, Indian Penal Code, do not apply to the facts of this particular case. There is no evidence that the parents of the girl ever parted with possession of her and the sections require a loss of control or dominion over the girl to make the action indictable. The performance of the "Kanyarikam" ceremony will not affect the case as the essentials of the offence are wanting.

JUDGMENT.—This is an appeal against the acquittal of two persons, the first of whom was charged with an offence under section 372, Indian Penal Code, and the other under section 373, Indian Penal Code. The first accused is the mother of a Hindu girl under 16 years of age and the 2nd accused is a Komattee. The latter kept the elder sister of the girl until she died and on her death, the evidence is that a ceremony called Kanyarikam was performed between the 2nd accused and the girl with the help of the 1st accused. The Kanyarikam ceremony, according to the witnesses, has the effect of an arrangement by which a person has intercourse with a girl who has just attained puberty for 3 days. P. W. No. 1 says: 'The 2nd accused Krishnamurthy performed the Kanyarikam ceremony which means her nuptials.' The man that performed the ceremony enjoys the girl's bed for 3 days successively. They may afterwards continue their friendship or may separate. The evidence, however, shows that the minor girl continued to live with her parents, that is, the 1st accused and her father in the same house as before. The house had been rented by the 2nd accused and he paid the rent while his former mistress, who was the sister of the girl concerned in this case, was living. The same arrangement was continued. There is evidence to show that the parents of the girl in no way parted with the possession of her to the 2nd accused. There is no suggestion, except that the ceremony of Kanyarikam was performed, that she was let to hire for any term. The question is, whether the performance of this ceremony and the above mentioned facts bring the case within section 372, Indian Penal Code, so far as the mother

of the girl is concerned, and within section 373, Indian Penal Code, so far as the 2nd accused is concerned. We may take it that the 2nd accused did have intercourse with this girl D. W. No. 9. The main question in the case is, whether what has taken place amounts to letting to hire or otherwise disposing of the minor within the meaning of section 372, Indian Penal Code, or hiring or otherwise obtaining possession within the meaning of section 373, Indian Penal Code. The first section is aimed at the person who disposes of the person of a minor for immoral purposes, and the other section is directed against the man who obtains possession of a minor girl for such purposes. We think that the language of the two sections is sufficiently clear to show that there must be making over of possession of the minor girl either by sale or by hire or by some similar arrangement in order that the case may come within the mischief of the law. This seems to us to be also the effect of the rulings. One of the earliest cases in this Court is that reported as *(Queen* v. *Shaik Ali* (1). That is a decision of three Judges. It is pointed out by Scotland, C. J., in his judgment in that case that to bring a case within section 373, Indian Penal Code, there must be evidence to show that complete possession and control of the minor's person was obtained by buying, hiring or otherwise with the intent or knowledge specified in the section. It is further pointed out that "the provision seems to exclude the supposition that an obtaining of possession in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the contemplation of the framers of the section." Innes, J., says: "I am of opinion that 'possession' in the section under which he is indicted means possession with a power of disposal, and in this sense there is no evidence that the prisoner had possession of the girl." The same view of the law was taken in *Queen-Empress* v. *Sukee Raur* (2). That was a case under section 373 and Pigot, J., held that section 372, Indian Penal Code, contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse. Mr. Mayne in his commentary on this section at page 589, fourth edition, states the law to be that "the words refer to a making over of a minor either in perpetuity or for a term, and not merely for the commission of isolated acts of sexual intercourse." We have on the other hand been referred to a number of decisions with respect to the dedication of a minor girl to a temple or a god as a Dasi. We do not think that those cases have a very close bearing on the present question. Those are the class of cases reported as *Reg.* v. *Arunachellam* (3), *Padmavati, Ex parte* (4), *Public Prosecutor* v. *Kannammal* (5), *Srinivasa* v. *Annasami* (6) and *Public Prosecutor* v. *Rajammal* (7). We hold that the facts proved in the case are not sufficient to support convictions under sections 372 and 373. The order of acquittal will, therefore, stand.

Appeal dismissed.

M. C. P.

(1) 5 M. H. C. R. 473; 1 Weir 377.
(2) 21 C. 97; 10 Ind. Dec. (N. S.) 697.

(3) 1 M. 164; 1 Weir. 358; 1 Ind. Dec. (N. S.) 109.
(4) 5 M. H C. R. 415; 1 Weir 356.
(5) 18 Ind. Cas. 257; 24 M. L. J. 211; 13 M. L. T. 131; 14 Cr. L. J. 33; (1913 M. W. N. 207.
(6) 15 M. 323; 1 Weir 366; 5 Ind. Dec. (N. S.) 577.
(7) 12 Ind. Cas. 654; (1911) 2 M. W. N. 479; 10 M. L. T. 501; 12 Cr. L. J. 566'

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 465-B OF 1917.

November 16, 1917.

Present:—Mr. Justice Pratt.

PO NYEIN—APPLICANT

versus

MA SHWE KIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488 (4)—Maintenance—Buddhist Law, Burmese—Husband

KARIM-UD-DIN *v.* EMPEROR.

marrying second wife—First wife refusing to live with husband—Sufficient cause.

Ordinarily the fact that a Burmese Buddhist husband takes a second wife might be a good reason for the first wife declining to live with him, unless he provides her with a separate house. Where, however, a husband marries a second wife owing to the refusal of his first wife to live with him, but is willing to take back the first wife, the latter is not entitled to maintenance under section 488 (4) of the Criminal Procedure Code.

Mr. *Maung Gyi*, for the Applicant.

Mr. *W. Po Thit*, for the Respondent.

JUDGMENT.—Applicant has been ordered to pay maintenance for his wife Ma Shwe Kin. His case was that there was a divorce but this was not proved. It is clear, however, that owing to incompatibility of temper or other cause they separated and the wife ceased to live under her husband's protection. About seven months after the separation applicant re married. Respondent declines to return to live with applicant who is willing to take her back, unless he provides her with a separate establishment.

Ordinarily the fact that the husband took a second wife might be a good reason for the first wife declining to live with him, unless he provides her with a separate house. In the present circumstance, however, I do not consider the claim is reasonable. Respondent chose to live separately from her husband and there is evidence that when asked to re-join him she declined.

She was appa[redacted]y willing to effect a divorce. By her conduct she could only expect that the natural result would be to force her husband into marrying again. In fact his re-marriage was the natural result of her refusing to live with him and separating from him for a number of months. Applicant is not a well-to-do man, and cannot afford to maintain two separate establishments.

His offer, therefore, to support his wife, if she will resume conjugal relations, is reasonable and I do not consider that she is entitled to maintenance because she elects to live apart from him. She must be prepared to accept the result of her own conduct. I set aside the order of the Magistrate for maintenance of Ma Shwe Kin.

Application allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 85 OF 1918.

April 11, 1918.

Present:—Justice Sir George Knox, KT.

KARIM-UD-DIN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust by clerk or servant—Marksman engaged by station master, whether servant of Railway Company—Overcharge retained by marksman—Offence.

Accused was engaged by a station master to mark and load goods delivered to the Railway Company for despatch and was paid out of an allowance granted by the Company to the station master. The latter also entrusted the accused with the writing up of the cash register. The accused recovered a certain sum as an overcharge from a consignor of goods and converted it to his own use. He was thereupon tried and convicted of an offence under section 408 of the Penal Code:

Held, that the accused, not being a clerk or servant of the Railway Company, could not be convicted of an offence under section 408 of the Penal Code in respect of the sum received by him. [p. 868, col. 1.]

Criminal revision from an order of the Sessions Judge, Allahabad.

Mr. *Peary Lal Banerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—Karim-ud-din has been convicted of three offences, each offence under section 403 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment on each offence, the sentences to run consecutively. It appears from the record and the arguments addressed to me that station masters on the East Indian Railway get some kind of allowance from the Railway in return for goods to be despatched by the Railway to be marked and loaded or otherwise handled. The station master Raghunath Pershad appointed Karim-ud-din and gave him Rs. 10 a month for doing this work. There was no contract of any kind between the East Indian Railway Company and Karim-ud-din. Raghunath Pershad appears to have made or permited Karim-ud-din to write a number of Railway registers. It is not for a moment asserted that the East Indian Railway Company sanctioned this allotment of work to Karim-ud-din or were in any way cognizant of it.

GAHAR MAHAMMAD *v.* PITAMBAR DAS.

Raghunath Pershad took leave and was succeeded by one Rikhi Lal. Rikhi Lal appears to have gone a step further than Raghunath Pershad in employing Karim-ud-din in this kind of work and to have given him the cash registers to write up. The result or alleged result of these proceedings was that certain items of money disappeared. The accused was charged with embezzling three separate different items. The nature of these items is somewhat different. The first item is an item of Rs. 5-10 0. The prosecution allege that this was an overcharge upon certain goods consigned through the East Indian Railway to one Sat Narain. Sat Narain appears to have paid the sum under protest, and to have written to the Railway Company on the point. The item was represented in a letter, the writing of which is traced to the accused but the signature on the writing is that of Rikhi Lal's. The money never came into the hands of the East Indian Railway Company. It was described as a demurrage charge, while I understand that the Railway have never put it forward as money due to them either on account of goods consigned or demurrage thereon. The other two items are of the same description, but for the purposes of this revision I need not go into them. The contention raised before me is that with reference to the first item no offence coming within section 408 of the Indian Penal Code has been proved and the trial of the accused for the three offences under section 408 of the Indian Penal Code is illegal, a joint trial of the three items not being allowable by law. It is really round this first charge that the argument in revision centres. I accept the plea that even if the facts be considered proved, the first is not an offence which falls within section 408 of the Indian Penal Code. Karim-ud-din was neither clerk nor servant of the Railway Company, he was not employed as clerk or servant of theirs and not being so, he could not be entrusted in such capacity with this sum of Rs. 5-10 0. It is contended before me that Karim-ud-din having chosen to take upon himself the duties and responsibilities of a clerk of the East Indian Railway Company, must be regarded as a clerk and cannot afterwards say that he is not such a clerk, and my attention was called to the case of *Queen-Empress* v. *Parmeshar Dat* (1). There is, however, an important difference in the case cited and the present case. Parmeshar Dat was recognised by the authorities as filling the position of a public servant. There was no such recognition in this case, nor can I suppose that there would ever have been such a recognition. The probabilities are that if the attention of the East Indian Railway Company had been called to the fact that this marksman was posting up registers and receiving moneys, they would have utterly refused to recognise him and would have called Rikhi Lal to account for such an irregularity. Then further my attention was called to what was argued, how far the sum of Rs. 5-10-0 taken under the circumstances stated would come at all under the crime of embezzlement. It was not the property of the East Indian Raliway Company, it was repudiated as not being their property and whatever may have been the offence committed in respect of that Rs. 5-10 0, it was not the offence of embezzlement. The joint trial under the circumstances was illegal. I quash it, set aside the convictions and sentences. Karim-ud-din must be released.

Conviction set aside.

(1) 8 A. 201; A. W. N. (1886) 63; 4 Ind. Dec. (N. s 1159.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 75 OF 1918.

February 8, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

GAHAR MAHAMMED SARKAR AND OTHERS—ACCUSED—PETITIONERS

versus

PITAMBAR DAS—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 186—Decree for restitution of conjugal rights—Warrant to seize wife, legality of—Resistance to warrant—Offence.

In execution of a decree for restitution of conjugal rights a warrant was issued directing the executing

peon to seize the wife and deliver her bodily over to her husband, failing which to bring her under arrest before the executing Court:

Held, that the warrant was illegal, so that resistance to its execution was not an offence under section 186 of the Penal Code. [p. 870, col. 1.]

Rule against the order of the Deputy Magistrate, Dinajpur, dated the 31st October 1917.

FACTS material to the report will appear from the following orders of the Deputy Magistrate and the District Magistrate of Dinajpur, respectively:—

"The complaint is that on the morning of the 21st August, Pitambar Das, a peon of the Civil Court, went to execute a warrant of arrest in the house of the accused Gaher Muhammad and the accused persons obstructed him in the discharge of his public functions. Halimuddin instituted a civil suit against his wife Masiran Bibi for the restitution of conjugal rights and got a decree. An appeal was preferred by the defendants against the order of the Munsif, and it was dismissed with costs. Masiran Bibi was detained by the accused Gaher Muhammad in his house as he wanted to marry her with his son Abdul Aziz. The peon went to Gaher Muhammad's house on the morning of the 21st August accompanied by Nasir Sheik, Halimuddin and Ajibulla. They found Masiran Bibi sweeping the inner yard of Gahar Muhammad's house. Halimuddin identified his wife, whereupon the peon asked him to seize her. Gaher Muhammad wanted to see the letter of authority and the peon showed him the warrant of arrest (Exhibit I). Halimuddin and Nasir were beaten by Gaher Muhammad and others. Nasir Sheik instituted a case under section 323, Indian Penal Code, against Gaher Muhammad and others, and it has been disposed of by me to day. The peon gave "dohai" of Government, but to no effect. The accused Gaher Muhammad ordered to snatch away Masiran Bibi. Abdul Aziz, Esar and others then dragged her away. The peon then wrote a report (Exhibit 2) in the outer yard of Gaher Muhammad's house. The first Munsif granted sanction to the peon to file a case under section 186, Indian Penal Code (Exhibit 3), on the 22nd August.

"It appears from the deposition of P. Ws. Nos. 1 and 2, that the peon asked Halimuddin to seize Masiran Bibi. The prosecution witnesses have satisfactorily proved that the peon showed the warrant to the accused Gaher Mahammad and that Masiran Bibi was dragged away by Abdul Aziz, Esar and others under the order of Gaher Muhammad Sarkar.

"The defence story is that Nasir Sheik, Halimuddin and others numbering about 30 or 40 men trespassed into the house of Gaher Muhammad, at about 4 A. M. of the 21st August. There was no peon with them and that nobody gave "dohai" of Government. Rai Mahamed, the father of Halimuddin, asked Gaher Muhammad to produce Masiran Bibi. An altercation ensued and Gaher Muhammad was wounded on his head by Rai Muhammad. The defence story does not seem to me to be a probable one. I cannot believe that D. Ws. 1 and 2 were sitting wide awake at that hour of the night and saw 30 or 40 men passing by their houses. Apparently the defence attempted to change the time of occurrence for their own advantage. I have seen the General Diary Book of the Chirirbandar Police Station for the 21st August. One of the sons of the accused Gaher Muhammad lodged an information of *mar pit* at the Thana. He stated then that there was a Hindu peon with the party. The prosecution ought to have examined the Police Officer and got the entry in the Diary marked as an Exhibit.

"The warrant was a legal one as Masiran Bibi had an opportunity of obeying the decree and wilfully failed to obey it (*vide* rule 32, Order XXI, Civil Procedure Code). Masiran Bibi had appealed against the order of the Munsif, and consequently she had full knowledge of the decree. The appeal was dismissed by the Officiating Additional Sub-Judge on the 31st July. The warrant was issued on the 20th August. It is clear, therefore, that she had nearly three weeks' time to obey the decree. Pitambar Das peon was obstructed in the discharge of his public duties by the aforesaid accused persons and he was authorised by law to execute the warrant.

"I, therefore, find the accused Gaher Muhammad Sarkar, Abdul Aziz and Esar Muhammad guilty under section 186, Indian Penal Code, and sentence each of them to pay a fine of Rs. 10 (ten only), in default to

undergo rigorous imprisonment for a fortnight. They are further directed to pay Rs. 1-8-0 to the complainant as the cost of Court-fee."

"The facts of the case seem properly proved. It is urged that the procedure was irregular on the part of the peon as he did not properly communicate the purport of the warrant to the woman, and that the proper way was to inform her of the order and then for the Court to deal with her by civil imprisonment or fine if she did not obey. But it seems from the evidence that the peon was not given time for attending to any such procedure but was attacked at once. I can hardly think that the action of the appellants in resisting the orders of the Court was not punishable. I think the conviction is correct. The appeal is dismissed."

Babu *Girija Prasonna Sanyal*, for the Petitioners.

JUDGMENT.—In this case we think that the warrant, the execution of which is said to have been resisted, was illegal. The petitioners should not, therefore, have been convicted under section 186, Indian Penal Code. We set aside the conviction and sentence and direct that the fines, if paid, be refunded.

Rule made absolute.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 76 OF 1918.

April 23, 1918.

Present:—Mr. Saunders, J. C.

EMPEROR—PROSECUTOR

versus

NGA PO KYAN—CONVICT.

Burma Excise Act (V of 1917), s. 37—Unlawful possession of tari *in district where tree-tax system is not in force—Offence.*

In a district in which the tree-tax system is not in force and in which, consequently, the law does not prohibit or place any restriction upon the manufacture of *tari*, it cannot be unlawfully manufactured, and section 37 of the Burma Excise Act does not, therefore, apply to the possession of *tari* manufactured in such a District. [p 870, col. 2.]

Mr. *H. H. Lutter*, for the Crown.

JUDGMENT.—This is one of seven cases in which the accused have been convicted and sentenced to pay fines under section 37 of the Burma Excise Act (Burma Act V of 1917). The charge in each case was that the accused had been in possession of less than four-quarts of *tari* which had been illegally manufactured, and that such possession was within five miles of a licensed *tari* shop. The District Magistrate is doubtful whether the convictions can stand.

Burma Act V of 1917 only came into force on the 1st October 1917, and though the law in respect of the possession of *tari* does not appear to have been materially altered, this result has been arrived at by a somewhat different method to that followed in the Act which has been superseded. For the purpose of the present case it is sufficient to point out that unfermented *tari* has been declared to be alcoholic liquor, and that alcoholic liquor is included in the meaning of the term "excisable article," while "manufacture" includes the tapping of *tari*-producing trees and the drawing of *tari* from trees, section 2, subsections (*a*), (*f*) and (*m*). The manufacture of excisable articles is forbidden except under the authority and subject to the conditions of a license granted under the Act by section 12 (*a*) of the Act, and by a notification of the Financial Deparment No. 72, dated the 18th September 1917, the Local Government has been pleased to exempt from the provisions of section 12 of the Act *tari* where the tree tax system is not in force.

The District Magistrate reports that the tree-tax system is not in force in his District. The provisions of section 12 (*a*) do not, therefore, apply to *tari* and there is no other provision in the Act making its manufacture illegal. Section 37 of the Act provides a penalty for the possession of an excisable article which the person possessing it knows or has reason to believe has been unlawfully manufactured. It is clear, therefore, that in a District in which the law does not prohibit or place any restriction upon the manufacture of *tari*, it cannot be unlawfully manufactured, and section 37 does not, therefore, apply to the possession of *tari* manufactured in such a District

The District Magistrate has expressed doubt as to whether the possession was lawful in view of the fact that it has not been shown that the *tari* had been collected in unsmoked or unlimed pots. This doubt, however, has reference to another set of facts. Section 16 (1) of the Act provides that the Local Government may, by notifi-

cation, prescribe a limit of quantity for possession of any excisable article, and in exercise of the authority so granted the Local Government has, by Financial Department Notification No. 77, dated the 18th September 1917, prescribed a limit of four reputed quart bottles in the case of *tari*; where the quantity of *tari* exceeds four quart bottles, its possession is an offence punishable under section 30 (*a*) of the Act subject to further exceptions made by Notification No. 72 referred to above, of which the first clause permits possession of *tari* intended for the manufacture of *gur*, jaggery, molasses or sugar, in a District where the tree tax system is not in force, if the *tari* is drawn either in smoked pots or in pots treated with lime. But inasmuch as in each of the cases here referred to the quantity of *tari* found was less than four quart bottles, it is clear that no offence was committed, however the *tari* may have been drawn.

The convictions and sentences are set aside and the fines must be refunded.

Convictions set aside.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 476 AND 484 OF 1915.

August 19, 1915.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Richardson.

MOHESH CHANDRA CHAUDHURY AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 192, 193, 465, 109—*Forgery—False evidence, fabrication of.*

A sale under a Kobala written out by one *N.* on a stamp paper of Rs 5 and dated the 23rd May having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. *N.* was told by one *M.* that as no refund could be made after two months the date in the document might be altered from 23rd May to 23rd September Accordingly the alteration was made, although it was quite unnecessary as the period for getting refund was not two months but six months;

Held, that *N.* and *M.* were respectively guilty of fabricating and abetting the fabrication of false evidence [p. 872, col. .]

Quære.—Whether the offences committed were not forgery and abetment of forgery

Appeals against the orders of the Officiating Sessions Judge, Cachar, dated the 24th April 1915.

Babu *Manmathanath Mukherjee*, for the Appellant in No. 476 of 1915.

Babus *Dasarathi Sanyal*, *Sasadhar Roy* (Sr.) and *Govinda Chunder Dey Roy*, for the Appellant in No. 484 of 1915.

Mr. *Orr* (Deputy Legal Remembrancer) and Babu *Jyotish Chandra Hazra*, for the Crown.

JUDGMENT.—These are two appeals by Nosha Mia and Mohesh Chandra Chaudhury who were convicted of forgery and abetment of forgery respectively, and sentenced, Nosha Mia to six months' rigorous imprisonment, and Mohesh Chandra Chaudhury to one year's rigorous imprisonment. The case is a somewhat peculiar one. It appears that Nosha Mia was proposing to sell some property to another person of the same name. A Kobala was written out by Nosha Mia—the appellant—on a stamp paper of Rs. 5. The Kobala was to have been executed sometime in May 1914 and bore the date 23rd May written by the appellant Nosha Mia. The sale having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. The appellant Nosha Mia took advice with regard to this and he was told that no refund would be made after two months. The other appellant Mohesh Chandra Chaudhury, who is a Pleader's clerk of some three years' standing, gave him this advice, and also told him that he might alter the date in the document from 23rd May to 23rd September, which would bring the application for the refund within the two months. This was quite unnecessary on their part inasmuch as the period was not two months but six months. The application for the refund would, therefore, have been within six months from the date 23rd May, inserted in the document. Upon this they were charged with forgery and abetment of forgery and found guilty as above stated.

The question then arises what was the offence committed. There was undoubtedly a

dishonest and fraudulent intention, for the appellants clearly intended to cheat the Government, being unaware that they could, in fact, obtain their object honestly. At the same time it may be argued with some show of reason that what they did does not fall within the definition of forgery contained in section 464, Indian Penal Code. So far as the document was an unexecuted Kobala, the appellant Nosha Mia had authority to alter it as it was his own document. But for the purposes of this case, the document must be regarded rather as an used or spoilt stamp paper, on which the appellants were applying for a refund. It is, however, unnecessary to decide this point, as they were clearly guilty of fabricating, and abetting the fabrication of, false evidence (sections 192, 193, Indian Penal Code). As was done in the case of *Empress* v. *Mir Ekrar Ali* (1), we convict the appellants under section 193 and sections 193 109 respectively. The term of imprisonment already undergone by Nosha Mia is, in our opinion, sufficient. We accordingly reduce the sentence in his case to the period of imprisonment already undegone, and direct that he be released.

In the case of Mohesh Chandra Chaudhury we think that the period of imprisonment which he has already undergone (*i.e.*, nearly two months) is sufficient imprisonment, and we accordingly reduce the term of imprisonment in his case to that period, but we sentence him in addition to a fine of Rs. 50, and, in default, one month's rigorous imprisonment.

Appeals dismissed; Sentences reduced.

(1) 6 C. 282; 3 Ind. Dec (N. S.) 313.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 863 OF 1917.

April 19, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice LeRossignol.

EMPEROR—APPELLANT

versus

JAGAT RAM—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Civil Procedure Code (Act V of 1908), O. XVIII, r. 5—Evidence Act (I of 1872), s. 80—Perjury, trial for—Statement read over to witness—Proof - Presumption—Locus penitentiæ when can be allowed.

There is no provision of law that a Judge, who records the evidence of a witness in cases to which Order XVIII, rule 5, of the Civil Procedure Code applies, shall append a note to the effect that the evidence of the witness when completed has been duly read out to him. In every such case it should be presumed under section 80 of the Evidence Act that the statement was duly taken. [p. 873, col. 1.]

Where, therefore, there is no evidence to show that the deposition of a witness in a civil suit was not read over to him by the Judge, it must be presumed under section 80 of the Evidence Act that the Judge complied with the provisions of Order XVIII, rule 5 of the Civil Procedure Code. [p. 873, col. 1.]

A *locus penitentiæ* should not be allowed to an accused person who has made a false statement in Court and who, when subsequently tried for perjury, adheres to his former statement, admits it was correctly recorded and asserts that it is true. [p. 873, col. 1.]

Appeal from the order of the Magistrate, 1st Class, Gurdaspur, dated the 30th April 1917.

Mr. *Mul Chand*, R. S., Public Prosecutor, for the Appellant.

Messrs. *Dalrymple* and *Hari Lal Bahl*, for the Respondent.

JUDGMENT.—The respondent in this case, Jagat Ram, and the respondent in Criminal Appeal No. 864 of 1917, Mahant Kaul Das, were tried before Khan Faiz Mohammad Khan, Extra Assistant Commissioner, Magistrate of the 1st Class, upon charges under section 193, Indian Penal Code, of having given false evidence in a judicial proceeding before the Subordinate Judge of Gurdaspur in the case of *Jagat Ram* v. *Mangal Das*. The alleged false statements made by the two respondents, respectively, as recorded by the Subordinate Judge, were duly set forth in the charges against them, and they both stated, when examined by the Magistrate who tried these cases, that the statements as recorded by the Subordinate Judge were true. The Magistrate at the conclusion of the trials (for each respondent was tried separately) found that in point of fact the said statements were false to the knowledge of the respondents, and that they had both deliberately and dishonestly perjured themselves in the Court of the Subordinate Judge. In view, however of the decision of a single Judge of this Court reported

as *Kartar Singh* v. *Emperor* (1), he held that it was impossible to convict the respondents, inasmuch as the record of the deposition of each of them in the Subordinate Judge's Court did not have appended to it "the usual note" that the depositions had been read over to the respondents and admitted by them to be correct. He felt compelled, therefore, to acquit them on the technical ground set forth in the judgment of this Court above referred to, that there can be no conviction based on "a false statement which is not made and recorded with all formalities in the manner required by law."

From this order of acquittal the Local Government has preferred an appeal under section 417, Criminal Procedure Code, and we have heard Mr. Mul Chand on behalf of the Crown and Mr. Dalrymple on behalf of the respondents. In our opinion the Magistrate was in error in holding that in the absence of "a definite note" on the Subordinate Judge's record, it was impossible for him to say that the statements were in fact read over to the accused persons when they gave evidence as witnesses in the civil suit. There is no provision of law that a Judge who records the evidence of a witness in cases to which Order XVIII, rule 5, of the Civil Procedure Code applies, shall append a note to the effect that the evidence of the witness, when completed, has been duly read out to him. As a matter of practice, and as a very wholesome rule, such notes are frequently appended, but it is not obligatory on the Courts in civil cases to make a note to that effect. Accordingly in every such case it should be presumed under section 80 of the Indian Evidence Act that the statement was duly taken, or, in other words, was taken in accordance with the provisions of section 182 of the Civil Procedure Code. This is, of course, merely a presumption and can be rebutted by evidence that the deposition in question was not duly taken, but in the absence of such evidence the Court is bound to presume that the provisions of the law as to the reading over of the evidence in the presence of the Judge and of the witness were duly complied with. Upon this point we must, with every respect, differ from the learned Judge who decided the authority relied upon by the Magistrate.

In the present case there is no evidence that the depositions were not read over to the witnesses, and the Magistrate ought, therefore, to have assumed that the Subordinate Judge complied with the provisions of Order XVIII, rule 5, of the Civil Procedure Code. Upon these facts it is unnecessary for us to discuss the question whether a *locus penitentiæ* should be allowed to a person who has made a false statement in Court and the Court has omitted to comply with the provisions of Order XVIII, rule 5, of the Code. But whether it is to be allowed or not, we cannot but think that such indulgence is excessive in a case where the person in question, when subsequently tried for perjury, adheres to his former statement, admits it was correctly recorded and asserts that it is true.

For the reasons given we accept the appeal and setting aside the order of acquittal we direct the Magistrate to proceed to judgment in accordance with law.

Appeal accepted.

(1) 39 Ind. Cas. 847; 12 P. R. 1917 Cr.; 15 P. W. R. 1917 Cr; 18 Cr. L. J. 607.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 317 OF 1918.
(CRIMINAL REVISION PETITION No. 252 OF 1918.)

August 20, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AMBALAM IBRAHI AND OTHERS—ACCUSED NOS. 1 TO 5—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 554 (2) (c)—Criminal Rules of Practice, Madras High Court, r. 188—Madras Board of Revenue Standing Order No. 173—Application to Tahsildar Magistrate for copy of judgment—Search fee, levy of, legality of.

No search fee can be levied along with an application for a copy of a judgment of a Tahsildar Magistrate. Order No. 173 of the Standing Orders of the Board of Revenue does not apply to such an application which is governed by Rule 188 of the Criminal Rules of Practice framed by the High Court under section 554 sub-section 2 clause (*c*) of the Criminal Procedure Code. [p. 874, col. 1.]

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judg-

HOTCHAND v. EMPEROR.

ment of the Court of the Sub-Divisional Magistrate of Ramnad, in Criminal Appeal No. 7 of 1918, preferred against the judgment of the Court of the Sub-Magistrate of Ramnad, in Calendar Case No. 314 of 1917.

Dr. *S. Swaminadhan*, for the Petitioners.

Mr. *C. Narasimha Chariar*, for the Public Prosecutor, for the Crown.

ORDER.—This must be taken as a petition of revision directed solely against the order of the Tahsildar Magistrate refusing to give a copy of the Magistrate's judgment, the refusal having been based on the ground that the petitioner ought to pay eight-annas search fees along with his application for copy under the Board's Standing Order No. 173.

The application for copy was made to the officer as a Magistrate (a Criminal Court) by an accused convicted by him and the Board's Standing Order has absolutely no relevancy to such an application. An application of that kind is governed by rule 188 of the Criminal Rules of Practice framed by the High Court under the powers vested in the High Court by section 554 sub section (2), clause (c) of the Criminal Procedure Code.

The Magistrate is, therefore, directed to give the copy applied for without further delay.

M. C. P.

Order reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 15 OF 1918.

April 5, 1918.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

HOTCHAND ATMARAM—APPLICANT

versus

EMPEROR—OPPONENT.

Cantonment Code, s. 231 (2)—"Absence," meaning of—Failure to appoint agent during absence of nine days from Cantonment—Offence.

In construing the word "absence" as used in section 231 (2) of the Cantonment Code, the word should receive a larger or more restricted meaning according to what the Court believes to be the intention of the Legislature in framing the particular provision in which the word is used. [p. 874, col. 2.]

An absence of nine days from a Cantonment is such absence as is contemplated by section 231 (2) of the Code and would render the delinquent liable to conviction and punishment under the section. [p. 875, col. 1.]

Application for revision of an order passed by the Cantonment Magistrate, Hyderabad.

Mr. *F. J. De Verteuil*, for the Applicant.

Mr. *T. G. Elphinston*, Acting Public Prosecutor, for the Crown.

JUDGMENT. This is an application for revision of an order of the Cantonment Magistrate, Hyderabad, convicting the applicant under section 231 (2) of the Cantonment Code for failing to appoint an agent during a period when he was absent from the cantonment in which he owned a bungalow.

The applicant admitted that he did remain absent for nine days at Karachi. He was convicted on that plea and sentenced to pay a fine of Rs. 20 or in default to suffer one week's simple imprisonment.

Mr. De Verteuil for the applicant states that the absence of nine days is too short a period to constitute absence within the meaning of section 231 (2) of the Cantonment Code. But the section does not specify any period of absence and, we think, the same rule must be applied to the construction of the word "absence" as was applied in the case of *Mahomed Shuffi* v. *Laldin Abdula* (1) to the word 'residence'. It is there said that the word may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature had been in framing the particular provision in which the word was used. The intention of the Legislature in this case was, no doubt, that the owner when absent should be represented by an agent to receive notices and otherwise to assist the Cantonment Authority in the performance of the sanitary and municipal duties imposed upon it by the rules made under the Cantonment Act. If the absence is of such a period as to cause inconvenience to the Cantonment Authority in performance of its duties, the accused

(1) 3 B. 227; 2 Ind. Dec. (N. s.) 153.

must be considered to have been absent within the meaning of section 231 of the Cantonment Code. In this view we think the absence of nine days at Karachi was such absence as was contemplated by section 231 (2) of the Cantonment Code.

We, therefore, reject this application.

Application rejected.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 192 OF 1918.
May 23, 1918.
Present:—Justice Sir P. C. Banerjee, Kt.
HARNAM SINGH AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 172, 406—Property placed in custody of accused, non-production of, on demand—Criminal breach of trust—Contempt of Court.

Certain moveable property was attached in execution of a decree. The officer of the Court who made the attachment placed the property in charge of the accused. When the time for auction-sale of the property arrived, notice was issued to the accused to produce the property. They evaded service of the notice on several occasions and the property was not produced:

Held, (1) that the accused could not be convicted of criminal breach of trust under section 406 of the Penal Code inasmuch as the property had not been misappropriated or converted to the use of the accused, nor had it been used or disposed of in any manner contrary to the terms of the trust.

(2) that the accused were guilty of contempt of Court under section 172 of the Penal Code.

Criminal revision from an order of the Sessions Judge, Mainpuri.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicant in this case has been convicted under section 406 of the Indian Penal Code. What happened was this. Certain moveable property was attached in execution of a decree. The officer of the Court who made the attachment

placed the property in charge of the accused. When the time for auction-sale of the property arrived, notice was issued to the accused to produce the property. They evaded service of the notice on several occasions and the property was not produced. For this they have been held to be guilty of criminal breach of trust. The accused were no doubt entrusted with the attached property, but they would not be guilty of criminal breach of trust unless they dishonestly misappropriated or converted the property to their own use or dishonestly used or disposed of it in violation of any direction of law describing the mode in which the trust which they undertook was to be discharged. In the present case the property was not misappropriated or converted to the use of the accused, nor was it used or disposed of in any manner contrary to the terms of the trust. Therefore, they could not be convicted under section 406. They were no doubt guilty of contempt of Court and their offence amounted, if at all, to one under section 172 of the Indian Penal Code. For this they could only be sentenced to one month's simple imprisonment. They have already undergone rigorous imprisonment for nearly three weeks. The result is that I set aside the conviction, acquit the accused of the offence under section 406 and convict them under section 172 of the Indian Penal Code. The imprisonment already undergone is more than sufficient for their conviction under this section. The sentence of fine is remitted and the accused need not surrender to their bail. The fine, if paid, must be refunded.

Conviction altered.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 176 OF 1918.
April 19, 1918.
Present:—Mr. Justice Chevis.
LABHU RAM—ACCUSED—PETITIONER
versus
NAND RAM—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (7) (a)—Sanction to prosecute, refusal of, by Munsif

ABDUL WAZED *v.* EMPEROR.

—*Munsif's Court, whether subordinate to District Judge for purposes of* s. 195 *—Appeal to District Judge, whether competent—Procedure—Punjab Courts Act (III of* 1914*),* s. 39 (4).

Section 195 (7) (*a*) of the Criminal Procedure Code lays down that where appeals lie to more Courts than one, the Appellate Court of inferior jurisdiction is the Court to which the lower Court is deemed to be subordinate for the purposes of the section.

Where, therefore, on a Munsif's refusal to sanction a prosecution, an appeal was preferred to the District Judge:

Held, that as under section 39 (4) of the Punjab Courts Act and Chief Court Notification No. 4424G dated 20th July 1914, certain appeals from the Munsif's decrees lay to the Subordinate Judge, the District Judge had no jurisdiction to hear the appeal which ought to have been preferred to the Subordinate Judge.

Revision from the order of the Sessions Judge, Hoshiarpur and Kangra, dated the 22nd December 1917.

Mr. *Fakir Chand*, for the Petitioner.

JUDGMENT.—The Munsif having refused sanction to prosecute, Nand Ram applied to the District Judge who granted leave to prosecute Labhu Ram and Salig Ram. Labhu Ram applies to this Court for revision.

Under section 39 (4) of the Punjab Courts Act, and Chief Court Notification No. 4424G., dated the 20th July 1914, certain appeals from Munsifs' decrees lie to the 1st Class Subordinate Judge.

Section 195 (7) (*a*), Criminal Procedure Code, lays down that where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction is the Court to which the lower Court is deemed to be subordinate for purposes of the section. So the District Judge had no jurisdiction ; Nand Ram should have appealed to the 1st Class Subordinate Judge. If any authority be needed, reference may be made to *Bure Khan* v. *Queen-Empress* (1) and *Boddu Ramayya* v. *Chitturi Surayya* (2).

I revoke the District Judge's order granting sanction for the prosecution of Labhu Ram and Salig Ram as having been passed without jurisdiction.

Revision accepted.

(1) 16 P. R. 1898 Cr.
(2) 29 Ind. Cas. 71; 28 M. L. J. 486; 17 M. L. T. 446; 16 Cr. L. J. 439.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 434 OF 1918.

June 21, 1918.

Present :—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

ABDUL WAZED AND OTHERS—ACCUSED —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860*),* s. 186*—Restitution of conjugal rights, decree for—Warrant for execution, legality of—Obstruction to warrant—Offence.*

A decree in a contested suit for restitution of conjugal rights passed on 3rd March 1917 directed the wife to return to her husband within 3 months of its date. The wife not having obeyed the decree, on the 15th September 1917 a warrant was issued against her without giving her any previous notice:

Held, that the wife was not entitled to a notice before the warrant was issued and that obstruction to the execution of the warrant was an offence punishable under section 186 of the Penal Code. [p. 877, cols 1 & 2.]

FACTS.—Petitioners, accused, obstructed a public servant, Naib-Nazir of a Court, who went to execute a decree by arresting one Ayesha Khatun, a Muhammadan woman, for restitution of conjugal rights. Hence they were convicted and sentenced, one set convicted under sections 353 and 323 and the other set under sections 186, 226 and 323, Indian Penal Code.

Babu *Chandra Sekhar Sen*, for the Petitioner.—Order XXI, rules 22 of the Civil Procedure Code, does not contemplate arrest but only detention. Judgment-debtor Ayesha Khatum had no opportunity of obeying the order of the Court, *i.e.*, the decree passed by the Civil Court. There is nothing in the record to show that the accused refused to obey the order of the Court.

[SHAMSUL HUDA, J.—The time for obeying the Court's decree is within 3 months and if you did not comply with the Court's order within that time the warrant was all right.]

The question is whether the arrest was legal or not, *i.e.*, whether the Court could, under the circumstances, issue such a warrant. Before executing the decree a notice ought to have been given to the judgment-debtor about its execution, but in this case nothing was done *i.e.*, notice was not issued to give her time to comply with the Court's order. Hence where is the justification of the Court's order? The judgment debtor being an illiterate *pardanashin* lady, the

warrant ought to have been explained to her.

In an unreported case of this Court Criminal Revision Case No. 175 of 1918, the facts were exactly the same as in this case and Rule was issued by their Lordships. As the warrant was not executed under Order XXI, rule 32, the warrant was illegal and obstruction against the execution of an illegal warrant was no obstruction which is punishable under the law. As soon as the time for execution *viz.*, 3 months expired, if the decree-holder came to the Court and asked for a warrant against the judgment-debtor, the Court should first issue notice on the judgment-debtor directing her to obey the Court's decree and if she refused then the Court would be justified in issuing the warrant.

[SHAMSUL HUDA, J.—If the warrant is within one year no notice is necessary. Had it been more than one year then notice would have been necessary.]

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

RICHARDSON, J.—The petitioners before us have been convicted and sentenced to various terms of imprisonment, and one of them has also been fined, under sections 186, 323 and 353, Indian Penal Code, or one or more of these sections. This Rule was issued on the District Magistrate to show cause why the convictions and sentences should not be set aside on the ground that the warrant was illegal, in that it was not shown that Ayesha Khatun had an opportunity of obeying the decree and wilfully failed to obey it. The only point, therefore, which has been argued before us is whether Ayesha Khatun, the lady mentioned in the Rule, had an opportunity or a sufficient opportunity to obey the decree. The decree was a decree obtained against her by her husband for restitution of conjugal rights. It was made on the 3rd March 1917. The warrant in question was not issued till the 15th September 1917. The decree directed that the lady should return to her husband within three months of its date. It is not suggested that the lady had no knowledge of the terms of the decree. The suit was a contested suit and no such suggestion could be successfully made in the circumstances. In my opinion, on the facts stated, there is no ground for saying that the lady had no sufficient opportunity to obey the decree. The learned Pleader who appears for the petitioners contended that the lady was entitled to notice before the warrant was issued. That proposition, however, cannot be supported in view of the decision of this Court in the case of *Durga Das Nandi* v. *Dewaraj Agarwala* (1).

In my opinion, the Rule must be discharged. Those of the petitioners who were released on bail must surrender to their bail and undergo the remainder of their sentences.

SHAMSUL HUDA, J.—I agree.

Rule discharged.

(1) 33 C. 306; 3 C. L. J. 112; 10 C. W. N. 297.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 716 OF 1917.
(CRIMINAL REVISION PETITION No. 567 OF 1917.)

April 9, 1918.

Present:—Mr. Justice Oldfield.

SANKARA KYLASA MUDALIAR AND ANOTHER—RESPONDENTS—PETITIONERS

versus

KUTHALINGA MUDALIAR AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 140, 145, 146, 147—Joint user by both parties, finding as to, legality of—Laying warps in street—Right, nature of—Custom—Order, appropriate—Possession, finding as to, necessary, at date of preliminary order.

Sections 145 and 146 of the Criminal Procedure Code authorize no recognition of joint possession, and no order can be passed forbidding one of the parties to interfere with the joint enjoyment by both. [p. 878, cols. 1 & 2.]

Veerabhadra Pillai v. *Shunmugam Pillai*, 32 Ind. Cas. 668; 17 Cr. L. J. 76, *Dharani Kanta Lahiry*

SANKARA KYLASA MUDALIAR v. KUTHALINGA MUDALIAR.

Chowdhury v. *Girija Kanta Lahiry Chowdhury*, 8 C. W. N. 485; 1 Cr. L. J. 367 and *Makhan Lal Roy* v. *Barada Kanta Roy*, 11 C. W. N. 512; 5 Cr. L. J. 296, followed.

Under section 145, the Court must record a finding as to which party was in possession at the date of its preliminary order. [p. 878, col. 2.]

Petitioners claimed the sole right to lay their warps in a certain street in a village and respondents claimed a joint right with the petitioners. The Court, holding that joint user of both parties was established, forbade petitioners from interfering with the joint enjoyment of the street by the respondents:

Held, (1) that it was not competent to the Court to find joint possession under sections 145 and 146, Criminal Procedure Code; [p. 878, col. 2.]

(2) that the right to lay warps was not a right to the possession of land but a right to the use of it and the Court should have dealt with the matter under section 147, Criminal Procedure Code; [p. 878, col. 2.]

(3 that the Court could find that by custom each party was entitled to use a particular part of the street, provided the right alleged by either side was sustainable under the proviso to the section. [p. 879, col. 1.]

Petition, under section 20 of the Letters Patent, praying the High Court to revise the order of the Joint 1st Class Magistrate of Tinnevelly, dated the 8th August 1917, in Miscellaneous Case No. 16 of 1917.

This case coming on for hearing, upon perusing the petition and the order of the lower Court and the record in the case and upon hearing the arguments of Mr. *M. D. Devadoss*, for the Petitioners, and of Messrs. *K. R. Guruswami Aiyar* and *A. Subramania Aiyar*, for Respondents Nos. 2 and 5, and the 1st respondent having died, the Court made the following

ORDER.—The dispute between the parties in this case is regarding the rights of respondents to lay their warps in a certain street in their village, petitioners claiming the exclusive right to do so and respondents alleging that they are entitled also. The lower Court, holding what it refers to as joint user established, has, under section 140 of the Code of Criminal Procedure, forbidden petitioners to interfere with the joint enjoyment of the street by respondents in the manner in question.

Petitioners have objected to this order on the ground that it was passed after admissible evidence, oral and documentary, had been excluded. But the view I take involves consideration only of two more substantial objections that (1) sections 145 and 146 authorise no recognition of joint possession, (2) the lower Court did not decide, as the former section directs, which party was in possession on 23rd June 1917, the date of the preliminary order. The first of these objections is justified by the description in the sections of the different orders which can be passed and by reference to authority, the latest case being *Veerabhadra Pillai* v. *Shunmugam Pillai* (1); see also *Dharani Kanta Lahiry Chowdhury* v. *Girija Kanta Lahiry Chowdhury* (2) and *Makhan Lal Roy* v. *Barada Kanta Roy* (3). The second is based on the contention which is consistent apparently (for the lower Court has not dealt with the point) with petitioners' petition of 3rd February 1917 and respondents' evidence that the latter were prevented from laying warps on 1st February 1917 and did not do so subsequently and, therefore, if possession was in question, had none either at the date of the preliminary order or within the two months preceding it referred to in the proviso to section 145. If this contention had been established it would have entitled petitioners to succeed, if an order under section 145 of the Code of Criminal Procedure had been appropriate, and such an order passed in disregard of this fact cannot be sustained. That the first of these objections to the lower Court's order is available is, however, entailed by the fact that it made a fundamental mistake in attempting to apply section 145 at all. On that account its order must be set aside.

The right to lay warps in a street is clearly, as respondents argue here and as petitioners contended in their review petition to the lower Court of September 1917, not a right to possession of land but a right to the use of it such as section 147 of the Code of Criminal Procedure deals with, and the lower Court should have proceeded under that section. If it had done so, it would have avoided not only the legally inadmissible recognition of joint possession, but also the use of terms "joint user", and "joint enjoyment" in its judgment and final order, to which it is impossible to attach any definite significance. For it cannot be said that *A* who lays his

(1) 32 Ind. Cas. 668; 17 Cr. L. J. 76.
(2) 8 C. W. N. 485; 1 Cr. L. J. 367.
(3) 11 C. W. N. 512; 5 Cr. L. J. 296.

warps on the one part of the street and *B* who lays his on another are using or enjoying the ground jointly, on the sole ground that they do so similarly and simultaneously. The lower Court may now find, and it will be admissible for it to consider before passing an order, that this user is regulated by custom or otherwise, if only to the extent that priority of occupation on any particular day is respected and if such regulation is established, it may do well to frame its order accordingly. It will, in any case, have to consider whether the right alleged by either side is sustainable with reference to the period prescribed in the proviso to the section. If it is not, no order recognising that side's user can be passed.

The lower Court's order is set aside and the petition is remanded to it for re-hearing in the light of the foregoing, after it has passed a preliminary order under section 147. At the enquiry to be held it will take evidence *de novo*, including that alleged to have been excluded improperly, if it is otherwise admissible. Costs to date here and before the lower Court will be costs in the case and will be provided for in the final order passed. Fee on each side in this Court is Rs. 25.

M.C.P.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 55 OF 1916.

May 10, 1916.

Present:- Mr. Batten, A. J. C.

MADAN GOPAL DEOKARAN— APPLICANT

versus

THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR - NON-APPLICANT.

C. P. Municipal Act (XVI of 1903), ss. 67 (1) (2), 122, 139—Encroachment, old, prosecution in respect of, legality of -Remedy.

What is made criminally punishable under section 122 of the C. P. Municipal Act is the act of making an encroachment. The section cannot reasonably be construed as making punishable an existing encroachment not made by the accused person. [p. 880, col. 1.]

In the case of an encroachment not made by the accused, sub-section (2) of section 67 of the Act provides full means of redress which can be enforced by the penal provisions of section 139. [p. 880, col 2.]

The word 'such' in sub-section (2) of section 67 of the Act refers back to the words "structure encroaching on any street" in sub-section (1), and not only to new encroachments as is clear from the proviso in which encroachments of very old standing are referred to. [p. 880, col. 2.]

Revision of the judgment, finding and sentence passed by the Magistrate, 1st Class, in Criminal Case No. 675 of 1915, dated the 21st March 1916.

Mr. *W. H. Dhabe*, for the Applicant.

Mr. *A. C. Roy*, for the Non-Applicant.

JUDGMENT.—The applicant was prosecuted by the Nagpur Municipality under section 122 of the Municipalities Act for encroaching on a public street. According to the learned Magistrate who tried the case summarily there is a *pacca chabutra* of dressed stones, which itself constitutes an encroachment, and beyond the *chabutra* is a line of loosely hacked stones (which I am told, correctly or not I cannot say, can be used as steps) projecting even further into the street; but the prosecution is in respect of the line of stones only. It is not denied by the learned Pleader for the applicant that the stones constituted a structure within the meaning of section 67 (1) of the Municipalities Act. The case for the prosecution was that the applicant himself had placed this structure in the street, but among other contentions the accused alleged that the stones have been where they are for a long time, from before the date on which he inherited the house. The City Magistrate in the course of a very reasonable and careful judgment says:—

"The fact is that no one knows exactly when these stones were added, because they do not form a conspicuous addition to the building. The main argument for the defence is that even if the land is

Municipal, Madan Gopal, the present accused, cannot be prosecuted for the encroachment because he inherited the house as it stands at present. The wording of section 122, Municipal Act, is 'whoever encroaches', and it is argued that only the person who originally made the encroachment can be prosecuted. This is of importance because in view of the conflict of the evidence I cannot hold that the prosecution have proved that it was Madan Gopal who actually put the stones there. It seems to me clear that the word 'encroach' includes the continuing of an encroachment as well as the making of it and that Madan Gopal can be prosecuted even though it was not he who put the stones there." The prosecution referred to by the Magistrate, of course, refers to the prosecution under section 122 of the Act.

That part of section 122 which relates to obstructions or encroachments upon streets made in connection with a house without the written permission of the Committee, must be read with section 67 (1), which enacts that "No person shall, without the written permission of the Committee, place in front of any building any structure.....encroaching on any street.

The words "place in front of any building" in section 67, and the word 'encroachment' in section 122 *prima facie* mean "commits an act of encroachment": a man cannot be held liable for an act or omission unless such act or omission is definitely declared to be an offence. What is made criminally punishable under section 122 is the act of making an encroachment; the section cannot reasonably be construed as making punishable the omission to remove an existing encroachment not made by the accused person. The learned District Magistrate who characterises the view that the word 'encroach' applies only to the original intention as a "*rident* proposition," says, "any other view (than his own) would reduce this provision of the law to absurdity. Any individual could otherwise steal property not his own, and convey a good title to another, or certainly transmit a good title to a successor." It seems hardly necessary to demonstrate the fallacy of this argument; the law provides ample remedies against a guilty receiver of stolen property, and provides means of restitution of the property to its lawful owner, and an innocent receiver of stolen property cannot be prosecuted criminally, although the law can force him to make restitution. Such analogies, however, are wide of the mark. The District Magistrate writes as if the Municipality in the case of an old standing encroachment not made by the present owner of the adjoining premises were without a remedy if a prosecution under section 122 is not available. Such is not, however, the case. Sub-section (2) of section 67 of the Act provides full means of redress, and these means can be enforced by the penal provisions of section 139, and otherwise. The word "such" in the sub-section refers back to the words "structure encroaching on any street" in sub-section (1), and not only to new encroachment, as is clear from the proviso in which encroachments of very old standing are referred to. The Municipality has, therefore, ample means of enforcing the Municipal law without employing section 122 in a case to which that section does not apply. On the ground that a person cannot be convicted under section 122 of encroaching in respect of an encroachment not proved to have been made by himself, I find the conviction to be illegal. I set aside the conviction and sentence and acquit the applicant. The fine, if paid, must be refunded.

Conviction set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 15 B OF 1918.

September 12, 1918.

Present:—Mr. Mittra, A. J. C.

BINYA BAI AND ANOTHER—DEFENDANTS —APPLICANTS

versus

GANPAT AND ANOTHER—PLAINTIFFS —NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Abandonment of claim—Knowledge of right, constructive, whether bars subsequent suit.

In order to make Order II, rule 2, of the Civil Procedure Code, applicable to a subsequent suit, it is necessary to show that the plaintiff had at the date of the institution of the previous suit actual and not merely constructive knowledge of the right which he is seeking to enforce in the subsequent suit. [p. 881, col. 2.]

Amanat Bibi v. *Imdad Husain*, 15 C. 800 at p. 808; 15 I. A. 106; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique & Jackson's P. C. No. 103; 7 Ind. Dec. (N. S.) 1117 (P. C.), followed.

Revision of the decree of the Judge, Small Cause Court, Amraoti, dated the 26th November 1917, in Civil Suit No. 770 of 1917.

Dr. *H. S. Gour*, for the Applicants.

Mr. *V. V. Chetale*, for the Non-Applicants.

ORDER.—On the 24th June 1913 one Honia, who was the owner of Survey Number 25, leased it for two years to the plaintiffs. Subsequently Honia sold to Motilal, the predecessor-in-title of the defendant applicants, a number of fields including Survey Number 25. Criminal proceedings were instituted under section 145 of the Code of Criminal Procedure in view of disputes between Honia and Motilal regarding the possession of these fields. They were ordered to be kept under attachment and the fields were leased out by the Tahsildar. On the 24th March 1916 the plaintiffs instituted Suit No. 73 of 1916 against Motilal and the heirs of Honia for a declaration that the plaintiffs were entitled to the rent of field No. 25 alleged to have been in deposit with the Criminal Court. This claim was admitted by Motilal and the other defendants and the plaintiffs were given a declaration as prayed for. The present suit has been instituted against the widows of Motilal for the recovery of the amount of rent which by the previous suit it has already been declared that the plaintiffs were entitled to. The main plea of the defendants applicants is that the suit is barred by Order II, rule 2. The Small Causes Court has overruled this plea and has passed a decree for the amount claimed.

It has been found by the lower Court that the plaintiffs were not aware of the fact that the money had been paid over to Motilal prior to the institution of Suit No. 73 of 1916. Their allegation in the previous suit was that money was still in deposit, an allegation which was not denied by Motilal. The finding regarding the plaintiffs' ignorance of the Criminal Court having paid over the lease money to the defendant appears to me to be justified by the evidence on record, and I must accept this finding. It is, however, urged that the plaintiffs had notice of the payment, inasmuch as the slightest enquiry would have led to the discovery of this fact. This may be conceded. The lower Court has decided the case following a passage from the judgment of the Privy Council, and the argument before me has been practically confined to a discussion as to the meaning of the passage.

In *Amanat Bibi* v. *Imdad Husain* (1) their Lordships say: "the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a portion of his claim" within the meaning of the section in question. For the applicants it is contended that by the use of the word "aware" their Lordships were referring to cases of both actual and constructive knowledge. I do not think so, for in a subsequent passage their Lordships speak of knowing. I hold that the view taken by the lower Court is correct.

Reference is made to the provisions of section 42 of the Specific Relief Act, and it is urged that the plaintiffs were entitled to consequential relief in the former suit by way of injunction, if not also by way of an order for payment of the money. This may be true, and if the plea had been raised in Suit No. 73 the plaint would have been allowed to be amended or the suit dismissed in accordance with the provisions of section 42. This cannot, how-

(1) 15 C. 800 at p. 808; 15 I. A. 106; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique & Jackson's P. C. No. 103; 7 Ind. Dec. (N. S.) 1117 (P. C.).

ever, in any way affect the present suit if it is not barred by Order II, rule 2, as I have already held.

The result is that the application for revision is dismissed with costs. I allow fifteen rupees as Pleader's fee in this Court.

Revision dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 902 OF 1917.

February 18, 1918.

Present :—Mr. Justice Phillips and Mr. Justice Krishnan.

A. RAMA RAO—DEFENDANT No. 4—APPELLANT

versus

MANDACHALUGAI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 3 AND 5—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss 74, 101—*Mortgage—Subrogation, right of, enforcement of, by suit—Payment of prior mortgage, whether gives right to subrogate—Intention—Presumption.*

The right of subrogation is an equitable right and where it is a simple mortgage right that has been acquired, it can be enforced by a suit against an auction-purchaser.

Arumugusundara v. *Narasimha Iyer*, 29 Ind. Cas. 916; 29 M. L. J. 583; 2 L. W. 542; (1915) M. W. N. 397; 18 M. L. T. 110 and *Rajah of Kalahasti* v. *Prayag Dossjee*, 35 Ind. Cas. 224; (1916) 2 M. W. N. 92; 30 M. L. J. 391, distinguished.

Gur Narain v. *Shadi Lal*, 12 Ind. Cas. 607; 34 A. 102; 8 A. L. J. 1289, followed.

A purchaser of the equity of redemption paying off a prior mortgage out of the purchase-money is presumed to keep it alive as against puisne mortgagees when it is to his interest to do so. The question is one of intention.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 250 of 1916, preferred against the decree of the Court of the Temporary Subordinate Judge of Madura, in Original Suit No. 16 of 1916.

Mr. *K. S. Jayarama Aiyar*, for the Appellant.

Messrs *C. V. Ananthakrishna Aiyar* and *K. Sankarasubba Aiyar*, for the Respondents.

JUDGMENT.—It is first contended that the right of a prior mortgagee obtained by subrogation cannot be enforced by suit, but can only be used as a defence against subsequent encumbrances, and reliance is placed on certain observations in *Arumugusundarn* v. *Narasimha Iyer* (1), quoted with approval in *Rajah of Kalahasti* v. *Prayag Dossjee* (2). In the present case, however, the right was used as a shield and plaintiff's mortgage right was recognised by the subsequent mortgagee when the property was brought to sale in execution of his decree. The right of subrogation is an equitable right and in the present case, being a mere simple mortgage right, it can now only be enforced against the auction-purchaser by suit. To recognise an equitable right and then refuse the means of enforcing it would in effect result in refusing the equity.

We cannot, therefore, accept the contention that such right cannot in any event be enforced by suit and we are supported in this view by the opinion of the Allahabad High Court in *Gur Narain* v. *Shadi Lal* (3). This objection must, therefore, fail.

It is next contended that plaintiff has obtained no right of subrogation because he paid off the prior mortgage out of the purchase-money, and we have been referred to numerous cases in support of this contention. The principle that has been applied in all these cases is the same, and each case has been decided on the question of whether it was or was not the intention of the purchaser to keep the mortgage alive, and the presumption is in favour of its being so kept when it is to the purchaser's interest to do so. In this case the question of intention was not raised in the lower Courts. As plaintiffs' right had been recognised by the puisne mortgagee, we cannot allow this question of fact to be re-opened, especially as the available evidence is against appellant.

The appeal is dismissed with costs.

Appeal dismissed.

M. C. P.

(1) 29 Ind. Cas. 916; 29 M. L. J. 583; 2 L. W. 542; (1915) M. W. N. 397; 18 M. L. T. 110.

(2) 35 Ind. Cas. 224; (1916) 2 M. W. N. 92; 30 M. L. J. 391.

(3) 12 Ind. Cas. 607; 34 A. 102; 8 A. L. J. 1289.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 172 OF 1917.

July 5, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

GOVIND RAMAJI GANJALE—DEFENDANT—APPELLANT

versus

SAVITRI RAMA THOSAR—PLAINTIFF—RESPONDENT.

Trusts Act (II of 1882), s. 88—Person in fiduciary position taking advantage of position and securing benefit—Transaction, validity of—Contract Act (IX of 1872), ss. 19, 19A, 64.

Plaintiff and her sister, who had been brought up in the house of their uncle, the defendant, and were under his influence, executed a sale-deed in his favour for an inadequate consideration. After the death of her sister the plaintiff brought a suit to recover the property conveyed by the sale-deed:

Held, that the defendant stood in a fiduciary position towards the plaintiff and her sister and that, therefore, under section 88 of the Trusts Act, the sale-deed was null and void both as regards the share of the plaintiff and that of her sister. [p. 884, col. 1; p. 885, col. 1.]

Second appeal from the decision of the Assistant Judge, Poona, in Appeal No. 113 of 1915, confirming the decree passed by the Additional Subordinate Judge, Karad, in Civil Suit No. 22 of 1914.

Mr. *Coyajee* (with him Mr. *K. H. Kelkar*), for the Appellant.

Mr. *Jayakar* (with him Mr. *K. P. Padhye*), for the Respondent.

JUDGMENT.—The plaintiff sued for a declaration that a sale-deed executed by her and her sister Manjoola on the 3rd August 1911 in favour of their uncle, the defendant, was null and void, and to recover possession of the property described therein. Manjoola, the plaintiff's sister, died in February 1912, and the plaintiff claims both in her own right, and in the right of Manjoola as her heir, to recover the property.

The first question is whether the plaintiff is the heir of Manjoola. That depends upon the question whether Manjoola was married by the *asura* form of marriage or by an approved form. If she was married by the *asura* form, then the plaintiff is her heir. It is held by both Courts that *dej* was paid on Manjoola's marriage, and that the defendant postponed that marriage because the *dej* had not been paid. They, therefore, came to the conclusion that the *dej* was paid to the defendant as a bride price. The marriage was, therefore, in the *asura* form.

It has been held by the lower Courts that the appellant was in a fiduciary relation to his nieces. They were brought up in his house and acted under his influence. The Courts also held that the price paid under the sale-deed as a consideration for the transfer of the plaintiff and her sister's property to the defendant was inadequate.

Assuming the plaintiff is the heiress of Manjoola, it is contended that claiming through Manjoola she has no right to exercise the option to avoid the deed as to one moiety of the property, since Manjoola in her lifetime did not exercise the option and a right dependent on the will of an individual is not transmissible to his heirs to exercise at their will and not that of the person through whom they claim.

The argument may be put thus:—

Under the Indian Contract Act all agreements fulfilling the conditions of section 10 are contracts.

One of those conditions is free consent of competent parties. But the absence of free consent from causes specified in section 14, namely, coercion, etc., does not prevent the agreement from being a contract. The contract only becomes voidable at the option of the party whose consent is caused (sections 19 and 19A).

In dealing with performance of such contracts in Chapter IV, section 64, the Act reserves no right expressly to the representative of the party whose unfree consent was obtained, although section 45 of the same Chapter provides for devolution of certain contractual rights where but for express provision the death of a joint promisee would bar such devolution.

Moreover section 86 of the Indian Trusts Act, which is in *pari materia* with sections 19 and 19A of the Indian Contract Act, is open to similar criticism since sections 81 and 83 refer expressly to representatives, while section 86 apparently only relates to the lifetime of a transferor.

Again Act XII of 1855, though it gives a right to representatives to sue for compensation for wrongs which have caused pecuniary loss to the estate of a deceased

person, does not give any right of suit to avoid contracts for wrongful action.

The Probate and Administration Act, section 88, gives the executor or administrator the same power to sue as the deceased in respect of all causes of action *that survive the deceased.* But it is contended that there is no cause of action till the person unduly influenced has indicated his election to avoid the contract.

This argument might be pertinent and require serious consideration, if we were dealing with a case of a contract effected by undue influence in which the parties were not in a finduciary relation to each other and in which the influencing party had not acquired possession of property of the party influenced. When property has been acquired by a party by using for his own advantage his fiduciary position, the case falls under section 88 of the Indian Trusts Act, which runs as follows:—

"Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

This section embodies a principle acted on in many English cases. It is sufficient to mention *Stump* v. *Gaby* (1) and *Gresley* v. *Mousley* (2), where devisees of the party influenced were allowed to set aside conveyances of their testators to solicitors on the ground that the testator by reason of the breach of trust of his grantee still retained a devisable right to the property in equity.

In *Stump* v. *Gaby* (1) it was said :— "I do not deny that a deed may be so fraudulent as to be set aside at law; this, however, is not such a case; but I will assume that the conveyance might have been set aside in equity for fraud: what then is the interest of a party in an estate which he has conveyed to his attorney under circumstances which would give a right in this Court to have the conveyance set aside? In the view of this Court he remains the owner, subject to the repayment of the money which has been advanced by the attorney, and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all question as to any rights of entry or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this Court. The testator, therefore, had a devisable interest. My strong impression is that this very point is concluded upon authority, but if not I am ready to make an authority on the present occasion, and to decide that, assuming the conveyance to have been voidable, the grantor had an equitable estate which he might have devised, and that being so he has in the clearest terms devised the estate, and thereby prevented the descent to his heir-at-law. I give no opinion as to what would have been the case if he had not devised the estate."

Apparently this is the idea underlying suits by representatives such as *Holman* v. *Loynes* (3) and *Wright* v. *Vanderplank* (4).

In such cases one comes very near treating the conveyances as void in equity and thus taking them in substance out of the range of voidable contracts.

The English Courts, however, have applied to them the tests applicable to cases of voidable contracts, such as that lapse of time without rescinding will furnish evidence that the party influenced has determined to affirm the contract, though delay is not imputable against him till he has such knowledge as he was bound to avail himself of, the onus being on the

(1) (1852) 2 De G. M. & G. 623 at p. 630; 22 L. J. Ch. 352; 17 Jur. 5; 1 W. R. 85; 42 E. R. 1015; 20 L. T. (o. s.) 213; 95 R. R. 257.

(2) (1859) 4 De G. & J. 78 at p. 93; 28 L. J. Ch. 620; 5 Jur. (N. S.) 583; 7 W. R. 427; 45 E. R. 31; 124 R. R. 164.

(3) (1854) 4 De G. M. & G. 270; 23 L. J. Ch. 529; 18 Jur. 839; 2 W. R. 205; 43 E. R. 510; 22 L. T. (o. s.) 296; 102 R. R. 127.

(4) (1856) 8 De G. M. & G. 133; 2 K. & J. 1; 25 L. J. Ch. 753; 2 Jur. (N. S.) 599; 4 W. R. 410; 44 E. R. 340; 114 R. R. 60.

other side to prove such knowledge and the time of its acquisition : see Leake on Contract, Part I, Chapter VI, s. II.

Since the facts of this case as found by the lower Courts clearly bring it within the scope of section 88 of the Indian Trusts Act, we affirm the decree declaring the sale-deed to be null and void. We direct inquiry as to the amount of the consideration paid by the appellant in discharging the mortgages which were binding on the estate and that on the respondent paying within six months the sum which may be found due on such account the appellant do deliver to her possession of the property in suit.

The costs of this appeal and the costs in the lower Courts up to date to be paid by the appellant.

Decree confirmed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 65 OF 1918.

July 24, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUHAMMAD ABDUL RASHID ALI KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

BUDH SEN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Mortgage-decree—Sale—Compromise—Sale, whether can be set aside by consent—Court, power of.

Certain property was sold in execution of a mortgage decree and was purchased by one of the decree-holders. The judgment-debtor applied to set aside the sale on the ground that a compromise had been arrived at between the parties prior to the sale. The decree-holders, through their Pleader, consented to the sale being set aside:

Held, that there being no opposition on the part either of the purchaser or of the decree-holders, the Court had power to set aside the sale.

First appeal from an order of the First Additional Subordinate Judge, Aligarh.

Mr. *Benoy Kumar Mukerji*, for the Appellant.

JUDGMENT.—The facts connected with this appeal are as follows:—There had been a mortgage decree. The property was advertised and put up to sale in the usual way and actually sold. After the sale one of the decree-holders purchased it (in all probability on behalf of himself and the other decree-holder). It appears that there had been some attempt at a compromise before the sale actually took place, which fell through. It is alleged that the property was sold considerably below its value, because possible bidders were kept away thinking that the matter had been compromised between the parties. That something of this kind occurred is strongly corroborated by the fact that when an application to set aside the sale was made, the Pleader for both decree-holders signed the petition in token of the agreement of the decree-holders that the sale should be set aside. The learned Judge has not disputed the matters that we have mentioned in his judgment. On the contrary his judgment simply says that there is no law by which a sale can be set aside when the judgment-debtor and decree-holder consent. In the present case both the decree-holders through their Pleader consented to the sale being set aside; and one or both of the decree-holders was the purchaser or purchasers of the property. Therefore every one concerned consented, and there does not appear to have been any opposition on the part of either the purchaser or the decree-holders. Under these circumstances we think the Court below ought to have set aside the sale and had power to do so. Even in this Court apparently the decree-holders, who, as we have already said, are also the purchasers, are absent and apparently raise no objection to the appeal being allowed. We allow the appeal, set aside the order of the Court below and set aside the sale, and direct that the property be re-sold according to law. We make no order as to costs.

Let our order be sent down as soon as possible.

Appeal allowed.

DHARAMCHAND *v.* GORELAL.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 450 OF 1917.

January 28, 1918.

Present :—Sir Henry Drake-Brockman, KT., J. C.

DHARAMCHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GORELAL SON OF MUKANDLAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 105 (2)—Appeal—Remand, order of, whether can be questioned by lower Court—Jurisdiction, question of, failure to raise, effect of—Court Fees Act (VII of 1870), s. 17, applicability of—Alternative reliefs arising from more causes of action than one—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 116, applicability of—Sale—Consideration, failure of—Suit to recover purchase-money—Limitation, commencement of—Transfer of Property Act (IV of 1882), s. 55 (2)—Covenant, implied, nature of.

Section 105 (2) of the Civil Procedure Code precludes a lower Court from treating the remand order of the Appellate Court as a nullity owing to the want of jurisdiction in the latter to pass it. [p. 889, col. 2.]

A party who omits to raise the question of the jurisdiction of the Appellate Court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate Court to which the matter in dispute is remanded. [p. 889, col. 2.]

Section 17 of the Court Fees Act applies to alternative reliefs claimed with reference to more causes of action than one. The operation of the section is not necessarily confined to cases where cumulative reliefs are claimed. [p. 889, col. 2.]

It is only where a sale is void *ab initio* that Article 62 of Schedule I of the Limitation Act can apply to a suit by the vendee for refund of the purchase-money. If, however, the vendee has actually obtained and held possession of the property, Article 97 may be applied even if the sale turns out to be void *ab initio*, for otherwise the claim for refund might be barred although the vendee had been given no occasion to sue. The same Article is applicable where there is a subsequent failure of consideration. [p. 890, cols. 1 & 2]

Where the vendor has no title to convey, the Article applicable to a suit for refund of the purchase-money is Article 116, and time in such a case begins to run from the date of the execution of the conveyance if there is no question of fraud. [p. 890, cols. 1 & 2.]

The covenant implied under section 55 (2) of the Transfer of Property Act is merely that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. [p. 890, col. 2.]

Appeal against the decree of the District Judge, Saugor, dated the 26th July 1917, in Civil Appeal No. 12/111 of 1917, against the decree of the Subordinate Judge, Saugor, dated the 22nd March 1917, in Civil Suit No. 22 of 1915.

Messrs. *P. R. Naidu* and *G. R. Pradhan*. for the Appellants.

Mr. *S. Ramdas*, for the Respondent.

JUDGMENT.—For the apprehension of the questions which arise for determination in this appeal it is necessary to state at some length the history of the relations between the parties.

On the 19th October 1908 a party of persons, who will hereinafter be referred to as Duli Chand, obtained a decree for money against one Mukundi Lal, since deceased, and his son, the present respondent Gore Lal. In execution of this decree Duli Chand on the 20th October 1908 attached Mukundi Lal's house in the town of Saugor. On the same day the judgment-debtors had conveyed the house to the present appellants, who may conveniently be indicated by the single name Dharam Chand, the price mentioned in the sale-deed being Rs. 999.

Dharam Chand objected to the attachment, but his objection was dismissed on the 5th December 1908, the Court holding under section 276, Code of Civil Procedure, 1882, that the sale was void as against all claims enforceable under the attachment. The house was then sold on the 17th December 1908 in execution of Duli Chand's decree and on the 14th April 1909 the auction purchaser Muni Lal, who had paid Rs. 560, [entered] into possession.

Meanwhile on the 15th December 1908 Mukundi Lal and Gore Lal had preferred an appeal from the decree passed against them, with the result that the Divisional Judge remanded the case for a complete retrial. The claim of Duli Chand was eventually dismissed on the 13th September 1910 and exactly a year later the Divisional Judge affirmed that decision.

On the 15th August 1911 Dharam Chand brought against Muni Lal a suit of the kind contemplated by rule 63, Order XXI, First Schedule, to the Civil Procedure Code. This was dismissed as time-barred by the District Judge on the 28th February 1912 and his decision was upheld, first by the Divisional Judge on the 15th July 1912 and finally by this Court in Second Appeal No 539 of 1912 on the 22nd July 1913.

Meanwhile in a suit for money (No. 99 of 1911) filed by Dharam Chand against Mukundi Lal and Gore Lal the character of the sale effected on the 20th October 1908 was put in issue, the defence having denounced it as fictitious and designed to shield the house from sale in execution of Duli Chand's decree. The decision was in favour of Dharam Chand, the trial Judge deciding that the sale was real and for consideration, and his view was upheld in first appeal by the District Judge on the 25th March 1913 and by this Court in Second Appeal No. 350 of 1913 on the 16th April 1914.

On the 10th January 1912 Mukundi Lal and Gore Lal applied to the Court which had finally dismissed Duli Chand's suit of 1908 demanding restitution of the house bought by Muni Lal or alternatively Rs. 5,000 as its value. Dharam Chand was allowed to intervene in this proceeding and to plead that any order for restitution must be for his benefit, inasmuch as his title to the house had been held to be good in Suit No. 99 of 1911: eventually his application was dismissed on the 22nd December 1914 on the ground that he had no *locus standi* as against Duli Chand or Muni Lal.

Dharam Chand's next step was to file the suit out of which the present appeal arises. Mukandi Lal had by this time died and Gore Lal and Duli Chand were joined as defendants. The following alternative reliefs were claimed:

(1) Rs. 560, the auction-price of the house, together with such compensation as might be awarded to Gore Lal as the result of his application for restitution in Duli Chand's suit and an injunction restraining Duli Chand from paying this compensation, when determined, to Gore Lal.

(2) Rs. 999 from Gore Lal only by way of compensation for the eviction due to his defective title.

The plaint also contained the usual prayer for any other relief which the Court might think fit to grant.

The trial Judge held that the plaintiff's claim for restitution in Duli Chand's suit having been dismissed by the order of the 22nd December 1914 which had not been appealed from, no relief could be granted against Duli Chand. The alternative claim he regarded as time-barred, more than three years having elapsed from the 5th December 1908 when the plaintiff's objection to the attachment in Duli Chand's suit was disallowed.

In appeal the District Judge allowed the plaintiff to withdraw from the suit as against Duli Chand. He then remanded the case for a fresh decision on the ground that the judgment did not comply with the requirements of rules 4 and 5, Order XX, First Schedule, to the Code of Civil Procedure, and that the pleadings required amplification. The date of the remand order is the 13th May 1916.

By the time the further hearing in the Court of first instance began, the Divisional Judge had awarded Gore Lal Rs. 2,500 by way of restitution for loss of the house. The trial Judge then permitted the plaint to be amended so as to claim the following reliefs as against Gore Lal only:

(1) A declaration that the plaintiff is entitled to receive the sum of Rs. 2,500 awarded to the defendant as damages for loss of his house and a direction for payment of the same by the defendant.

(2) That on the aforesaid compensation being deposited in Court by Duli Chand it should be paid to the plaintiff.

The trial Judge again dismissed the suit. The first ground for his decision is that the District Judge had no jurisdiction to hear the appeal from the first decree of dismissal, the reason being that the value of the suit as originally framed was in excess of Rs. 1,000, and that consequently the first decree must be regarded as still in force and final, no proper appeal having been preferred against it within the time allowed by law. He went on to hold that the plaintiff had no cause of action, inasmuch as the defendant was in no way accountable for the dispossession and no convenant for quiet enjoyment is included in the sale-deed. Lastly he considered that even conceding that the plaintiff could have claimed refund of his purchase-money from the defendant, the claim would be time-barred under Article 116 of the Limitation Schedule, the cause of action for such relief having arisen either on the date of the sale or on the 5th

December 1903, when the objection to the attachment of the house was disallowed.

In appeal the District Judge held that section 105 (2), Civil Procedure Code, precluded the lower Court from treating his predecessor's remand order of the 13th May 1916 as a nullity. With regard to the merits he considered that no cause of action would arise until the defendant actually received the compensation claimed from Duli Chand and that until such receipt no question of limitation could arise. The appeal was accordingly dismissed on the 26th July last, the parties being directed to bear their own costs in the District Judge's Court. On the same day the learned Judge passed an order on Gore Lal's application for restitution in Duli Chand's suit that Duli Chand should pay Gore Lal Rs. 2,154-9-7, a direction against which no appeal has yet been preferred.

The plaintiff has appealed to this Court and Gore Lal has preferred cross-objections. In this Court it is contended for the appellant that the suit is one for breach of a covenant for title and that the defendant must be regarded as a trustee for any sum he may eventually recover by way of restitution from Duli Chand, also that the lower Appellate Court has overlooked the general prayer under which the plaintiff would at any rate be entitled to get back his purchase-money.

With regard to the question whether the defendant can be regarded as trustee of such money as he may hereafter recover from Duli Chand sections 63 and 94, Indian Trusts Act, 1882, are relied upon. The following are the terms of those provisions:—

63. "Where the trustee has disposed of trust property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property."

94. "In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

It is said that the defendant should be regarded as having disposed of the house and as having held it until disposal by auction-sale in trust for the plaintiff. Neither of these propositions seems to me to be tenable. The house was in fact held by the plaintiff and it was diposed of not by but in spite of the defendant, and from the moment of parting with the house to the plaintiff the defendant ceased to have anything to which a trust could attach. I am referred in this connection to *Torrance* v. *Bolton* (1). In that case certain property was put up for sale, and in the particulars, which were advertised, it was described as an immediate absolute reversion in a free-hold estate, falling into possession on the death of a lady in her seventieth year; and by the conditions of sale, which were read in the auction-room immediately before the sale but were not printed or circulated among those present, the property was stated to be subject to three mortgages. The property was bought by the plaintiff, who stated that he was deaf and did not understand that he was buying merely an equity of redemption. It was held on a bill filed by the plaintiff to have the contract for sale rescinded, that the description of the property and the particulars of sale were misleading, that the onus was therefore on the vendor to show that the purchaser was not actually misled and that as he had failed to do so the plaintiff was entitled to have the contract rescinded and his deposit returned. This decision was affirmed in appeal: see *Torrance* v. *Bolton* (2). There is evidently nothing in the circumstances of that case to support the contention that the vendor in the present case should be deemed to be a trustee for any restitution he may obtain in a suit of his own against the third person. The plaintiff-appellant in the present case has really no *locus standi* of any sort with regard

(1) (1872) 14 Eq. 124.
(2) (1873) 8 Ch. 118; 42 L. J. Ch. 177; 27 L. T. 738; 21 W. R. 134.

to the litigation between Gore Lal and Duli Chand, inasmuch as for the purposes of that litigation his purchase from Gore Lal is of no effect. For this reason, and not because it should be regarded as premature, I hold that the new relief asked for in the amended plaint has been rightly disallowed.

It will be convenient to deal at this stage with the cross-objection of the defendant to the effect that the District Judge's order of remand dated the 13th May 1916 was without jurisdiction. That view was based upon the assumption that the value of the suit for the purposes of jurisdiction should be treated as exceeding Rs. 1,000, a Court fee being payable on each of the reliefs claimed in the original plaint. *Neelakandhan* v. *Ananthakrishna Ayyar* (3) was relied upon. In that case it was held that the operation of section 17, Court Fees Act, is not necessarily confined to cases where cumulative reliefs are claimed. The alternative claims there were :—

(1) For redemption based upon the alleged right of the plaintiff as mortgagor,

(2) for various sums of money on the footing of a further mortgage to be executed by the plaintiff to the defendants in accordance with certain provisions contained in the earlier mortgage.

It was held that these claims were distinct matters which could have been the grounds of separate suits and that they were, therefore, distinct subjects within the meaning of section 17. The learned Judges also remarked as follows :—

"The phrase 'two or more distinct subjects' in section 17 may not admit of precise definition applicable to all cases, and it may be that where reliefs are claimed in the alternative with reference to the same cause of action, section 17 would not govern the case. That may also be so where the relief claimed is one and the same, though the claim is sought to be made out on distinct or alternative grounds."

The present seems to be a case of alternative reliefs being claimed with reference to causes of action of which the plaintiff's loss of the house bought from the defendant Gore Lal forms part. The foundations of the claims are not, however, precisely the same. As pointed out by the trial Judge the relief against Duli Chand was based on the plaintiff's right as vendee to stand in Gore Lal's shoes, whereas refund of the purchase-money was asked for on the ground that the sale had failed owing to a defect in Gore Lal's title. The position somewhat resembles that in *Hashmat-un nissa Begam* v. *Muhammad Abdul Karim* (4), where section 17, Court Fees Act, was held to be applicable. In *Kashinath Narayan* v. *Govinda* (5) there was clearly a single cause of action and the decision that section 17, is applicable only to a case of cumulative reliefs sought by the plaintiff appears to go further than the language of section 20 warrants. On the whole, then, I am inclined to think that the trial Judge was right as to the valuation of the suit in its original shape for the purposes of jurisdiction. I agree, however, with the lower Appellate Court that the trial Judge had no power to treat the Appellate Court's order as passed without jurisdiction. The trial Judge relied on *Narayan Raoji Ranade* v. *Gangaram Ratanchand Marwadi* (6) and *Rajalakshmi Dasee* v. *Katyayani Dasee* (7) but in both those cases the objection to the jurisdiction of the Appellate Court was raised in a higher Court and in neither had there been an order of remand protected by section 105 (2), Code of Civil Procedure. In the Calcutta case the point was taken in a distinct litigation from that in which the appellate decree held bad for want of jurisdiction was passed. I know of no authority expressly covering the point under consideration. On the other hand it appears to me wholly unreasonable that a party having omitted to raise the question of jurisdiction at the hearing and to appeal from the decision reached should be allowed to object to that decision in the Subordinate Court to which the matter

(3) 30 M. 61; 16 M. L. J. 462; 1 M. L. T. 426.

(4) 29 A. 157; A. W. N. (1907) 4; 4 A. L. J. 127.
(5) 15 B. 82; 8 Ind. Dec (N. S.) 56.
(6) 3 Ind. Cas. 816; 33 B. 664; 11 Bom. L. R. 817.
(7) 12 Ind. Cas. 464; 38 C. 639.

in dispute has been remanded. The objection, therefore, fails.

It remains to consider the alternative claim of the plaintiff for refund of his purchase-money (Rs. 999). This, though not expressly reproduced in the amended plaint, is covered by the general prayer which appears there as in the original plaint. With this the lower Appellate Court has entirely failed to deal. Nor has the trial Judge complied with the directions in the remand order of the 13th May 1916. In connection with the alternative relief which has already been disallowed, the learned District Judge considered that Article 62 or possibly Article 29 of the Limitation Schedule might apply when the defendant recovers the money payable to him by way of restitution. Article 29 has clearly no application, Gore Lal not being the person responsible for seizure of the property and the property being immoveable, Article 62 applies to a suit for money payable by defendant to the plaintiff for money received by the defendant for the plaintiff's use. But when the purchase-money was paid, Gore Lal had still a title which he could transfer and the position which subsequently arose amounted to a failure of consideration, so that Article 97 as more specific than Article 62 would govern the case: see *Nagoba* v. *Madholala Kalar* (8), *Hanuman Kamat* v. *Hanuman Mandur* (9) and *Bahadur Lal* v. *Jadhao* (10). It is only where a sale is void *ab initio* that Article 62 can apply to a suit like the present: see *Venkatanarasimhula* v. *Peramma* (11). And if the vendee has actually obtained and held possession, Article 97 may be applied even if the sale turns out to be void *ab initio*, for otherwise the claim for refund might be barred although the vendee had been given no occasion to sue: see *Narsing Shivbakas Marwadi* v. *Pachu Rambakas* (12). In this Court it is urged that Article 116 applies. That this is so where the vendor has no title to convey appears from numerous authorities of which it will suffice to cite *Bahadur Lal* v. *Jadhao* (10), *Arunachala Aiyar* v. *Ramasami Aiyar* (13) and *Pirbhu* v. *Wazirbi* (14). According to the later of the two decisions of this Court time in such a case will run from the execution of the conveyance if there is no question of fraud. In the present case, however, it cannot be said that the defendant had absolutely no title and it is no part of the plaintiff's case as against the defendant that the attachment of Duli Chand preceded his purchase. The covenant implied under section 55 (2), Transfer of Property Act, is merely that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. The defendant has now in fact established by securing dismissal of Duli Chand's suit that the attachment which he all along resisted should not have been made, and in the circumstances I do not think it can be held that he has been guilty of any breach of the implied contract at any rate if the sale to the plaintiff preceded Duli Chand's attachment. The plaintiff on the other hand failed to do all that he might have done, in that he delayed suing to establish his title to the house until the suit allowed by rule 63, Order XXI, First Schedule, to the Code of Civil Procedure, had become time-barred. The case then reduces itself to one in which the consideration has failed and is, therefore, governed by Article 97 of the Limitation Schedule: the plaintiff having been dispossessed on the 14th April 1909, the suit is long time-barred and must fail accordingly. If, however, it be taken that Duli Chand's attachment was effected before the sale to the plaintiff, then such flaw as the attachment created in the plaintiff's title was already in existence when the sale took place and the cause of action for a suit to recover compensation for the breach of the implied covenant of title arose either on the 20th October 1908 or at latest on the date (17th December 1908) of the auction-purchase by Muni Lal. Whichever of those dates is adopted the suit is beyond time. Section

(8) 4 N. L. R. 49.
(9) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).
(10) 2 N. L. R. 174.
(11) 18 M. 173; 5 M. L. J. 32; 6 Ind. Dec (N. S.) 470.
(12) 20 Ind. Cas. 254; 37 B. 538; 15 Bom. L. R. 559.
(13) 25 Ind. Cas. 618; 38 M. 1171; 27 M. L. J. 517; 16 M. L. T. 397; 1 L. W. 849.
(14) 31 Ind. Cas. 877; 11 N. L. R. 186.

14 of the Indian Limitation Act affords the plaintiff no protection for his suit against Muni Lal was dismissed as time-barred and that suit, therefore, did not fail from defective jurisdiction or other cause of a like nature: see *Bishambhur Haldar* v. *Bonomali Haldar* (15). I hold, therefore, that the alternative claim for refund of the plaintiff's purchase-money is barred by time, whether Duli Chand's attachment was effected before or after the sale to the plaintiff.

It remains to consider the cross-objection to the effect that the lower Appellate Court should not have directed the defendant to bear his own costs in that Court merely because the plaintiff succeeded on the question whether the trial Judge had power to treat the order of remand dated the 17th May 1916 as bad for want of jurisdiction. Inasmuch as the raising of this question involved no extra cost to either side and its decision in no way affected the amount of relief allowed, which was actually nil, I do not think there was any good reason for departing from the general rule that costs follow the event.

The appeal is dismissed and the plaintiff will pay the defendant's costs in all three Courts, including the Court-fee on the defendant's cross-objection which has been paid solely on the amount of the defendant's costs in the lower Appellate Court.

Appeal dismissed.

(15) 26 C. 4 4 at p. 417; 3 C. W. N. 283; 13 Ind. Dec. (N. S.) 868.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 429 OF 1915.

May 25, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

DEO NARAIN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SITLA BAKSH SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 95, 177 (f), 202—Jurisdiction of Revenue Courts—Suit under s. 95 for declaration of nature of tenancy—Objection as to jurisdiction of Revenue Court—Appeal, whether lies to District Judge.

A defendant in a revenue suit cannot be allowed by formally raising an untenable plea of jurisdiction to take the case from the Revenue Court to the Civil Court. [p. 892, col. 1.]

Plaintiff was directed by a Civil Court, under section 202 of the Agra Tenancy Act, to bring a suit in the Revenue Court for determination of the nature of his tenancy. He thereupon brought a suit under section 95 of the Act which was heard by an Assistant Collector. The defendant objected that the Revenue Court had no jurisdiction to hear the suit, but the objection was overruled:

Held, that the suit, being one under section 95 of the Agra Tenancy Act and having been brought in compliance with an order of the Civil Court, could be heard only by a Revenue Court, and that no question of jurisdiction had, therefore, been decided by the Revenue Court, so that an appeal against the decision of the Revenue Court did not lie to the District Judge under section 177, clause (*f*) of the Agra Tenancy Act. [p. 892, col. 1.]

Second appeal from a decree of the District Judge, Benares, modifying that of the Assistant Collector, First Class, Jaunpur.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—This appeal arises under the following circumstances. The present defendants brought a suit in the Civil Court for possession against the plaintiffs as trespassers. The latter pleaded that they held the land as tenants to the plaintiffs. The Civil Court thereupon made an order directing the defendants in that suit to institute within three months a suit in the Revenue Court for determination of the question. This order was made under the provisions of section 202 of the Tenancy Act. This suit was thereupon instituted asking for a declaration of the nature of the tenancy under section 95 of the Tenancy Act. An objection was taken as to his jurisdiction to hear the suit, which he at once overruled. He then dealt with the suit and made a decree. An appeal was preferred to the District Judge and cross-objections filed by the other side. The learned District Judge entertained the appeal on the ground that a question of jurisdiction had been decided. He then dealt with the case on the merits. An appeal has been preferred by the defend-

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ants and the plaintiffs have filed cross-objections. In our opinion no question of jurisdiction was in reality decided by the Assistant Collector. In the first place, the suit was brought in compliance with the order of the Civil Court that a suit should be instituted in the Revenue Court. In the next place, the suit was under section 95 of the Tenancy Act, which Act expressly provides that suits under section 95 must be brought in the Revenue Court and no other. It was, therefore, absolutely absurd to contend that the Revenue Court had no jurisdiction to hear the present suit. It would be reducing matters to an absolute absurdity to hold that the defendants in a revenue suit could by formally raising an absolutely untenable plea of jurisdiction take every case from the Revenue Court to the Civil Court. We accordingly allow the appeal to this extent that we set aside the decree of the learned District Judge and remand the case to him with directions to return the memorandum of appeal and the cross-objections for presentation to the proper Court. Costs here and heretofore will be costs in the cause.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 112 OF 1918.

September 7, 1918.

Present :—Sir Henry Drake-Brockman, KT., J. C.

PRALHAD SINGH—APPELLANT

versus

ABDUL AZIZ KHAN—RESPONDENT.

C. P. Municipal Act (XVI of 1903), ss. 52, 53—Municipal Committee, whether owner of all land within limits of Municipal Town—Adverse possession—Question of law and fact—Possession sufficient to extinguish title of true owner, nature of.

There is no authority for the proposition that all land within the limits of a Municipal town must, in the absence of evidence to the contrary, be taken to belong to the Municipal Committee. [p. 893, col. 1]

A claim of title by adverse possession raises a mixed question of law and fact and should, therefore, be raised in the Court of the first instance so that the opposite party may plead to the claim and evidence may be adduced thereon. [p. 893, col. 2.]

A person who seeks to establish such a claim has to show that his possession was adequate in continuity, publicity and in extent to extinguish the title of the true owner [p. 893, col. 2.]

Radhamoni Debi v. *Collector of Khulna*, 27 C. 943 at p. 950; 27 I. A. 136; 4 C. W. N. 597; 2 Bom L. R. 592; 7 Sar. P. C. J. 714; 14 Ind Dec. (N. S.) 617 (P. C.), followed.

Appeal from the decree of the Additional District Judge, Balaghat, in Civil Appeal No. 450 of 1917, dated the 12th January 1918.

Mr. *K. K. Gandhi*, for the Appellant.

JUDGMENT.—The suit out of which this second appeal arises was brought by the respondent Diwan as transferee of the *malguzar* Abdul Aziz Khan, defendant No. 2, to recover possession of a house site in the town of Balaghat from the present appellant Pralhad Singh, defendant No. 1. The *malguzar* supported the claim of the plaintiff as his transferee, alleging that the site was originally occupied by the house of one Sukhia, who left Balaghat over 12 years before the suit and had since been lying vacant and was, therefore, under the *wajib-ul-arz* the property of the *malguzar*. The present appellant pleaded that the land belonged to him and to his ancestors before him and that Sukhia, a relative, occupied it on his behalf.

The conveyance (Exhibit P2) to the plaintiff is dated the 1st November 1916.

The trial Judge found that the land was first occupied by the house of Sukhia's mother Gajri who was succeeded in possession by Sukhia, that Sukhia abandoned the site more than 12 years before the suit, and that it became the property of the *malguzar* but lay vacant till occupied by the plaintiff. The claim for possession was, therefore, decreed.

In appeal the Additional District Judge held that Sukhia left the house and its site 10 or 12 years before the suit; that in the absence of any evidence to establish the title of the plaintiff or any ancestor of his Sukhia must be deemed to have been the owner by reason of the presumption on which section 110, Indian Evidence Act, is based; that Sukhia abandoned the land which consequently reverted to the *malguzar*; and that the appellant made some show of occupying the site after Sukhia left it, but that being a mere trespasser his occupation, even if it exceeded

12 years in duration, could not afford a title as against the *malguzar* or his transferee. *Narain* v. *Behari* (1) was cited as negativing any acquisition of title by the appellant. The appeal was accordingly dismissed and Pralhad Singh has now come to this Court.

An entirely new point is taken in the first ground of appeal, *viz.*, that as Balaghat is a Municipal town the Municipality, not the *malguzar*, must be the owner if the title of the original owner has been extinguished by abandonment. There is, however, no basis in the pleadings or evidence for the assumption that the site in question does not form part of the area settled with the *malguzar*. The *wajib-ul arz* was relied upon by the plaintiff and the defendant Abdul Aziz Khan and I know no authority for the proposition that the land within the limits of a Municipal town must, in the absence of evidence to the contrary, be taken to belong to the Municipal Committee. The contrary is clearly indicated by sections 52 and 53 of the C. P. Municipal Act, 1903, where the property which vests in and belongs to the Committee is described and the acquisition of land within the limits of the Municipality, under the Land Acquisition Act, 1894, is contemplated. This ground is thus without substance.

In the second ground it is said that having found the appellant to have exercised some sort of possession over the land, the presumption recognized by section 110, Indian Evidence Act, should have been made in his favour. To this the answer is that Sukhia having been the owner till she left Balaghat and the appellant not claiming through her, there is in view of the terms of the *wajib-ul-arz* no room for any presumption in favour of the appellant, who set up an independent title and altogether failed to adduce evidence in support of it.

Thirdly it is said that *Narain* v. *Behari* (1), the case cited by the lower Appellate Court, has no bearing, inasmuch as the point decided there was merely that a transferee from the occupant of a village site cannot claim a greater right than his transferor had. The appellant further relies on the fourth ground of appeal on adverse possession for more than 12 years as giving him a good title against the *malguzar*. There is, however, no finding that he enjoyed adverse possession for more than 12 years, nor was it part of his case that after Sukhia left Balaghat he had such possession as against the *malguzar*. The position he now seeks to take up was not even suggested in the grounds of appeal to the lower Appellate Court, in fact one of the grounds of first appeal is that abandonment of site by Sukhia had not been made out. It appears that on leaving Balaghat Sukhia went to live with the appellant at Kanki, and it is said in this Court that she died at Kanki while still living with him some three or four years later. There is nothing in the evidence to show that the appellant took possession of the land in Sukhia's lifetime and set up independent title in himself, and if he made any show of occupation before Sukhia died that may well have been regarded as made with Sukhia's consent. A claim of title by adverse possession raises a mixed question of law and fact and should, therefore, be raised in the Court of the first instance so that the opposite party may plead to the claim and evidence may be adduced thereon. The appellant to establish such a claim had to show that his possession was adequate in continuity, in publicity and in extent to extinguish the title of the true owner. See the judgment of the Privy Council in *Radhamoni Debi* v. *Collector of Khulna* (2). I have read the evidence adduced by the applicant and am clearly of opinion that it cannot suffice for this purpose and even if it were regarded as sufficient, there would remain the objection that the plaintiff and the *malguzar* had no notice on the pleadings of a claim by adverse possession. In *Sundari Dassee* v. *Mudhoo Chunder Sircar* (3) it was held that a plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in a Court of Appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. A

(1) 31 Ind. Cas. 307; 11 N. L. R. 126.

(2) 27 C. 943 at p. 950; 27 I. A. 136; 4 C. W. N. 597; 2 Bom. L. R. 592; 7 Sar. P. C. J. 714; 14 Ind. Dec. (N. S.) 617 (P. C.).

(3) 14 C. 592; 7 Ind. Dec. (N. S.) 392.

similar rule should, in my opinion, be applied to a defendant and in the present case the element of surprise cannot fairly be said to be absent.

The appeal fails and is dismissed without notice to the respondent.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 101 OF 1917.

May 27, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

NAU NEHAL SINGH—PLAINTIFF—APPELLANT

versus

THE DEPUTY COMMISSIONER, UNAO, MANAGER OF GHARIBULLA'S PROPERTY UNDER THE COURT OF WARDS, AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Court of Wards Act (IV of 1912), s. 54, applicability of—Title of ward defeasible, effect of—Pre-emption, suit for, whether must embrace entire property sold—Civil Procedure Code (Act V of 1908), O. I, r. 3—Limitation Act (IX of 1908), s. 22—Suit instituted against dead person—Limitation, extension of, against heirs.

The provisions of section 54 of the U. P. Court of Wards Act cover all suits relating to the property of any ward, that is, any property belonging to him, though his title thereto may be defeasible by reason of a claim for pre-emption which may be maintainable in regard to the same. [p. 895, col. 1.]

The rule that a suit for pre-emption must embrace the entire property sold, unless the plaintiff is not entitled to claim pre-emption in regard to any portion thereof, is inapplicable where the interests of the vendees, *inter se*, are distinct or where they have since been separated or divided. [p. 896, col. 1.]

A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. [p. 895, col. 2.]

Order I, rule 3, of the Code of Civil Procedure does not apply to a case where a suit is filed against a deceased person and his heirs are subsequently sought to be brought on the record. For the purposes of section 22 of the Limitation Act such heirs, whether added or substituted, must be treated as newly impleaded and the suit as against them will be deemed to have been instituted when they were so made parties. [p. 895, col. 2.]

Sreekishen Chowdhry v. *Ram Kristo Bhuttacharjee*, 10 W. R. 317, distinguished from.

Appeal from the decree of the Subordinate Judge, Unao, dated the 28th May 1917.

Babus *Basudeo Lal*, *Hari Kishen Dhaon*, and *Gulab Chand Srimal*, for the Appellant.

Babu *Nagendra Nath Ghoshal*, for Respondent No. 1.

Babu *Salig Ram*, for Respondents Nos. 2 to 6.

JUDGMENT.—This appeal arises out of a suit for pre-emption. It appears that on the 18th January 1898 Gajraj Singh mortgaged the entire village Mubarakpur and an 8 annas of the village Shahpur, describing the mortgagee as Habibullah, son of Aminullah. Half of the said property was subsequently found to belong to other persons. Aminullah died on the 27th September 1898. A dispute arose on his death in regard to his estate between Gharibullah, his so-called son, and his nephews, Ruhullah, Rahmatullah, Niamatullah and Mohammad Yakub. He also left a widow *Musammat* Raisunnisa. On the 1st June 1901 an agreement was arrived at between the said claimants, whereby Gharibullah contented himself with a 7-annas share in the property left by Aminullah, a 4-annas share went to *Musammat* Raisunnisa, while the remaining 5 annas went to Ruhullah, Rahmatullah, Niamatullah and Mohammad Yakub. A decree appears to have been passed in accordance with this compromise.

Gharibullah subsequently died and his property was taken charge of by the Court of Wards. On the 25th January 1909 the Deputy Commissioner of Unao, acting as the Manager of the estate of Gharibullah, and the other persons, to whom the property of Aminullah had been allotted, filed a suit for the recovery of money due on the mortgage aforesaid, treating it as forming part of the property held by Aminullah. The plaint recited the agreement made between the heirs of Aminullah, whereby the shares of the different claimants to the estate were defined and asked that in case the heirs and representatives of the mortgagor failed to pay the mortgage money, the mortgage might be foreclosed. On the 21st January 1911 the

then plaintiffs obtained a final decree for foreclosure in regard to the half share belonging to the mortgagor (Exhibit 1), which has given rise to the present claim for pre emption. The suit was filed on the 20th January 1917 within six years from the date of the said decree.

The Court below dismissed the claim, holding that no notice had been sent to the Court of Wards as required by section 54 of U. P. Act IV of 1912, that the claim against the heirs of Mohammad Yakub was barred by limitation, and that a suit for pre-emption in regard to the property held by the remaining defendants, was not maintainable.

The provisions of section 54 of U. P. Act IV of 1912 cover all suits relating to the property of any ward, that is, any property belonging to him, though his title thereto may be defeasible by reason of a claim for pre-emption which may be maintainable in regard to the same. The contention urged on behalf of the plaintiff-appellant is that the position of a mortgagee who obtains a final decree for foreclosure without sending the notice required by section 10 of the Oudh Laws Act (XVIII of 1876) continues in spite of that decree to be that of a mortgagee *qua* a person entitled to claim the property by pre-emption. But such a contention is obviously untenable, because the effect of a decree for pre-emption is only to displace the title of the purchaser or of the person who obtains the final decree for foreclosure from the date when the payment is made in pursuance of that decree. Till such a decree is obtained and payment is made in accordance with it, the title of the purchaser or of the person obtaining foreclosure holds good, and if he is a ward within the meaning of section 54 of U. P. Act IV of 1912, no suit for pre-emption can lie in respect of any property held by him, till the notice required by that section is given. The share of Gharibullah, which is held by the Court of Wards, being 7 annas, that portion of the claim which relates to it cannot, therefore, be entertained.

The claim in regard to the $1\frac{1}{4}$ annas share held by Mohammad Yakub is similarly not maintainable, because Mohammad Yakub had died before the institution of the suit and his heirs were not impleaded till the period of limitation for a suit for pre emption against them had expired. Order I, rule 3, of the Code of Civil Procedure does not apply to a case where a suit is filed against a deceased person and his heirs are subsequently sought to be brought on the record. For the purposes of section 22 of the Indian Limitation Act (IX of 1908) such heirs, whether added or substituted, must be treated as newly impleaded and the suit as against them will be deemed to have been instituted when they were so made parties. The plaintiff-appellant cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. In *Fatmabai* v. *Pirbhai Virji* (1), where a suit was instituted by a person who claimed to be the heir of a deceased creditor, for the recovery of money due on a promissory note, and disputes subsequently cropped up between that person and the other heirs of the deceased, who were subsequently added as co-plaintiffs, resulting in the latter being declared to be entitled to Letters of Administration, it was held that the institution of the suit by the former did not avail for the benefit of the latter who were subsequently added as co-plaintiffs, because the former was eventually found to have had no right at all, and when the latter were impleaded, the suit had become barred by time. As pointed out in *Veerappa Chetty* v. *Tindal Ponnen* (2), there is nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person, and the claim against the heirs of Mohammad Yakub, who were added after the period of limitation for a suit for pre-emption had expired, will be deemed to have been barred by time. The learned Counsel for the plaintiff-appellant relies on a decision in *Sreekishen Chowdhry* v. *Ram Kristo Bhuttacharjee* (3), but the rules of limitation now in force were not then the same.

(1) 21 B. 580; Chitty's S. C. C. R. 527; 11 Ind. Dec. (N. S.) 389.
(2) 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12.
(3) 10 W. R. 317.

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The claim as against the other defendants, who represent a 7¾-annas share, is, however, maintainable. The general rule, as laid down in *Mujib-Ullah* v. *Umed Bibi* (4) and *Mahabir Prasad* v. *Ram Jiwan Lal* (5), is that a suit for pre emption must embrace the entire property sold, unless the plaintiff is not entitled to claim pre-emption in regard to any portion thereof. But as explained in *Sheobharos Rai* v. *Jiach Rai* (6), *Ram Nath* v. *Badri Narain* (7) and *Lachhman* v. *Tulsi Ram* (8), that rule is inapplicable where the interests of the vendees, *inter se*, are distinct or where they have since been separated or divided. The principle of denying a right of pre-emption, except as to the whole of the property sold, is that by breaking up the bargain, the pre-emptor may seek to take the best portion of the property and leave the worst part of it with the vendee. But where the share of each purchaser is separate and distinct, there is really no breaking up of the bargain. The preferential right of the plaintiff-appellant not being disputed, he should have been allowed a decree for pre-emption in regard to the said 7¾-annas share out of the Mahals, which now constitute the mortgaged property.

The appeal is, therefore, allowed, and the claim of the plaintiff-appellant decreed for pre-emption in respect of a 7¾-annas share out of the Mahals, which now constitute the mortgaged property, and in respect of which the decree for foreclosure was obtained, subject to the payment of Rs. 2,689-2-6 within one month from this date. In case of payment, the plaintiffs and defendants, other than defendant No. 1 and the heirs of Mohammad Yakub, will bear their own costs throughout. In case of non-payment the defendants shall get their costs here and hitherto from the plaintiffs. Defendant No. 1 and the heirs of Mohammad Yakub will in any event get their costs here and hitherto from the plaintiffs.

Appeal allowed.

(4) 21 A. 119; A. W. N. (1893) 202; 9 Ind. Dec. (N. S.) 785.

(5) 8 Ind Cas. 272; 13 O. C. 269.

(6) 8 A. 452; A. W. N. (1886) 214; 5 Ind. Dec. (N. S.) 176.

(7) 19 A. 148; A. W. N. (1897) 20; 9 Ind. Dec. (N. S.) 98.

(8) 2 A. L. J. 199.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 354-B OF 1917.

September 13, 1918.

Present :—Mr. Mittra, A. J. C.

KASHI BAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHEORAM KHUPCHAND—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, applicability of—Suit against one debtor—Subsequent suit against different debtor, whether barred.

Order II, rule 2 of the Civil Procedure Code, applies only where the defendant in the subsequent suit was also the defendant in the previous suit. The rule does not apply where the subsequent suit is brought against a different defendant [p. 897, col. 1.]

Appeal from the decree of the District Judge, Amraoti, dated the 2nd July 1917, in Appeal No. 34 of 1917.

Messrs. *G. L. Subhedar* and *M. V. Joshi*, for the Appellants.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The two defendants and one Rajaram executed a bond on the 28th June 1913. Rajaram was at that time a minor and the defendants acted as his guardians. They also personally covenanted to repay the money. In a previous suit the plaintiff has recovered one-third of the amount due under the bond by a judgment against Rajaram. The point for decision is whether the present suit for the recovery of the remaining two-thirds is barred by any rule of law. Admittedly there is no statutory provision which bars the suit. Order II, rule 2, only applies if the second suit is brought against the same defendant. However, it is contended that the rule of English Law recognized in *King* v. *Hoare* (1) should be applied. The lower Courts have held that the rule does not apply to Mofussil of India. This view is well sup-

(1) (1844) 13 M. & W. 494; 14 L. J. Ex. 29; 8 Jur. 1127; 2 Dowl. & L. 382; 67 R. R. 694; 153 E. R. 206.

ported by the decisions of the Allahabad and Madras High Courts, *Muhammad Askari* v. *Radhe Ram Singh* (2) and *Ramanjulu Naidu* v. *Aramudu Iyengar* (3). There is no other ground pressed in this second appeal. I accordingly dismiss it with costs.

Appeal dismissed.

(2) 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236.

(3) 5 Ind. Cas. 735; 33 M. 317; 7 M. L. T. 373; (1910) M. W. N. 35.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 97 OF 1916.

June 11, 1918.

Present:—Mr. Lindsay, J. C., and Mr. Daniels, A. J. C.

CHAUBAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAKHTAWAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Agreement to separate, effect of—U. P. Land Revenue Act (III of 1901), s. 111—Partition—Jurisdiction of Civil Court to determine question of title.

Once the members of a joint Hindu family have agreed and declared their intention to hold the joint family property in definite shares, the family is no longer a joint family. It may be that no actual division of the property takes place, but the result of such agreement and declaration is that from the time it is made the parties thenceforth hold the property not as joint tenants but as tenants-in-common. [p. 900, col. 2.]

A Civil Court has no jurisdiction to determine a question of title with regard to a property under partition before a Revenue Court, unless the latter Court refers the question for decision to the former Court by an order passed explicitly under section 111 of the U. P. Land Revenue Act. [p. 902, col. 1.]

Appeal from the decree of the Subordinate Judge, Kheri, dated the 17th May 1916.

Mr. *St. George Jackson*, Pandit *Harkaran Nath Misra* and Pandit *Brijnath Sharga*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Mohan Lal*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for partition of certain property described in List A attached to the plaint, which the plaintiffs claimed to be joint family property.

The defendants belong to the same family as the plaintiffs, all being descendants from a common ancestor named Phoka Singh, who had three sons Rup Singh, Girand Singh or Gend Singh and Meharban Singh. The latter died without issue. The plaintiffs are the sons and grandsons of Girand Singh, whilst the defendants are, respectively, the son and grandson of Rup Singh. It was alleged in the plaint that the family had remained joint up till just before the time this suit was brought. In paragraph 5 of the plaint it was stated that a year and a half or two years before the suit a separation was effected between the parties in mess and residence but that the family property had not so far been divided. The circumstance which gave rise immediately to the suit for partition was an application filed by the defendants at the end of 1913, or the beginning of 1914, for partition of Mauza Sehauna which is the family property. The plaintiffs alleged that when the application to the Revenue Court for partition was made by the defendants, the latter represented their share in the property to be two-thirds and that of the plaintiffs to be one-third only. The plaintiffs deny this and say that they are entitled to a one-half share of all the family property; and so this suit has been brought for the purpose of obtaining a declaration to this effect and in order to have a partition made upon this basis.

The case for the defendants is that the family is no longer a joint family. It was pleaded that separation took place some 60 or 65 years before the suit was filed, when Girand Singh separated himself from his two brothers Meharban Singh and Rup Singh. The defendants pleaded that after this division Meharban Singh and Rup Singh remained united. It was further pleaded that Meharban Singh made a gift of his one-third share of the family property to Bakhtawar the first defendant on the 6th of September 1873. With regard to *Mauza* Sehauna, the family village, the allegation is that the lands have been actually divided and that the plaintiffs are in possession of a one-third share, which is all they are entitled to. With regard to the other

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items of immoveable property specified in the List A attached to the plaint, the case for the defendants was that this was all self-acquired property, having come into the possession of the defendants since the time the partition was made.

The principal issues before the Subordinate Judge were, therefore, whether the family consisting of the plaintiffs and the defendants was joint or separate and whether or not the property described in the List A was joint family property With regard to the first of these issues the Court below rightly laid the burden of proof upon the defendants. On the pleadings it clearly lay upon them to establish that the family was no longer joint but separate. The defendants called a large number of witnesses and they also produced a considerable volume of documentary evidence. A few witnesses were produced on behalf of the plaintiffs and a few documents were also put in to support the plaintiffs' case. The result was that the Subordinate Judge held that the defendants had succeeded in proving that the family had become a separate family at a period not less than 40 years before the suit was brought. He believed the oral testimony of the defendants' witnesses and he also relied strongly upon the documents which the defendants put in. In consequence of this finding he reached the further conclusion that the items of immoveable property specified in List A, other than the village Sehauna, and two houses situated in Sehauna, were the separate property of the defendants; in short, that items 2, 3, 4, 5 and 6 in the list belonged exclusively to the defendants and that the plaintiffs were not entitled to have any share. He held that the plaintiffs were entitled to have a one-third share in village Sehauna and their share of the family houses.

It has already been mentioned that before this suit was brought the defendants had applied for partition of Mauza Sehauna, and the Subordinate Judge has further held that in consequence of those partition proceedings the present suit, in so far as it relates to the division of Sehauna, is not entertainable by a Civil Court. The case for the plaintiffs, therefore, substantially failed.

They now come in appeal and the memorandum of appeal contains eight grounds upon which the findings of the learned Subordinate Judge are challenged. Of these grounds Nos. 1, 3, 7 and 8 relate to the status of the family. They all in one shape or other raise the plea that the lower Court was wrong in deciding that the family was separate. Ground No. 2 attacks the decision of the Court below to the effect that the present suit for partition of Mauza Sehauna is barred. The other grounds relate to the admissibility and weight of the evidence which was before the Court below.

The main issue we have to consider is whether or not the family to which the parties belong was separate at the time the suit was brought. We have been referred to the evidence of 18 witnesses who were called by the defendants. The learned Counsel for the plaintiffs-appellants does not rely upon the evidence put forward on behalf of his clients. The only evidence of a plaintiffs' witness to which we were referred is the statement of Bakhtawar Singh the 1st defendant, who was examined as plaintiffs' witness No. 3.

The general tenor of the evidence for the defendants is to show that for many years Girand Singh or Gend Singh lived separate from his brothers. Many of the defendants' witnesses are men of respectable position, *zemindars* and *mahajans*, and the lower Court has treated them as reliable and independent witnesses. Their statements vary to some extent; some of them can testify to longer periods of acquaintance with the history of the family than others, for example the first witness for the defendants is a Kalwar whose age is 80. His memory goes back as far as 56 years before the date of the suit. He deposes to the effect that Girand Singh was separate from his brothers and nothing of any importance was elicited in cross-examination to shake his credit. The 2nd defendants' witness is a Brahman who gives similar evidence. We have also the evidence of the defendants' witness No. 5, a Bania who has had money dealings with the parties. It is true that his evidence relates only to a period of some 15 years before the suit. He was

able to prove, however, that that Chaubar Singh, one of the plaintiffs, had executed a mortgage of his own share in favour of this witness whose name is Bhagwandin. The mortgage-deed was put in Court and was proved. Then we have an important witness in Ram Nath D. W. No. 6. He is a Kayasth and is the Sadar Qanungo in the Kheri District. He knew the parties some time ago because the village used to lie in his circle. He speaks of them as living in separate houses and having separate business, that is to say, separate *sir* cultivation. The eighth witness for the defendants is a Brahman named Baij Nath. He speaks concerning a village called Ghaghpur which was held in mortgage by the defendants, and his evidence was given for the purpose of showing that he had paid rent for lands in his cultivation in that village to the defendants and never to the plaintiffs. The ninth witness for the defendants is a Kachhi who gave similar evidence. Khanna Chamar who was called as defendants' witness No. 10 is an old man who has lived in Sehauna for many years. He deposes to having known the family for over 40 years and he swears that Gend Singh or Girand Singh was separate from his brothers. He also deposes that the land of the village was actually divided by the Patwari Mohan Lal some 20 or 22 years before the suit. Mohan Lal has been called as a witness (D. W. No. 13). He deposes definitely to the division of the Sehauna village lands. He swears that he himself made the division some 22 or 23 years before the suit was brought, that a one-third share of the village lands was allotted to the plaintiffs while two-thirds was given to the defendants. He swears that even before the actual division of the land was made by fields the parties had been separately collecting their shares of the village income. In one respect his evidence differs from that of Khanna Chamar, for while the latter deposed that papers were drawn up at the time of partition the Patwari's story is that he prepared no partition papers at all. Great stress has also been laid upon the statement made by Mohan Lal to the effect that the parties used to live in the same house. We are not inclined to attach very much importance to this statement, for even from what appears from the statements of other witnesses it seems clear that although the parties resided separately for a long period, they lived at any rate for a considerable time inside the same enclosure. Two witnesses Nos. 14 and 15 depose to mortgages of certain lands made in favour of the defendants and to the payment of rent to the defendants. These witnesses say that the plaintiffs never received any rent of the mortgaged properties. We may pass over the other evidence which is in a similar strain, mentioning only the statement of the defendants' witness No. 18, a Bania named Hazari Sah. His evidence is of considerable importance for it is proved that he has had money dealings with the parties. He deposes that he has known the family all his life and he supports the statements of the other witnesses regarding the separation of Girand Singh or Gend Singh. The witness swore that both the plaintiffs and the defendants had had money dealings with him and he produced his books of account to show that the parties had separate accounts with him. It is hardly necessary to dwell upon the evidence of the defendant Bakhtawar Singh who was examined as a witness for the plaintiff. Bakhtawar supports the case which he set up in his written statement.

It is not to be denied, therefore, that there is a considerable volume of oral testimony to support the case for the defendants and we are not convinced that the Subordinate Judge was wrong in relying upon it. It is not we think correct to say that the evidence is vague and to some extent contradictory. We think on the contrary that it is as good evidence as could reasonably be expected from persons who are not actually members of the family and whose only opportunities of judging of the status of the family was derived from their visits and friendly relations with the parties. But the matter is settled conclusively in our opinion by the documentary evidence in the case.

The defendants put in a large number of documents for the purpose of showing that property had been acquired separately by Fateh Singh, the son of Rup Singh, under various transactions beginning with the year 1887. It is also manifest from

the copies of the village papers which were filed that at any rate since the time of the recent Settlement almost 20 years ago, the parties have been recorded as being in possession of separate *pattis* of Mauza Sehauna, the plaintiffs' *patti* representing one-third of the entire village. The appellants rely principally upon Exhibit I, which is a certified copy of the *wajib-ul-arz* of Sehauna prepared in the year 1869. They also rely on a certain copy of the *khasra* of the village of Sehauna which was prepared in the year 1867. It has been boldly contended on behalf of the appellants that these documents prove conclusively that the family was joint on the dates mentioned, and it is argued that no definite and reliable evidence of a separation since that time having been given, the plaintiffs are entitled to a finding that the whole of the property, both what existed in the year 1869 and what was subsequently acquired, is joint family property. On the other hand the learned Counsel for the respondents also relies upon the *wajib-ul-arz* just mentioned and contends that it supports the case of the defendants and not the case of the plaintiffs. After hearing the arguments on this point and considering the language of the *wajib ul-arz* we are satisfied that it is quite impossible for the plaintiffs-appellants to rely upon that document for the purpose of showing that the family was a joint family in the year 1869. The only possible conclusion to be drawn from the language of the document is the other way. The first section of the *wajib ul-arz* relates to the history of the village, and the only statement we need notice in this part of it is one to the effect that from the years 1255 to 1263 Fasli the village was in possession of Rup Singh the father of Fateh Singh who was *lambardar* at the time of the Settlement, and from a further statement contained in the same part of the *wajib-ul-arz* it is made clear that both the summary settlements of this village were made with Rup Singh. The appellants rely strongly upon section 11 of the *wajib-ul-arz* and in particular upon the following passage:—"This village is held as joint undivided *zemindari* and all the co-sharers are joint in mess; no co-sharer has separated up till the present time. All the lands of the village are held jointly and undivided by reason of the mutual good relations (*ittifaq*) between the parties and because they live together. All the co-sharers are agreed that each of them has a right to have his share made separate according to the entries contained in the *khewat*. He can do so at any time he pleases and no co-sharer can make any objection." Following upon this statement we have an extract from the *khewat*, which sets out the names of the co sharers. First we have the share of Fateh *lambardar* and his brother Bakhtawar. They are described as having equal shares in a one-third share of the *mauza*. Gend Singh brother of Rup Singh is shown as being the owner of a one-third share and Meharban is shown as being the owner of the remaining one-third share. In each case the extent of the share is specified in one of the columns of the statement, and it is further to be noticed that the revenue payable in respect of each one-third share is set out in detail. It seems to us, therefore, that it is idle for the appellants to argue upon this document that the family was a joint Hindu family at the time it was prepared. Here we have a plain statement that the parties have agreed to hold the property in definite shares which are specified with all the particularity which is possible, and we have it definitely laid down that at any time a co sharer pleases he may call for partition, that is, actual division of the village upon the basis of the shares so recorded. Once the members of a joint family have agreed and declared their intention to hold the property in definite shares the family is no longer a joint family at all and we deem it unnecessary to cite any authority for a proposition so well established. It may, of course, be that no actual division of the property takes place, but the result of an agreement or declaration such as we have referred to is that from the time it is made the parties thenceforth hold the property not as joint tenants but as tenants-in-common.

There are other statements in this *wajib-ul-arz* which support this obvious interpretation. For example, in section 111 of the *wajib-ul arz*, which deals with the collection of rents and the payment of revenue, we

have a statement that every co-sharer has the right of realizing his portion of the rents from the tenants and that the collection of rents is not the sole prerogative of the *lambardar*. It seems needless for us to pursue this matter any further. The *wajib-ul-arz* entirely supports the case for the defendants and can in no way be treated as evidence for the purpose of showing that in the year 1869 this family was a joint family holding joint family property in the proper sense of the term.

With regard to the *khasra* Exhibit 6 upon which the plaintiffs rely so strongly, all we need say is that it does not appear to us to justify the conclusion that the family was joint. It is true that in the column describing the owners of the various plots of land in the village all the members of the family are mentioned together and there is no statement regarding the definite shares in which the parties hold. We doubt whether in any case it would be necessary for the purpose of the *khasra* to set out any definition of shares, but after all what really matters are statements contained in the *khewat* and the *wajib-ul-arz*, for those are the documents to which regard must be had for the purpose of ascertaining the proprietary rights of the parties. The *khewat* is the proprietary register and we have already referred to the extract from that document which is set out in the *wajib ul-arz* and which decides the matter conclusively.

It has already been stated that in the year 1873 Meharban Singh made a gift of his one-third share mentioned in the *wajib-ul-arz* to the defendant Bakhtawar Singh, and it is in this way that the defendants between them have come to own a two-thirds share of the village. The fact that such a gift was made so long back is, we think, a very strong proof that the family was separate at that time. We have already mentioned that one of the defendants' witnesses deposed to a mortgage made by the plaintiff Chaubar Singh in his favour. This document is Exhibit A-30 and was executed by Chaubar Singh on the 16th of September 1912. It purports to be a mortgage of Chaubar Singh's own separate share in the village of Sehauna. If anything were needed to settle the matter more conclusively than it has been, we might refer to a document called a *tamliknama* which is Exhibit A-2. It is proved that this document was executed by Chaubar Singh, Kalka Singh and Khuman Singh, the father of the third and fourth plaintiffs, on the 21st of November 1890. The document was executed for the purpose of securing maintenance to the widow of one Chhattar Singh, who was the brother of Chaubar Singh. It is expressly stated in this document that a one-twelfth share of Mauza Sehauna belonged to the deceased Chhattar Singh and was in his possession. It was further stated that after the death of Chhattar Singh this property came into possession of the executants of the deed. The deed went on to provide for an annuity payable to Chhattar Singh's widow on her executing a deed of release to any claim to the one-twelfth share of the village held by her husband. These documents knock the bottom out of the plaintiffs' case that the family was a joint family up till the time the present suit was brought.

The result is that we have no doubt whatever that the finding of the Subordinate Judge on this issue was perfectly correct. The family is not a joint family and the property in suit is not joint family property, but is proved to have been divided in the sense that the parties agreed years ago to hold it in definite shares. On this part of the case the appeal must fail. We are satisfied also that the Subordinate Judge was right in finding that the items of property Nos. 2, 3, 4, 5 and 6 specified in List A attached to the plaint are the separate property of the defendants.

There remains only the other point decided by the Court below, namely, that the suit for the partition of Mauza Sehauna is not entertainable by a Civil Court. We think this decision is correct. What appears to have happened in the Revenue Court was this. An application for partition was made by the defendants in which they stated that their share of the village amounted to two-thirds. Notices were issued to the other co sharers and the present plaintiffs came in and objected that the *khewat* had been wrongly prepared and that the shares were not correctly stated. The plaintiffs claimed that they were the owners of a one-half share of the village They asked the Assistant Collector to stay the

partition proceedings until they could apply to have the *khewat* amended. This application was granted and a separate petition was then put in asking that the *khewat* might be framed in the manner contended for by the plaintiffs. This application was sent for an inquiry to a Naib-Tahsildar, who investigated the matter and reported that the plaintiffs were not entitled to have any correction of the *khewat* made. His opinion was that the plaintiffs had only a one-third share in the village and he suggested in his report that if the plaintiffs had any case to make out on this ground, they should go to a Civil Court for a declaration of their right. This report was afterwards considered by the Assistant Collector, who agreed with the Naib-Tahsildar and dismissed the application. It so happened that the Assistant Collector who dealt with this application for correction of the *khewat* was the same officer before whom the partition proceedings were pending. We are unable to entertain the argument that the order of the Assistant Collector disposing of the application for amendment of the *khewat* can be treated in any way as an order passed under section 111 of the Land Revenue Act requiring the present plaintiffs to go to a Civil Court for the purpose of having their title determined. If no order is made under this last named section by which the question of title is referred for disposal to a Civil Court, the Civil Court has no jurisdiction to entertain any suit for partition. The exclusive right to make the partition is reserved to the Revenue Court. The Court below was right, therefore, in saying that the present suit, so far as it regards the division of Mauza Sehauna, is not entertainable.

The result of all this is that the decision of the Court below is affirmed The appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 65B OF 1917.

September 13, 1918.

Present :—Mr. Mittra, A. J. C.

KARAN KHAN—PLAINTIFF—APPLICANT

versus

DANGUSHTI AND ANOTHER—DEFENDANTS Nos. 1 AND 2—NON-APPLICANTS.

Transfer of Property Act (IV of 1882), s. 6 (e)—Assignment—Contract of service, whether assignable.

A contract of service being a personal contract is not assignable before breach, as the transfer would be of a mere right to sue. [p. 902, col. 2.]

Petition for revision of the decree of the Judge, Small Cause Court, Daryapur, in Civil Suit No. 1035 of 1916, dated the 12th February 1917.

FACTS appear from the following judgment of the lower Court:—

"The facts of the case are that the defendants Nos. 1 and 2 had executed a service bond in favour of defendant No. 3 on 16th May 1913. The defendant No. 1 received Rs 42 thereunder and agreed to serve for 6 months. It was further agreed that in case defendant No. 1 failed to serve, he shall be liable to pay damages at 6 annas per day. The defendant No. 1 served only for 3 months till 16th August 1913. The defendant No. 3, therefore, sold his right under the deed to plaintiff under a deed of assignment dated 20th July 1916. Plaintiff now brings this suit to recover damages Rs. 33-12 0. It is contended for the defendants Nos. 1 and 2 that the suit cannot lie. In view of the case reported as *Abu Mahomed* v. *S. C. Chunder* (1). I hold that this suit cannot lie, as defendant No. 3 clearly transferred his mere right to sue, which cannot be transferred under section 6, Transfer of Property Act. It is held in the above cases that such a claim does not fall under the definition of actionable claim. Suit dismissed with costs. Defendants' costs on plaintiff."

Mr. *K. V. Deoskar*, for the Applicant.

Mr. *Atmaram Bhagwant*, for the Non-Applicants.

ORDER.—Following *Abu Mahomed* v. *S. C. Chunder* (1). I agree with the lower Court that the contract of service was not assignable. The transfer was of a mere right to sue. It was certainly not assignable before the breach, as the contract

(1) 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384.

was a personal one. After the breach the master was entitled to damages only, although the parties have named a fixed rate of damages for each day of absence from work. The petition of revision is, therefore, dismissed with costs. I fix Rs. 5 as Pleader's fee in this Court.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 299 OF 1916,

April 10, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

SURAJ BHAN—DEFENDANT—APPELLANT

versus

HASHIM BEGAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 70—Sale—Consideration, part of, left with vendee to pay off creditor of vendor—Payment in excess of amount left with vendee—Excess amount, whether can be recovered from vendor.

Under a sale-deed executed by the plaintiff in favour of the defendant, a sum of money was left with the defendant for payment to a creditor of the plaintiff who held a mortgage over some other property belonging to the plaintiff. Defendant paid off the mortgage with a sum in excess of that which was left with him. In a suit by the plaintiff to recover a portion of the consideration for the sale which had been left unpaid:

Held, that the defendant could not be allowed to set off the amount paid by him to the plaintiff's creditor in excess of the amount that was left with him, inasmuch as the excess payment was not obligatory upon the defendant. [p. 903, col. 1; p. 904, col. 1.]

Second appeal from a decree of the District Judge, Moradabad.

Mr. *Kailas Nath Katju*, for The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—The point which arises in this appeal is as follows. Certain immoveable property was sold for a considerable sum of money. In the sale-deed the consideration is stated to have been received in a certain way (as per details at the foot of the deed). According to this detail the vendee was to retain a sum of Rs. 8,150 for payment to a certain creditor of the vendors who had a mortgage upon other property belonging to the vendors, and which was no part of the property sold to the vendee. Some delay seems to have taken place in the registration of the deed and as a consequence, the vendee alleges that he did not pay the Rs. 8,150. Eventually when he succeeded in getting the sale-deed registered, he went to the creditor and offered him the Rs. 8,150, which the creditor refused to receive because further interest had in the meantime accrued amounting to the sum of Rs. 749 or thereabouts. The present suit was instituted by the plaintiffs to recover the portion of the purchase-money which they alleged had not been paid. The defendant admitted that a portion of the purchase-money had not been paid but he claimed credit as against the amount that remained unpaid for the sum of Rs. 749 interest, which he alleged he had paid the creditor of the vendors. Both the Courts below held that assuming that the defendant had paid the creditor the extra sum of Rs. 749 for the interest which had accrued, he could not plead this as a set-off against the plaintiffs' claim for the unpaid purchase-money upon the ground that there was no obligation on the vendee to pay any money to the creditor except the Rs. 8,150, which had been left with him by the vendors. In second appeal to this Court it has been urged that the view taken by the Courts below was incorrect and section 70 of the Contract Act is relied upon. That section provides that "where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered." We do not think that this section applies to the circumstances of the present case. It was admitted at the Bar that if the sale-deed had been silent about payment to the creditor of the vendors and that the vendee of his own motion had paid off the creditor, he could not have pleaded such payment as a set-off against the purchase money. We think that exactly the same reasoning applies to the present case. According to the sale-deed the only sum which the vendee was requested

to retain out of the purchase-money and pay to the creditor, was the sum of Rs. 8,150. The payment of the balance was a payment gratuitously made. We have already pointed out that the property mortgaged to secure the sum due to the creditors was no part of the property sold. It may be of course that the plaintiffs have benefited by the payment to the creditor, but this by itself is no sufficient ground to entitle the defendant to set it off against the plaintiffs' claim. We dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 363 OF 1917.

July 16, 1918.

Present:—Mr. Batten, A. J. C.

GANDELAL M. G. HAZARILAL—DEFENDANT—APPELLANT

versus

MANJEE SONAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 58, 63—Execution—Attachment—Objection by stranger, dismissal of, on ground that he was party to suit—Appeal, whether lies—Suit, regular, maintainability of.

Where in execution of a decree a person who claims that he was not a party to the suit prefers an objection to the attachment of certain property in the capacity of a stranger to the suit and the objection is dismissed on the ground that he was a party to the suit, no appeal lies against the order dismissing the objection but it is open to the objector to file a regular civil suit to establish his right to the property attached. [p. 905, col. 1]

In such cases the test is whether the claim as laid by the objector is adverse to the claims of the real judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary remedy of a regular suit merely because his objection is dismissed on the ground that he is held to be a party to the suit. [p. 905, col. 1.]

Appeal against the decree of the Divisional Judge, Nagpur Division, in Civil Appeal No. 132 of 1916, decided on 16th April 1917, arising out of Civil Suit No. 58 of 1915, decided by the Additional Sub Judge, Kamptee, on the 26th September 1916.

Messrs. *M. V. Joshi* and *V. V. Chetale*, for the Appellant.

The Hon'ble Sir *B. K. Bose* and Messrs. *V. Bose* and *Eraksha*, for the Respondent.

JUDGMENT.—Appeal by the defendant. The facts out of which this appeal arises are briefly these. The defendant in 1907 filed a suit in the Court of Small Causes, Bombay, for the price of goods sold, the defendant in the suit being described as Mannalal Ramchandra residing in Bombay. An *ex parte* decree for Rs. 1,710-6-0 was passed. In execution the judgment debtor was arrested and imprisoned, and then released as his subsistence allowance was not paid. The Bombay decree was transferred for execution to the Court of the District Judge, Nagpur, and the jewelry of the present plaintiff-respondent Manji son of Diparam was attached He lodged an objection under rule 58, Order XXI of the 1st Schedule to the Civil Procedure Code, on the ground that he was not a party to the suit and that the jewelry was his. The Additional District Judge dismissed the objection, holding that the objector was a party to the suit. The objection was dismissed as the executing Court held that the objector was a party to the suit, since the debtor in the suit was a firm of which the objector and his brother Ramchandra were the partners. The respondent has brought the present suit to recover from the decree-holder the money which he paid in satisfaction of the decree to get his jewelry released from attachment. The learned Sub-Judge held that the respondent was not a party to the suit, the person against whom the decree had been passed being his brother Ramchandra in his individual capacity, and decreed the respondent's claim. In appeal the learned District Judge upheld the decree, taking the same view as to the facts. It was also contended in first appeal that the suit was barred by the rule of *res judicata*, it having been decided in the execution proceedings that the respondent was a party to the suit and that the remedy of the objector was by way of appeal from that decision. The learned Divisional Judge held that the dismissal of the objection was not a decision under section 47, Civil Procedure Code, of a question arising between parties to the suit, and that a separate suit lay

under rule 63 of Order XXI. The first ground of appeal to this Court is that the executing Court having held that the respondent was a party to the suit, that finding, not having been appealed against is conclusive. It is argued that the executing Court was bound to determine whether or not the objector was a party to the suit, and its decision that he was such a party is a decision that the question was one between the parties to the suit within the meaning of section 47, and not having been appealed against is a final decision.

I am of opinion that the view taken by the Divisional Judge is correct. There is no reported case exactly on all fours, but in *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi* (1) it was held that an objection made by a *shebait* of a deity, against whom a decree had been passed as *shebait*, that the property attached was his private property, was not an objection by a party to the suit as such within the meaning of section 47, and an appeal did not lie against the order on the objection. If the same individual can claim to be regarded as having two capacities in one of which he was not a party to the suit, *a fortiori* a person who claims that he was not a party to the suit can make an objection in the capacity of a stranger to the suit. The test is laid down at page 450* of the case cited, and is whether the claim laid by the objector is adverse to the claims of the real judgment debtor. The nature of the proceedings is to be judged by the claim of the objector, and an objector claiming under a paramount title is not deprived of his ordinary remedy merely because his objection is dismissed on the ground that he is held to be a party to the suit.

The second ground of appeal calls in question the concurrent finding of both the lower Courts that the decree was against Ramchandra individually. This appears to be a finding of fact, binding on this Court. It is argued by the learned Advocate for the appellant that the interpretation of a decree is a question of law. In any case I am of opinion after studying the record that the decision of the lower Courts is indubitably correct. Whatever the nature of the suit that the appellant should have brought or intended to bring, the suit and decree were actually against the individual Ramchandra.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 27 Ind. Cas. 328; 42 C. 440; 19 C. W. N. 520; 20 C. L. J. 485.

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 397 OF 1915.

April 12, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

UMRAO SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

UMRAO SINGH—DEFENDANT—RESPONDENT.

Partition Act (IV of 1893), ss. 2, 3—Partition, suit for—Defendant claiming to exercise right of purchase—Withdrawal of suit, application for, whether can be allowed—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1.

In a suit for partition of a house the plaintiff stated that the partition of the house by metes and bounds would spoil the house altogether and asked the Court under section 2 of the Partition Act to order a sale of the house. The defendant claimed to exercise his right under section 3 of the Act to buy the plaintiff's share at a valuation to be fixed by the Court. The Court proceeded to cause a valuation of the house to be made and after it had fixed the valuation of the plaintiff's share, the latter filed an application for leave to withdraw the suit with liberty to bring a fresh suit, which was dismissed:

Held, that the application having been made at a time when matters had reached a stage at which the defendant was entitled to the benefit of the claim which he had put forward under section 3 of the Partition Act, the Court exercised a sound discretion in refusing to allow the application. [p. 906, col. 2.]

First appeal from a decree of the Additional Subordinate Judge, Meerut.

Dr. *Surendra Nath Sen* (with him Mr. *B. E. O'Conor*), for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Girdhari Lal Agarwala*, for the Respondent.

JUDGMENT.—The appellants in this Court were the plaintiffs in a suit for partition. They owned between them 8-19ths of a certain house. The defendant owned the remaining 1-19th share. In their plaint at paragraph 4 the plaintiffs stated that, regard being

had to its accommodation, the partition of the house in suit would spoil the house altogether so that it would not "at all remain comfortable for residential purposes." Hence the plaintiffs asked the Court under section 2 of the Partition Act (IV of 1893) to order a sale of the house. In reply the defendant raised alternative pleas. In the first place he alleged that a partition of the house by metes and bounds could be effected to the mutual convenience of the parties, provided it were effected in a certain way. In the alternative he pleaded that, if the Court held that the house could not reasonably or conveniently be partitioned and was prepared to accept the plaintiffs' prayer for an auction-sale, then the defendant claimed to exercise his right under section 3 of the same Act to buy the plaintiffs' share at a valuation. At a later stage it is quite clear that the defendant was prepared to withdraw, and did withdraw, his objection to the plaintiffs' allegation that the house could not conveniently be partitioned. He elected to abide by his alternative claim to purchase at a valuation to be fixed by the Court. The Court proceeded accordingly to cause a valuation to be made, obtained a report from Commissioners, heard objections to that report and fixed the value of the plaintiffs' share at Rs. 6,000. It has framed its decree accordingly, permitting the defendant to purchase at this price. In the memorandum of appeal before us it is contended, *firstly*, that the Court below has misinterpreted sections 2 and 3 of the Partition Act. We think that on the contrary the Court below has properly applied those sections according to their plain meaning. The suggestion that the Court could not legally take the action which it did, without first taking evidence and recording an affirmative finding to the effect that the house could not conveniently be partitioned and that its sale by auction would be more beneficial to the share-holders, comes with an ill-grace from the plaintiffs-appellants. They are, as a matter of fact, trying to make it a grievance that the Court accepted their own allegations of fact to be correct. Moreover, as we have already pointed out, the defendant in a subsequent pleading had virtually accepted the same position. Finally it has been urged upon us that, at a later stage of the trial, when the plaintiffs discovered what the result of the proceedings was likely to be, they asked permission of the Court to withdraw from their suit, with leave to bring a fresh suit, and that this request was refused. Under the circumstances the Court below exercised a sound discretion in refusing to allow this application. Matters had reached a stage at which the defendant was entitled to the benefit of the claim which he had put forward under section 3 of the Partition Act, and in any case the application for withdrawal filed by the plaintiffs does not satisfy the conditions laid down by Order XXIII of the Code of Civil Procedure. In the memorandum of appeal before us there is no definite plea that the finding of the Court below, fixing the value of the plaintiffs' share at Rs. 6,000, is incorrect. Even if we can understand the paragraph of the memorandum of appeal before us as suggesting such a plea, it seems to us that the finding of the Court below is in accordance with the weight of the evidence. The result is that this appeal fails and we dismiss it with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 334 OF 1917.

September 12, 1918.

Present:—Mr. Mittra, A. J. C.

BALIRAM—PLAINTIFF—APPELLANT

versus

GANPAT—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. XXIII, r. 1—Amendment of plaint—Withdrawal of suit—Appeal, second—Delay in making application, effect of.

Plaintiff brought a suit for a declaration that a certain sale-deed executed by his father was a bogus transaction. At a later stage the plaint was amended so as to include a claim for possession of the property sold. Both the trial Court and the Court of first appeal held that consideration had passed for the sale and dismissed the suit. In second appeal it was sought to impeach the sale on the ground that it was not for antecedent debts or for legal necessity and was, therefore, not binding on the plaintiff:

SATISH MOHINI DEBYA *v.* PABNA BANK, LIMITED.

Held, that at such a late stage of the proceedings the plaintiff could not be allowed either to amend his pleadings or to withdraw from the suit with liberty to bring a fresh suit.

Appeal against the decree of the Special Additional District Judge, Akola, dated the 27th April 1917.

Mr. *V. V. Chitale*, for the Appellant.

JUDGMENT.—This second appeal arises out of a suit for a declaration that a sale-deed dated the 5th December 1910 executed by the plaintiff's father Parashram in favour of the defendant's father was a bogus transaction. At a later stage the plaint was amended so as to include a claim for possession of a half share of the property sold. It may be noted that in a previous litigation between the defendant's father and the plaintiff's uncle Krishna it has been decided that Parashram had only a right to convey a half share in the field. Now both the Courts below have held that the transaction in favour of the defendant's father was not a bogus transaction and that there was consideration for the sale. The suit has, therefore, been dismissed.

In second appeal it is contended that the sale by the father was not for an antecedent debt nor for legal necessity. This is a point which the plaintiff never raised in the Courts below. Having regard to the fact that the plaintiff originally came into Court with a relief for a declaration based upon a particular ground, it is not competent to him now to insist upon the invalidity of the sale-deed upon grounds not raised before. There is scarcely any suggestion that the property was joint ancestral property in which the plaintiff had a right by birth. After four years of litigation I cannot allow the plaintiff either to amend his pleadings or to withdraw from the suit with liberty to bring a fresh suit. It is argued that recent decisions have pointed out that a father has no power to sell ancestral family property except for legal necessity or for what is strictly an antecedent debt. The Privy Council decisions cite with approval the Full Bench ruling of the Allahabad High Court in *Chandradeo Singh* v. *Mata Prasad* (1), a case which was followed in 1913 by the Judicial Commissioner in *Hira Ram* v. *Udhe Ram* (2). I am, therefore, unable to accede to the prayer that either the pleadings should be allowed to be amended or that the plaintiff should be given liberty to bring a fresh suit.

The appeal is, therefore, dismissed. There will be no order for costs, as the respondent appears in person.

Appeal dismissed.

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(2) 19 Ind. Cas. 861; 9 N. L. R. 74.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 310 OF 1916.

June 4, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

SATISH MOHINI DEBYA AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

PABNA BANK, LIMITED—DECREE-HOLDER—RESPONDENT.

Mortgage decree, whether can be executed against some owners of equity of redemption - Limitation Act (IX of 1908), s. 15—Execution of decree—Limitation, suspension of, while case struck off.

A mortgage decree cannot be executed against some of the owners of the equity of redemption [p. 908, col. 1.]

After the final decree in a mortgage suit had been set aside in appeal as against some of the defendants and the case as against them was ordered to be retried, the decree-holders applied for execution of the decree as against the other defendants, but the executing Court, declining to issue execution until the liability of the defendants against whom the decree had been set aside was finally settled, made an order striking off the execution case for the present:

Held, that the execution of the decree was stayed by the Court's order striking off the execution case, so that limitation in respect of execution did not begin to run until the liability of the defendants against whom the decree had been set aside was finally settled. [p. 908, cols. 1 & 2.]

Appeal against the order of the Subordinate Judge, Pabna and Bogra, dated the 18th July 1916.

Dr. *Dwarkanath Mitter*, for the Appellant.

Babus *Brojalal Chuckerbutty* and *Gurudas Sinha*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the representative, the widow, of a deceased

judgment-debtor against the order of the learned first Subordinate Judge of Pabna, dated the 10th July 1916, directing execution to issue in respect of a certain decree. The matter is an extremely simple one if we take the material facts and confine our attention to them. The husband of the appellant was a party to a mortgage in favour of an institution called the Pabna Bank, Limited, which is a financial institution, I am told, constituted of the local lawyers practising at Pabna. That mortgage was dated the 16th June 1908. It is stated that nine days before the mortgage, the husband of the appellant, that is the judgment-debtor Basant Kumar Roy, executed a deed of gift of one of the properties in the town of Pabna in favour of his wife, the present applicant. Be that as it may, the Pabna Bank, Limited, instituted in the year 1908 a suit on their mortgage. They obtained a decree on the 15th February 1909, and the order absolute for sale was made on the 25th November of the same year. Subsequently, the defendants Nos. 2, 3 and 4 took further proceedings in the matter. The case came up to the High Court. The decree as against the defendants Nos. 2, 3 and 4 was set aside and the case was ordered to be retried. But the decree and the order absolute for sale as against the other defendants were not interfered with. In the meantime, on the 27th May 1913, an application was made for execution as against the defendants other than the defendants Nos. 2, 3 and 4. It is quite obvious that a mortgage decree cannot be executed against some of the owners of the equity of redemption, and the learned Judge to whom the application for execution was made said that he was not going on with that case until the liability of the defendants Nos. 2, 3 and 4 had been finally settled. This was clearly a proper order. In the result the case was tried against the defendants Nos. 2, 3 and 4. It was decreed on the 6th February 1915 by a preliminary decree and the final decree was passed on the 27th September 1915. Then comes the present application.

The point made is that the decree-holders cannot execute the first decree because it is barred by limitation. That is quite clearly not so. Execution was clearly stayed by the order of the 27th May 1913. The Judge said that he declined to make any order in the execution case until the liability of the defendants Nos. 2, 3 and 4 was finally settled and he struck off, as he stated in his order, the execution case for the present. What could a party do then when the Judge said that until the liability of the defendants Nos. 2 3, and 4 was settled, he declined to issue execution? As a matter of fact, the learned Judge was quite right. It is quite impossible to execute a decree in a mortgage suit in the way it was suggested. If that is so, then limitation did not begin to run until the liability of the defendants Nos. 2, 3 and 4 was finally settled; and that was done on the 27th September 1915. In that view, the case was clearly within time and no point can possibly be raised as against the present application on the ground of limitation. Dr. Mitter who appears for the appellant did not make a point as to whether the tabular statement did or did not comply with the terms of Order XXI, rule 11, Code of Civil Procedure. That matter seems to be dealt with by the learned Judge of the Court below. If necessary, it is only a matter of amendment and amendment can easily be made. The decree was passed in 1909 against the defendants other than the defendants Nos. 2, 3 and 4 and the decree passed against the defendants Nos. 2, 3 and 4 on the 6th February 1915 was made absolute on the 27th September of the same year. Under and by virtue of those decrees, the mortgagees, the Bank, are entitled to have the property brought to sale and the proceeds dealt with in accordance with the terms thereof. The real point that Dr. Mitter has raised in the present appeal is the question of fraud and various charges of a similar nature made against the Pabna Bank in the Court below. That question obviously cannot be gone into in a matter of this nature. This is an application to execute certain decrees that have been passed and are found to be binding. So long as those decrees remain undisturbed, it is quite clear that it cannot be said that execution ought not to issue because they were obtained by some improper means. Those decrees, as long as they stand, obviously must be treated as

decrees binding on the parties, and are liable to be executed. In my opinion, the learned Judge of the Court below came to a correct conclusion when he directed execution to issue in this case. In that view, the present appeal fails and must be dismissed with costs. We assess the hearing fee at one hundred rupees.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 243 OF 1917.

August 24, 1918.

Present:—Mr. Mittra, A. J. C.

DEODHAR SHEOSINGH—DEFENDANT—APPELLANT

versus

Thakur NIHAL SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Res judicata—*Former suit dismissed on technical point—Subsequent suit, whether barred.*

In order to conclude a plaintiff by a plea of *res judicata* it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. Where a suit is dismissed for misjoinder or multifariousness or because all the necessary parties have not been joined in it or on any other purely technical point, a subsequent suit on the same cause of action is not barred. [p. 910, col. 1.]

Appeal from the decree of the Court of the District Judge, Raipur, dated the 7th March 1917, in Appeal No. 342 of 1916.

The Hon'ble Sir *Bipin Krishna Bose*, for the Appellant.

Mr. *P. S. Kotwal*, for the Respondent.

JUDGMENT.—The plaintiff is the Zemindar of Gunderdehi and the defendant was a *thekadar* of Mauza Pinkapar, which is one of the villages in the Zemindari. The defendant held the village, according to the plaintiff, under a lease from the plaintiff's grandfather which expired in 1911. The plaintiff, therefore, sues for possession of the village including *sir* and *khudkast* appertaining thereto.

In Suit No. 350 of 1913 the present plaintiff sued for possession of *sir* and *khudkast* lands of Pinkapar, alleging that he had already received possession of the rest of the village. The defendant denied in that suit that he had given back possession of the village, and pleaded that the plaintiff could not bring a suit for possession of the *sir* and *khudkast* land without ejecting the defendant from the village. The Court held that there was no voluntary surrender of the village by the defendant, though the Court of Wards on behalf of the plaintiff realized rents from the tenants. The following passage from the judgment in Suit No. 350 of 1913 gives the reasons for the dismissal of the suit :—

"As the suit has not been properly framed nor does it include the whole of the claim which the plaintiff is entitled to make in respect of the village and the allegations made by plaintiff have not been established, I find that the plaintiff cannot succeed. His present suit, therefore, fails and is dismissed with costs." (Exhibit D-1).

From this judgment there was an appeal but the appeal was withdrawn. The Appellate Court refused to give the plaintiff liberty to bring a fresh suit. (Exhibit D 3).

In second appeal it is now contended that the decree in the previous suit operates as *res judicata* and that the present suit is barred by Order II, rule 2. The plaintiff, it is urged, should have pressed the appeal with regard to the possession of *sir* and *khudkast* as he was entitled to and left it to a future suit to decide whether there was an omission or relinquishment of his claim to the rest of the village, within the meaning of Order II, rule 2. Further it is pointed out that the plaintiff obtained no permission to withdraw from the suit with liberty to bring a fresh suit, that the plaint was not rejected, but the suit was dismissed by a decree. It is also urged that even if the decision of the former Court was erroneous in law, the decree is still binding on the plaintiff.

In Suit No. 350 all the issues were found in favour of the plaintiff except

that the Court held that there was no surrender of the village. The Court rightly or wrongly held that the plaintiff was bound to bring a suit for the village as well as the home farm land : in other words, the Court held that there was a defect in the frame of the suit, and hence the suit as framed was dismissed.

Cases were cited before me to show that the cause of action in the suits is identical. I will assume this in favour of the appellant throughout this judgment.

In *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar* (1) it was laid down: "To conclude a plaintiff by a plea of *res judicata* it is not sufficient to show that there was a former suit between the same parties for the same matter upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought." There was no final grant or withholding of the relief sought. The suit as framed was held to be not maintainable.

Neill, J. C., in *Ganpat Rao* v. *Doma Patel* (2) speaking of the rule of *res judicata* says: "It is sound law when a suit has been dismissed for misjoinder or multifariousness or because all the proper parties have not been joined in it or when it has been dismissed on a purely technical point, a subsequent suit is not barred."

The decree read by itself is an unconditional dismissal of the suit, but we are entitled to look at the judgment to see what was actually decided. In the view taken in the previous suit the frame of the suit prevented its determination on the merits of the case. To use the words of Phear, J., in *Futteh Singh* v. *Musammat Luchmee Kooer* (3), "The fact that the Court has in form passed a decree dismissing the suit, does not alter the character of the determination."

The decree, even if erroneous, must be held to be binding upon the plaintiff, as contended for the appellant; the appeal was withdrawn and no liberty to bring a fresh suit was given.

The appellate proceedings have not, however, placed the plaintiff in a worse position than he was under the decree of the first Court. It is true he might have pressed the appeal for his claim for home farm land relinquishing his claim to the rest of the village, but this he was not bound to do, if he was prepared to take the risk of a different construction being put upon the decree of the first Court. The decree, I have now held, does not operate as *res judicata*.

The case is analogous to the case when a suit for a purely declaratory decree is dismissed on the ground that consequential relief should have been asked for. There are a number of cases where it has been held that a subsequent suit for possession is not barred either by section 11 or by Order II, rule 2. The difficulty has been felt mainly with reference to the application of section 43 of the Code of 1882. All the cases cited are in favour of the plaintiff and none in favour of the defendant. In *L. Rooke* v. *Dosai Sonar* (4) Stevens, J.C., followed the cases mentioned in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (5), *Komola Kaminy Debia* v. *Loke Nath Kur* (6), *Ram Sewak Singh* v. *Nakched Singh* (7) and *Mohan Lal* v. *Bilaso* (8). To these I may add *Bhola Singh* v. *Gurdit Singh* (9). I find the weight of authority is distinctly against the appellants' contention. I hold that the suit is not barred either by section 11 or Order XX, rule 2.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 3 M. H. C. R. 84.
(2) 3 C. P. L. R. 3.
(3) 21 W. R. 105.
(4) 7 C. P. L. R. 63.
(5) 8 C. 819; 10 C. L. R. 537; 4 Ind. Dec. (N. S.) 529.
(6) 8 C. 835 *foot-note*; 11 C. L. R. 183; 4 Ind. Dec. (N. S.) 532.
(7) 4 A. 261; 2 Ind. Dec. (N. S.) 830.
(8) 14 A. 512; A. W. N. (1892) 80; 7 Ind. Dec. (N. S.) 696.
(9) 66 P. R. 1884.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 348 OF 1917.

July 31, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Cuming.

MOHINI MOHAN SIRKAR, MINOR, AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

NAVADWIP CHANDRA BISWAS—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Application for attachment of moveables—Subsequent application for attachment of immoveables, whether in continuation of previous application—Limitation.

On the 26th of August 1916 a decree-holder made an application for execution of a decree for arrears of rent, which he had obtained on the 10th of December 1913, praying for the attachment and sale of the judgment-debtor's moveable properties. Processes were issued accordingly, but as the result of proceedings taken by the judgment-debtor, the attachment of moveables was found to be impracticable. Thereupon on the 22nd February 1917 the decree-holder prayed that he should be permitted to proceed against the judgment-debtor's immoveable properties. Permission was granted and on the 24th February 1917 the decree-holder filed a list of the immoveable properties against which he desired that proceedings should be taken:

Held, that the applications of the 22nd and 24th February 1917 should be regarded and treated as in continuation of the application made on the 26th August 1916 and that, therefore, there was no bar of limitation to the execution sought by the decree-holder. [p. 912, col. 1.]

Asgar Ali v. *Troilokya Nath Ghose*, 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.), distinguished.

Gnanendra Kumar Rai Chowdhury v. *Shayama Sunder Jen*, 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398, applied.

Where on an application for execution of a decree made in accordance with law, execution cannot be successfully taken against the property specified in the application by reason of causes for which the decree-holder is in no way responsible, he should not be confined to the properties first specified, but it is open to him to ask the Court to proceed against other properties specified in his further supplementary list. [p. 912, col. 1.]

Appeal against the order of the District Judge of Zillah Murshidabad, dated the 16th June 1917, reversing that of the Officiating Munsif, Berhampur, dated the 24th March 1917.

Babus *Gunada Charan Sen* for Babu *Mohini Mohan Chatterjee*, for the Appellants.

Babu *Purna Chandra Roy*, for the Respondent.

JUDGMENT.—This appeal arises out of certain execution proceedings. It appears that on the 10th December 1913 the decree-holder-appellant obtained a decree for arrears of rent against the judgment-debtor-respondent in this appeal. On the 26th August 1916 the decree-holder made an application for execution, and in the same application prayed for the attachment and sale of the judgment-debtor's moveable properties. Processes were issued accordingly, but as the result of proceedings taken apparently by the judgment-debtor the attachment of moveables was found to be impracticable. Thereupon on the 22nd February 1917 the decree-holder prayed that he should be permitted to proceed against the judgment-debtor's immoveable properties. Permission was granted and on the 24th February 1917, the decree-holder filed a list of the immoveable properties against which he desired that proceedings should be taken.

The application made on the 26th August 1916 was admittedly within time. But the Court of first appeal has held that the applications made on the 22nd and 24th February 1917 were barred by the three years' rule of limitation to be found in Article 6 of Schedule III of the Bengal Tenancy Act. In appeal the decree-holder contends that the applications made on the 22nd and 24th February 1917 should be considered and treated, not as fresh or new applications, but as applications made as parts of and in continuation of the first application rendered necessary by the fact that the Court was unable to give the decree-holder the remedy sought for in the first instance. The judgment debtor-respondent on the other hand cites the Full Bench case of *Asgar Ali* v. *Troilokya Nath Ghose* (1), and on the authority of that case contends that the applications of the 22nd and 24th February 1917 should be looked upon as in the nature of amendments of the original application and, therefore, as amendments which could not be made after the original application had been admitted and registered. The present case may, however, be distinguished from the Full Bench case in the manner in which the case of *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Jen* (2), to the decision of which I was myself a

(1) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.).
(2) 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398.

party, was distinguished. In this case, as in that case, the application of the 26th August 1916 was one made in accordance with law. In this case, as in that case, by reason of causes for which the decree-holder was in no way responsible, execution could not be successfully taken against the properties first specified. As in that case, we are of opinion that in such a case the decree-holder should not be confined to the properties first specified and it was open to him to ask the Court to proceed against the properties specified in his further and supplementary list. For the reasons given, therefore, we are of opinion that the applications of the 22nd and 24th February 1917 should be regarded and treated as in continuation of the application made on the 26th August 1916, and that there is no bar of limitation to the execution sought by the decree-holder.

In this view of the case we need not consider the question, namely, whether by reason of the judgment-debtor's conduct he has not brought himself within the exception to Article 6 of the 3rd Schedule of the Bengal Tenancy Act. That is a question which we leave open.

This appeal is accordingly decreed with costs. We assess the hearing fee at two gold *mohurs*.

COMING, J.—I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 2 OF 1918.

June 10, 1918

Present:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

RUDRA PRATAP SINGH *alias* GUDAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat UMRAI KUNWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Will, interpretation of—Intention of testator—Life-estate, transfer of, to remainderman, effect of—Surrender—Acceleration.

A Hindu testator devised a life-estate in favour of his widow, and on her death, a vested remained in favour of his grandson by a predeceased daughter, whom he had brought up as his own son, subject to certain devises for maintenance in favour of the plaintiffs, who were also his grandsons by another daughter:

Held, that the intention of the testator was to provide immediate means for the maintenance of the plaintiffs after his death, and that, therefore, the plaintiffs became entitled to the properties devised to them immediately on the happening of that event. [p. 913, col. 2.]

A transfer of his entire interest effected by the holder of a life-estate in favour of the remainderman operates as a surrender accelerating the devolution of the estate in favour of the latter. [p. 913, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 15th December 1917.

Babu *Basudeo Lal*, the Hon'ble Pandit *Gokaran Nath Misra* and Babu *Gopal Sahai*, for the Appellants.

The Hon'ble *Syed Wazir Hasan* and *Syed Ali Mohammad*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the village Madarpur Bahadur Singh, which formed part of the estate belonging to Sarabjit Singh. Sarabjit Singh was a *taluqdar* whose father was entered at No. 41 in List I and No. 7 in List II, appended to Act I of 1869. He had a wife, *Musammat* Umrai Kunwar, who is defendant No. 1, and 4 daughters, *Musammat* Balraja, *Musammat* Sheoraja, *Musammat* Dilaram and *Musammat* Sirtaja. *Musammat* Balraja was a widow. *Musammat* Sheoraja had died, leaving two sons, Rudra Pratap Singh and Dasrath Lal, who are the plaintiffs-appellants. *Musammat* Dilaram died, leaving a son, Piare Lal, who is defendant No. 2. *Musammat* Sirtaja is said to have had no issue.

On the 10th February 1904 Sarabjit Singh executed a Will by which he gave to his wife, *Musammat* Umrai Kunwar, a life-estate in all the immoveable property belonging to him without any power of alienation, with a vested remainder in favour of Piare Lal, the son of the deceased daughter *Musammat* Dilaram, whom he had brought up as his own son, subject to a devise in favour of the present plaintiffs of the village Madarpur Bahadur Singh for their maintenance without any power of alienation, free from the payment of Government revenue, generation after generation, so long as their line of descendants continued to exist, and an annuity of Rs. 300 per year to *Musammat* Balraja for her life and of Rs. 1,000 per annum to *Musammat* Sirtaja and her male descend-

ants, so long as the male line of the descendants did not become extinct, and thereafter of Rs. 100 per annum to her female line. The Will recited a previous gift of some property in favour of *Musammat* Jafri Begam, his concubine, and the grant of a *guzara* to her son, Kirat Singh, and further stated that all the moveable property and effects in the house, which *Musammat* Jafri Begam occupied, were hers and that none of his successors shall have any power to interfere with her possession of the same.

Sarabjit Singh died on the 6th March 1916. *Musammat* Umrai Kunwar got mutation of names effected in her favour on his death in respect of the entire estate, but subsequently surrendered her life-estate in favour of Piare Lal, the remainderman mentioned in the Will, by a document which she executed in his favour on the 17th May 1917.

The plaintiffs state that under the aforesaid Will they became entitled to the possession of the village Madarpur Bahadur Singh on the death of Sarabjit Singh; but the defendants contend that the Will gave no right to the plaintiffs to claim the said village, so long as *Musammat* Umrai Kunwar was alive. The Court below accepted the contention of the defendants and dismissed the claim.

The interpretation put by the Court below on the Will is not, however, justified by its terms. Excluding the preamble, the operative part of the Will is divided into two paragraphs, the first of which states that by virtue of that Will the testator cancelled his previous Will of the 26th October 1895, and the second proceeds to make a devise of a life-estate in favour of *Musammat* Umrai Kunwar without any power of alienation and a vested remainder in favour of Piare Lal on her death, subject to certain bequests which were described in four sub paragraphs or clauses By one of these clauses the village Madarpur Bahadur Singh was given to the present plaintiffs and their descendants for their maintenance without any power of alienation. By the other clauses annuities were provided for *Musammat* Balraja and *Musammat* Sirtaja and the descendants of the latter and a provision made for the exclusion of certain property or rights previously given to *Musammat* Jafri Begam and her son, Kirat Singh, and the effects or goods lying in the house occupied by *Musammat* Jafri Begam, from the operation of the Will in favour of *Musammat* Umrai Kunwar and Piare Lal. Each of these clauses restricts or controls the main bequests made by the second paragraph of the Will in favour of *Musammat* Umrai Kunwar and Piare Lal. The contention of the learned Counsel for the defendants-respondents that these clauses restrict and control only the vesting of the estate in favour of Piare Lal on the death of *Musammat* Umrai Kunwar and do not affect the intermediate life-estate granted to *Musammat* Umrai Kunwar, is on the face of the document entirely untenable. So far as Piare Lal is concerned, no immediate bequest was made in his favour, because as the testator says in his Will and *Musammat* Umrai Kunwar affirms in her deed of surrender, Piare Lal was brought up and maintained by the testator as his own son and *Musammat* Umrai Kunwar was expected to look after him after his death. The construction adopted by the learned Subordinate Judge is entirely unnatural, and does not carry out the intention of the testator, which was to provide immediate means for the maintenance of the plaintiffs and his surviving daughters after his death.

The transfer effected by *Musammat* Umrai Kunwar of her life-interest in favour of the remainderman, moreover, operates as a surrender, accelerating the devolution in favour of the latter [*Behari Lal* v. *Madho Lal Ahir Gayawal* (1)].

We allow the appeal accordingly and decree the claim of the plaintiffs for possession and mesne profits to be ascertained hereafter with costs here and hitherto and direct that the amount of the said mesne profits shall be determined by the Court below in the manner provided by Order XX, rule 13 (*c*), of the Code of Civil Procedure. The defendants respondents shall bear their own costs throughout.

Appeal allowed.

(1) 19 C. 236 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603 (P. C.)

NANU NAIR *v.* KUNDAN ASHTAMURTHI.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 99 OF 1917.

March 8, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

K. NANU NAIR AND ANOTHER—RESPONDENTS NOS. 1 AND 37—APPELLANTS

versus

K. M. KUNDAN ASHTAMURTHI NAMBUDRIPAD BY MUKTEAR KUNDAN DAMODARAN NAMBUDRIPAD—PETITIONER—RESPONDENT.

Malabar Compensation for Tenants' Improvements Act (I of 1900), ss. 3 (2), 6 (3)—Ejectment suit against mortgagee—Order for payment of amount due and improvements within certain time, nature and effect of—Peliminary and final decrees—Civil Procedure Code (Act V of 1908), s. 47, O. XXXIV, rr. 7, 8, applicability of, to cases under Malabar Compensation Act—Order for re-valuation of improvements passed after Act V of 1908, whether preliminary decree—Amendment of application for re-valuation and order thereon as proceedings in execution—Jurisdiction of executing Court—Appeal against order, maintainability of.

The word "ejectment" in section 3 (2) of the Malabar Compensation for Tenants' Improvements Act includes "redemption" or recovery of possession of the land mortgaged. [p. 914, col. 2.]

The distinction between preliminary and final decrees made in rules 7 and 8 of Order XXXIV, Civil Procedure Code, is unknown to decrees passed under section 6 (1) of the Malabar Compensation for Tenants' Improvements Act. The latter Act provides only for one decree which is a decree in ejectment, though that decree is liable to be revised by orders passed by the executing Court under section 6 (3) of the Act. [p. 915, col. 2; p. 916, col. 1.]

An application for enhancement of the value of improvements owing to further improvements effected by the defendant after the date of the decree cannot be treated as an application for a final decree, nor can the order thereon be deemed to be the final decree in the suit. An order for re-valuation of improvements can only be passed by the executing Court. [p. 915, col 2; p 916, col. 1.]

Where an appeal was preferred against an order for re-valuation of improvements which was followed by the passing of what was called a final decree and the appeal was dismissed on the ground that no appeal lay:

Held, (1) that the application of the decree-holder, though styled as one for the passing of a final decree, was, in substance, one for the execution of the decree already passed; [p. 916, col. 2.]

(2) that the Court should have ordered the amendment of the application as one in execution and passed its order thereon, in which case the order for re-valuation would fall under section 47, Civil Procedure Code, and be appealable; [p. 917, col 1.]

(3) that the Appellate Court could make the amendment itself and pass the necessary orders after the amendment. [p. 917, col 1.]

Appeal against the order, dated the 26th June 1917, of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Original Suit No. 106 of 1917, and the memorandum of objections to the said appeal preferred against the order, dated the 6th November 1916, of the Court of the District Munsif, Palghat, in Miscellaneous Petition No. 2350 of 1915 in Original Suit No. 322 of 1907.

Mr. *T. Eromani Unni*, for the Appellants.

Mr. *P. V. Parameswara Aiyar*, for the Respondent.

The appeal and the memorandum of objections coming on for hearing on 26th February 1918 and the case having stood over to this day for consideration, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—This is an appeal by two of the judgment debtors, mortgagees and tenants under the Malabar Compensation for Tenants' Improvements Act, the respondent being the mortgagor landlord who brought this suit for ejectment and obtained a decree. Under section 3, clause (2) of the Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900) "ejectment" includes "redemption" or recovery of possession of the land mortgaged. The revised decree in the suit passed by the Subordinate Judge (the lower Appellate Court) on the 14th February 1913 was to the following effect: that on plaintiff's depositing into Court on or before the 14th day of August 1913 the amount shown above as due to various defendants less the arrears of rent and costs and future rent till the date of deposit, the defendants do surrender the plaint properties with all improvements thereon and if such payment is not made on or before the said 14th August 1913 the property shall be sold. This decree seems to have been substantially confirmed by the High Court on 9th February 1915. The decree expressly mentions the value of improvements due to the respective defendants as required by section 6, clause (1), of the Malabar Compensation for Tenants' Improvements Act and does not order the taking of any accounts either as regards the amount which may be found due under the mortgage on the date fixed for redemption as in an ordinary mortgage decree or as regards improvements. The

NANU NAIR *v.* KUNDAN ASHTAMURTHI.

Malabar Compensation for Tenants' Improvements Act was passed in 1900 when the old Civil Procedure Code of 1882 was in force. Under that Code (according to the law as finally settled in this Court) only one decree is passed in an ordinary mortgage suit for redemption in districts even other than the Malabar District; see *Mallikarjunadu* v. *Lingamurti Pantulu* (1). The Malabar Compensation Act by section 6, clause (1), treated a suit for redemption in Malabar as a suit in ejectment and provided for only one decree which, of course, is a decree in ejectment. As regards decrees in ejectment there is no question of preliminary decrees and final decrees. As regards decrees for redemption passed in other districts under the Transfer of Property Act and the old Civil Procedure Code, there was only an order absolute for foreclosure or for sale provided for, after the simple decree for redemption was passed. There was under these Acts no preliminary decree and no final decree as distinguished from the simple decree for redemption, which was dated on the day that the judgment was pronounced in the suit. The Malabar Compensation Act, however, made departures from the Transfer of Property Act and the old Civil Procedure Code as regards the procedure in a suit for ejectment brought against tenants [which term includes mortgagees, see section 3, clause (1)], by (1) providing in sub-sections 3 and 4 of section 6 for the passing of an order as to re-valuation of improvements even after decree and before ejectment by an order of Court executing the decree, (2) by providing for the varying of the decree (originally passed) in accordance with the said order of the Court executing the decree re-valuing the improvements, (3) by providing that the matters relating to re valuation and to variation of the decree in accordance with such a re-valuation shall be deemed to be questions relating to the execution of the decree within the meaning of clause (1) of section 244 of the old Code of Civil Procedure and (4) by not providing for the passing of an order for sale either *nisi* or absolute in such suits (see repealed sections 88, 89, 92 and 93 of the Transfer of Property Act). The new Civil Procedure Code of 1908 by Order XXXIV, rule 7, (see marginal note) styled the only decree passed in a suit for redemption in other districts under the old Code as a *preliminary* decree and provided newly by Order XXXIV, rule 8, for the passing of a *final* decree in a redemption suit instead of the order absolute for sale provided for in the Transfer of Property Act, the provisions in which as regards decrees in mortgage suits were repealed by the new Civil Procedure Code. The new Civil Procedure Code, however, makes no reference to the Malabar Compensation Act, section 6, under which decrees in suits against mortgagees of Malabar are directed to be passed in a particular form which makes no provision for the two kinds of decrees, "preliminary" and "final". The new Civil Procedure Code in section 4, clause (1), says: "In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise *affect any special or local law* now in force or any special jurisdiction or power conferred or *any special form or procedure prescribed by or under any other law* for the time being in force." It is thus clear that notwithstanding the passing of the new Civil Procedure Code, as far as suits in Malabar against mortgagees are concerned, there could be only one decree passed in a suit, under section 6, clause (1) of the Malabar Compensation for Tenants' Improvements Act, and not two decrees, "preliminary" and "final". Provisions like directions for sale in default, allowing time to pay moneys declared as due and so on, *not inconsistent with the Improvements Act* and directed or allowed by the new Civil Procedure Code to be mentioned in decrees for redemption or ejectment, can, of course, be mentioned in decrees passed in suits falling under the Compensation Act also.

I am, therefore, of opinion that the decree passed in the present suit, though passed in 1913 after the new Civil Procedure Code came into force, was not a preliminary decree under Order XXXIV, rule 7, of the new Civil Procedure Code, to be followed by a final decree under rule 8, but that it is only the one decree which has to be passed under section 6, clause (1), of the Malabar Compensation Act, though this one decree

(1) 25 M. 244; 12 M. L. J. 279 (F. B.).

is liable to be revised by orders passed by the executing Court under section 6, clause 3.

I shall now proceed to set out the several irregularities which have been committed in this case. The plaintiff in ejectment (the decree-holder), instead of treating this decree as the only decree in ejectment, treated it as a preliminary decree passed under the Civil Procedure Code and applied under Order XXXIV, rule 8, on 31st July 1915, to the District Munsif for a final decree for redemption. On the 27th August 1915 the contesting defendants appeared and without objecting to the petition to pass a final decree as one not provided for by law contended that the value of improvements mentioned in the decree should be enhanced before they are ejected, and then on the 10th September 1915 filed a statement showing the further improvements made by them between 1913 and 1915. It is clear from section 6, clause 3 of the Act, that it is only the Court *executing the decree* that can re-value the improvements. Unless the application to pass a final decree is treated as an execution application, the Court considering that application cannot be called a Court "executing the decree" and hence had no jurisdiction to pass orders, as regards the re-valuation of improvements. The District Munsif, however, (neither party objecting) appointed a Commissioner to re-value the improvements, and the Commissioner's report made in April 1916 and the objections thereto were considered by the District Munsif on 30th October 1916, when he pronounced a partial judgment dealing with most of the matters argued before him in view to pass a final decree as prayed for by the plaintiff. At the end of that judgment of 30th October 1916, he allowed the plaintiff a week's time to deposit the balance payable by him for the value of the excess improvements and adjourned the matter for one week, that is, to the 6th November 1916 in order to complete his judgment before passing the final decree in accordance with such judgment, as some minor questions (as to costs, as to the rights to gather the second crops on some lands, the liability for payment of revenue, etc.) had still to be disposed of. Then on the 6th November 1916 he completed his judgment by expressing his opinions on these points also. In accordance with this judgment of 6th November 1916 a formal final decree, dated the same day, 6th November 1916, seems to have been drawn up in the Munsif's Court.

Against the order of the District Munsif of 6th November 1916 increasing the value of improvements, an appeal was filed to the Sub Court at Palghat. The temporary Subordinate Judge dismissed the appeal, on a preliminary objection taken by the respondent to the effect that the appeal was misconceived, because the appeal was filed not against the final decree but against the order passed on an interlocutory petition made by the judgment-debtor for the enhancement of the value of improvements, though that interlocutory petition was made as an answer to the decree-holder's petition for the passing of a final decree. The learned Subordinate Judge further held that an application for a final decree is not an application arising in execution of the decree and held, therefore, that no appeal lay under section 47, Civil Procedure Code. I think that no serious notice need be taken of another contention urged before us by Mr. Parameswara Aiyar for the respondent that the appeal ought to have been against the incomplete judgment of 30th October 1916 (and not against the complete order of 6th November 1916).

The appeal before us is against the order of the Subordinate Judge dismissing the appeal to him on the preliminary point above stated. I think that the order having been followed up by the drawing up of a final decree, the technical objection upheld by the lower Appellate Court that the appeal to it was made against the order and not against the final decree and, therefore, incompetent is unsubstantial, the grounds urged in appeal against the order applying of course to the final decree.

Further, on the view which I have expressed above, there being no final decree contemplated by the Malabar Compensation Act, the application of the decree-holder, though styled as one for the passing of the final decree, was in substance one for execution of the decree already passed. As it was, however, not in proper form, the learned District

Munsif ought to have directed it to be amended by quoting the proper order and rule applicable and then passed his orders in execution. The order altering the compensation value would, under the Compensation Act, fall within the description of an order passed by the executing Court in execution and would be deemed to have fallen under section 244 of the old Civil Procedure Code if that Code was in force and would, after the present Code came into force, fall under section 47 thereof (see section 8 of the General Clauses Act). Hence an appeal lay against such an order. If the decree is altered in accordance with such order and if the order itself is set aside on appeal, the alteration of the decree is cancelled *ipso facto*, just as when a preliminary decree in the plaintiff's favour is set aside on appeal and the suit is dismissed, the final decree drawn up pending the appeal loses all its legal effect.

This appeal and the memorandum of objections have, therefore, to be allowed and I would set aside the Sub-Judge's order and remand the case to him with directions to him to order the plaintiff to amend his application for the passing of a final decree as an application in execution (the amendment may be made by filing a separate paper in the proper form prescribed for an execution application), to treat, after such amendment is made, the order of the District Munsif of 6th November 1916 as an order passed by the executing Court for re-valuing the improvements, to treat the appeal and the memorandum of objections filed before him (the Subordinate Judge) as an appeal and as an objection memorandum against that order filed against an order passed under section 47 and to dispose of them in due course according to law. The parties will bear their respective costs in this appeal.

OLDFIELD, J.—I agree.

Case remanded.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2010 OF 1917.

June 25, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

DURGA CHARAN BOSE—PLAINTIFF—APPELLANT

versus

LAKHI NARAIN BERA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Decree, whether can be set aside in subsequent suit—Pro-note, suit on—Question whether executant signed it as security for other persons, whether can be determined—Appeal by some of several defendants—Co-defendant not made party to appeal—Decree against co-defendant, validity of—Appellate Court, power of, to add parties.

It is not open to a litigant, except on the ground of fraud, to maintain a suit to rescind or nullify a decree passed in a former suit to which he was a party and which was tried out by a competent Court. [p. 918, col. 2.]

In a suit on a promissory note the question whether the defendant, executant of the note, signed it by way of security for others cannot be tried or determined, except so far as it affects the question of consideration. [p. 919, col. 1.]

Where some of several defendants appeal from a decree without bringing their co-defendants before the Appellate Court as respondents, the Appellate Court has no jurisdiction to pass any decree against the co-defendants without adding them as parties to the appeal. [p. 919, col. 2.]

An appeal having been preferred by some of the defendants, the Appellate Court set aside the decree of the lower Court as against them and made a new decree against a co-defendant who was not a respondent to the appeal. Thereupon the latter applied for the restoration and re-hearing of the appeal in his presence:

Held, that although no provision of the Civil Procedure Code dealt with such a case, yet the Appellate Court should restore the appeal and re-hear it in the presence of the co-defendant after adding him as a party. [p. 919, col. 2.]

Appeal against the decree of the District Judge, 24 Pergannahs, dated the 26th May 1917, reversing that of the Munsif, 3rd Court at Diamond Harbour, dated the 26th June 1916.

Babu *Charu Chundra Biswas*, for the Appellant.

Babu *Manmotho Nath Roy*, for the Respondents.

JUDGMENT.—This is an appeal preferred by Durga Charan Bose, plaintiff in Suit No. 398 of 1915, which suit has been dismissed by the District Judge. We are also asked to revise the decree and order of the Additional District Judge in Appeal No, 291 of 1913 arising out of Suit No, 12

of 1912 in which Durga Charan Bose was defendant No. 9.

The facts of the case are somewhat peculiar. There was a dispute between Lakhi Narain Bera and Hari Krista Bera on the one side and Gopal Chandra Jana of Nadabhouga and others on the other over certain paddy, which resulted in proceedings under section 107 and section 145, Criminal Procedure Code. The matter was referred to the arbitration of Pramada Nath Dutt, Muktear of the Beras, and Durga Charan Bose, the present appellant, the Muktear of the opposite party. Of the merits of that dispute we have no means of judging, nor is it necessary for the present purpose to discuss them. It is sufficient to say that on 19th January 1910 Durga Charan Bose executed a promissory note for Rs. 250 in favour of the Beras payable on demand. On that promissory note the Beras instituted Suit No. 12 of 1912 against Gopal Chandra Jana and 7 others, defendants Nos. 1 to 8, and Durga Charan Bose, defendant No. 9. The suit came on for hearing before the Munsif. Defendants Nos. 3 and 8 not being served, the suit was dismissed as against them. Defendants Nos. 1, 2, 4, 5, 6 and 7 denied all knowledge of the promissory note, pleaded that it was void for want of consideration, and raised other defences. Durga Charan Bose contended that there was no consideration for the note and that, if there was, it had in fact been satisfied. It may be noted that he no longer puts forward these pleas but admits his liability on the promissory note. The Munsif found that the promissory note was executed by Durga Charan Bose for good consideration but really as a surety for defendants Nos. 1 to 8 who owed certain moneys to the Beras. He accordingly on 31st March 1913 passed a decree against all the defendants (other than defendants Nos. 3 and 8 who were not served) and directed that the decretal amount should be realised first from the properties, or persons, or both, of defendants Nos. 1, 2, 4, 5, 6 and 7 only, and then the balance, if necessary, from the properties of the defendant No. 9 (Durga Charan Bose).

Against this decree the defendants Nos. 1, 2, 4, 5, 6 and 7 appealed making the Beras, the plaintiffs, respondents, but not Durga Charan Bose their co-defendant. The appeal was heard by the Additional District Judge, Mr. Duval, on 28th February 1914. Before him the plaintiffs' Pleader admitted that on the pleadings there was no cause of action against defendants Nos. 1 to 8, whatever rights defendant No. 9 might have against them. The learned Additional District Judge accordingly set aside the decree against defendants Nos. 1, 2, 4, 5, 6 and 7 but added (and those words appear also in his decree) "a decree will be given against the defendant No. 9 only."

On 20th March 1914 Durga Charan Bose applied for the restoration of the appeal. After hearing the parties the Additional District Judge on 24th June 1914 passed the following order:—"The decree in the lower Court was against defendants Nos. 1 to 7" (it was not as a fact against defendant No. 3) "and defendant No. 9 and it was acquiesced in by defendant No. 9. I do not see how I can permit defendant No. 9 to re-argue the appeal. I dismiss the application, I find no section under which it can come."

Durga Charan Bose took no further steps of any kind until 24th April 1915, when he filed the suit out of which the present appeal arises (Suit No. 398 of 1915). In this suit he proceeded only against the Beras, plaintiffs in Suit No. 12 of 1912, and not against his co defendants in that suit. He prayed for a declaration that the appellate decree of the Additional District Judge above mentioned (money Appeal No. 291 of 1913) was not binding upon him, but fraudulent, illegal, invalid, inoperative, null and void and "*dictum*" (whatever that may mean); that the Additional District Judge had no jurisdiction to pass such a decree; and that the said decree was "non-executable" against him. The Munsif granted him a decree, but that has been reversed by the District Judge, Mr. Cuming, and the plaintiffs' suit dismissed. We think that the decision of the learned District Judge is correct. It is not open to a litigant, except on the ground of fraud, to maintain a second suit to rescind or nullify the decree in a former suit to which he was a party and which was tried out by a competent Court. The case of *Balwant*

Prasad Pande v. *Ram Ratan Gir* (1) is directly in point. To quote the words of Lord Shaw, "such a procedure is radically incompetent."

The appeal fails and is dismissed with costs.

The matter does not, however, end there. We are asked to revise the decrees in Suit No. 12 of 1912, and this we have power to do under section 115 of the Civil Procedure Code. In this suit, a series of mistakes has been committed, the last of which, we regret to see, was committed in this Court in the issue of this Rule. The Rule was directed to issue on the "8 defendants-respondents." What was obviously intended was to issue a Rule on the two plaintiffs, the Beras, and the six defendants Nos. 1, 2, 4, 5, 6 and 7, against whom the suit had proceeded. The Bera plaintiffs, though not served with the Rule, are before us in the cognate matter of Appeal No. 2010 of 1917 and have no objection to the order which we propose to pass on this Rule. The petitioner Durga Charan Bose is to blame in this matter as he gave in paragraph 11 of his petition the names of the 8 persons who were to be served. They are the persons who were the original defendants Nos. 1 to 8 in Suit No. 12 of 1912. It appears from the record that defendant No. 8 is now dead and his heirs have not been brought on the record. This is, however, of no importance inasmuch as the suit never proceeded against defendants Nos. 3 and 8, and they have no concern with the subsequent proceedings. None of the persons, defendants Nos. 1 to 7, who have been served appear in this Rule.

Turning to the proceedings in the suit it is clear that the plaintiffs, the Beras, sued only on the promissory note. They had, therefore, no cause of action against defendants Nos. 1 to 8 who were no parties to that note. The question whether Durga Charan Bose had signed the promissory note by way of security for the defendants Nos. 1 to 8 could not be tried or determined in this suit, except so far as it affected the question of consideration. Durga Charan Bose alone could be held liable on the promissory note, and the decree of the Munsif making defendants Nos. 1, 2, 4, 5, 6 and 7 liable as principal debtors and Durga Charan Bose liable as a surety only was clearly erroneous. For some extraordinary reason defendants Nos. 1, 2, 4, 5, 6 and 7 in their appeal against this decree did not bring Durga Charan Bose before the Court as a respondent. The learned Additional District Judge, therefore, was correct in setting aside the Munsif's decree against the appellants but had no jurisdiction to pass the decree which he passed, or indeed any decree, against Durga Charan Bose, who was no party to the appeal before him. We think that the learned Additional District Judge was in error in refusing to restore the appeal and re-hear it in the presence of Durga Charan Bose after adding him as a party. It is true that no section of the Civil Procedure Code deals with such a case but then it was never contemplated that a Court would deal with a person, who was no party to the proceeding before it, as if he were a party properly added and properly served. The learned Additional District Judge would have been in order if in allowing the appeal of defendants Nos. 1, 2, 4, 5, 6 and 7 he had said nothing about defendant No. 9. In that case the decree of the Munsif against defendant No. 9 would have stood. But as it was, he made the decree against him a decree of the Appellate Court which he had no jurisdiction to do. There are two courses open to us. We may set aside the decree of the Additional District Judge and remand the appeal for rehearing in the presence of Durga Charan Bose, or we may now pass such final decree in Suit No. 12 of 1912 as in our opinion ought to have been passed by the Courts below. As we entertain no manner of doubt as to what the decree should be, we adopt the latter course.

We set aside the decrees of both the Courts and pass a decree in favour of the plaintiffs against defendant No. 9, Durga Charan Bose, for Rs. 307-8-0 and costs, and interest at six per cent. per annum from 31st March 1913 until realization. The suit is dismissed against

(1) 30 Ind. Cas. 849; 20 C. W. N. 35; 13 A. L. J. 937; 29 M. L. J. 165; 2 L. W. 671; 18 M. L. T. 173; 17 Bom. L. R. 754; 37 A. 485; (1915) M. W. N. 736; 23 C. L. J. 55; 42 I. A. 171 (P. C.).

defendants Nos. 3 and 8, who were not served, without costs, and against defendants Nos. 1, 2, 4, 5, 6 and 7 with costs in both the lower Courts and interest on such costs at six per cent. per annum until realization.

We make no order as to costs of this Rule, as the plaintiffs have incurred no additional costs in respect of it and the defendants Nos. 1 to 7 have not appeared.

This decree will not affect the rights, if any, which Durga Charan Bose may have against defendants Nos. 1 to 8 and which, as we have said, could not be investigated in this suit.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 79 OF 1916.

May 9, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

Thakur RAGHUBAR SINGH—DEFENDANT—APPELLANT

versus

GAJRAJ SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom, proof of—Wajib-ul-arz, *entries in, value of.*

The value of a *wajib-ul-arz* as evidence of a custom depends upon the circumstances under which the entry with regard to the custom came to be recorded in it. [p. 921, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 31st March 1916.

The Hon'ble Pandit *Gokaran Nath Misra* and Sayed *Zahur Ahmad*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the partition of a two-thirds share out of certain joint properties. The relationship between the parties will appear from the pedigree given by the learned Subordinate Judge in his judgment. It is not disputed that the parties were living jointly till the date of the suit. The main contention of the defendant-appellant is that the properties, the partition of which was decreed by the Court below, were impartible and belonged exclusively to the defendant-appellant.

The learned Subordinate Judge found that the said properties were partible and belonged to the joint family, of which the plaintiffs and the defendant were members. The allegation of impartibility rests on a very slender foundation. The defendant-appellant alleges that by reason of a family custom one member of the family, preferably the eldest, is entitled to possession of the family property and the other members are only entitled to claim a maintenance-allowance. He relies in support of that contention on a statement made in the *wajib-ul-arz* of the village Beoli Islamabad prepared at the first Regular Settlement, on certain statements made by Meharban Singh in previous suits, and some oral evidence showing the mode in which the property is said to have devolved from time to time.

As regards the *wajib-ul-arz*, its value as evidence of a custom is considerably discounted by the fact that Meharban Singh, who was recorded as the sole owner of Taraf Rautana of this village at the first Regular Settlement and who was probably responsible for the entry contained in it, knew that other claimants might come forward to claim a share in the estate. In the history of the village appended to the *wajib-ul-arz* (Exhibit A 8) it was stated that the first Summary Settlement of Patti Rautana was made by the British Government with Ram Bakhsh Singh in 1264 Fasli. Ram Bakhsh Singh was the grandson of Dalganjan Singh, one of the uncles of Meharban Singh. The defendant-appellant admitted before the Court below on the 24th January 1911 that the person who held the estate before Meharban Singh was Dalganjan Singh. Dalganjan Singh had two sons, Narpat Singh and Bhawani Singh. Ram Bakhsh Singh was the son of the latter, and even if the devolution of the estate was governed by a family custom of impartibility, Meharban Singh could not have succeeded Dalganjan Singh, so long as Narpat Singh and Ram Bakhsh Singh were alive. The first Summary Settlement was followed by the Mutiny, in the course of which numerous persons left their holdings or estates for fear or other cause. In the Settlement, which took place after the Mutiny, Meharban Singh got himself recognised as the sole proprietor of the Patti,

known as Taraf Rautana, and executed a *kabuliyat* in regard to the same. He was naturally anxious at the same time to ensure that no member of the family should claim a share from him, and this he safeguarded by getting a custom recorded in respect of Taraf Rautana that if a person died leaving several sons by a married wife, his eldest son was to be the owner of the property and to be responsible for the education and maintenance of the remaining sons. No such custom was recorded as prevailing in the other Tarafs or Pattis. He meant thereby to hold the property exclusively for his life and to exclude the junior members of the family from participation, and this he did effectively, for when Lalta Singh and Narpat Singh filed separate suits for the recovery of their shares in the Patti, he pleaded that there was no custom of division in the family and that the claimants had no right to get possession of any share. The suits of Lalta Singh and Narpat Singh were dismissed on the ground that they had failed to establish their possession within limitation. Ram Bakhsh Singh filed no suit. On the death of Meharban Singh the names of his sons, Sanwal Singh, Raghubar Singh, Dhurendra Singh and Gajraj Singh, were entered in the revenue papers in pursuance of an order of the Revenue Court dated the 9th November 1881 (Exhibit 5), and when Sanwal Singh died mutation of names was similarly effected in respect of his share in favour of his widow *Musammat* Kalkin (Exhibit 16). So far as Lalta Singh and Narpat Singh were concerned, they only succeeded in retaining possession of certain cultivatory plots on payment of rent [Exhibit A1 (2)], while *Musammat* Narain Kuar, the widow of Ram Bakhsh Singh, was allowed to remain in possession of certain other land free of rent as a *guzaradar* (Exhibit 2).

It is significant, however, that in the partition which took place in 1887 Taraf Rautana was formed into a Mahal and recorded as belonging to Raghubar Singh and his brothers (Exhibit 9), and in the *wajib-ul-arz* which was prepared at the last Settlement in 1300 Fasli the Mahal was shown as an undivided Zemindari with Raghubar Singh, the present defendant-appellant, as *lambardar*. One of the paragraphs of the *wajib-ul-arz* then prepared stated: "Raghubar Singh *lambardar*, after making collections from the tenants, deposits the revenue and other demands in the Government Treasury, and incurs village expenses, if any, and, being joint in mess, no necessity has arisen for a rendition of accounts among Raghubar Singh, Sanwal Singh, Dhurendra Singh and Gajraj Singh." (Exhibit 7.) Raghubar Singh himself verified this entry. There can be no doubt, therefore, from the subsequent treatment of the property both on the deaths of Meharban Singh and Sanwal Singh at the time of partition and subsequent settlement that the so-called custom of impartibility recorded in the *wajib-ul-arz* was a bogus entry or a nullity and was never put into force.

The statements made by Meharban Singh in the suits filed against him by Lalta Singh and Narpat Singh were similarly valueless and were prompted by considerations of self-interest. The oral evidence adduced by the plaintffs is of a most unsatisfactory character. The family to which the parties belong is known as the family of Rawats; but the suggestion that one of the members of the family, whoever is considered fit and eligible, is selected as a Rawat by the Janwar Thakurs of the 24 villages roundabout Beoli Islamabad to settle their disputes and to receive their homage annually on the occasion of Holi, seems to be entirely unfounded. The witnesses of the defendant stated that Rawat was the ancestor who founded the Patti; but whether that was so or not the office of Rawat, if it existed, had no connection with or bearing on the partibility of the estate held by the family. In his statement of the 24th January 1911 the defendant-appellant admitted: "We belong to Taraf Rautana and are called Rawats", and one of the witnesses Bhabhuti Singh (D. W. No. 8) stated that he was also a Rawat and all of the Rautana Thoks were called by that name. Rawat is obviously a family title and no inference as to the imparti-bility of the property held by the family can be drawn from the possession of that title by its members.

The learned Subordinate Judge who heard the evidence, adduced by the plaintiff, disbelieved it and we see no reason to come to a different conclusion.

MUKUNDA LAL ROY *v.* BHABASUNDARI DEBYA.

The family having been admittedly joint, the property in dispute has been rightly treated as joint family property. The plaintiffs are entered as the owners of the landed property in dispute to the extent of a two-thirds share, and the mere fact that any portion of it may have been purchased in the name of one or other of the members makes no difference. In fact no argument has been addressed by the learned Counsel for the appellant on that point.

The question raised in the memorandum of appeal regarding the theft of Rs. 85,000 by the plaintiffs-respondents has similarly not been pressed. The partition of the landed property can proceed in the manner provided by section 54 of the Code of Civil Procedure.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 289 OF 1918.
July 22, 1918.
Present :—Mr. Justice Newbould and Mr. Justice Panton.

MUKUNDA LAL ROY AND ANOTHER—PRINCIPAL DEFENDANTS—PETITIONERS

versus

Srimati BHABASUNDARI DEBYA CHOWDHURANI AND ANOTHER—PLAINTIFF AND *Pro forma* DEFENDANTS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 153 (b)—Rent suit, dismissal of, on ground that relationship of landlord and tenant not established—Appeal, whether lies.

In a suit for rent in which the amount claimed did not exceed Rs. 50, the plaintiff alleged that the defendant held two *jamas* under him, one at Rs. 3-12-0 and the other at Rs. 3-15-0 and he claimed to recover arrears of the *jama* of Rs. 3-15-0. The defendant admitted holding only one *jama* at Rs. 3-12-0 under the plaintiff, but denied holding any *jama* at Rs. 3-15-0. The Munsif, who had final powers under section 153 (*b* of the Bengal Tenancy Act, holding that the *jama* claimed by the plaintiff was identical with that alleged by the defendant, dismissed the suit on the ground that there was no relationship of landlord and tenant between the parties in regard to the *jama* of Rs. 3-15-0 alleged by the plaintiff:

Held, that no appeal lay to the District Judge as the decision of the Munsif was not a decision of the question of the amount of rent annually payable, but was a decision as to the existence of the relationship of landlord and tenant between the parties in respect of the *jama* sued for. [p. 924, col. 1.]

Rule against the judgment of the District Judge, Rangpur.

FACTS material to the report will appear from the following judgment of the Munsif:—

"This is a suit for recovery of arrears of rent for the plaintiff's share said to be due for the years 1319 to 1322 in respect of a Jama of Rs. 3-15-0 for 1 Done of land situated in Taluq Radha Callan. The claim includes damages at 25 per cent. and is laid at Rs. 19-11-0 as detailed in the plaint.

The defendants contend that they do not hold the disputed Jama under the plaintiff, that they hold a Jama of Rs. 3-12-0 and odd under the plaintiff and that was sued for up to 1320, and that the defendants hold a portion of the disputed land under another landlord.

The point for determination in this case is, whether the relationship of landlord and tenant exists between the parties.

The plaintiff's Pleader maintained that the Jama in suit was different from that alleged by the defendants, and that being so, the previous suit alleged by the defendants does not come into play in this suit at all. The plaintiff's collection papers, to show the existence of the Jama of Rs. 3-12-0 and odd and as a separate thing from the Jama in suit, were called for by the defendants and the plaintiff failed to produce them on the ground that her Gomastha was absent, but I do not consider this to be a sufficient excuse for the non-production of the said papers. The plaintiff's papers show that the Jama in suit was one of Rs. 3-14-0 and odd up to 1312 when it was raised to Rs. 3-15-0 as claimed; but realisation of the Jama after 1312 is meagre and scanty. In my thinking the Jama as claimed is identical with that alleged by the defend

ants, but as that is not the plaintiff's case. I cannot grant the plaintiff any relief on that ground and I hold that the relationship of landlord and tenant does not exist between the parties in respect to the Jama in suit.

The result, therefore, is that the plaintiff's suit will be dismissed with costs and interest at 6 per cent. per annum until realisation."

Plaintiff appealed to the District Judge, who overruled the preliminary objection of the respondent that no appeal lay to his Court, on the ground that as the decision of the suit involved a question of title or of the variation of the rate of rent, the appeal to him was competent and allowed the appeal.

The defendant then moved the High Court in revision.

Babu *Brojendra Nath Chatterjee*, for the Petitioners.—The lower Appellate Court was wrong in holding that an appeal lay from the decision of the Munsif, as that decision involved a question of title or of the variation of the rate of rent. The question is not what was pleaded by the parties or what questions were raised in the suit, but the question is what *was decided* by the Munsif in dismissing the suit.

Section 153 of the Bengal Tenancy Act clearly lays down that an appeal would lie only if the decree or order *has decided* a question to land or to some interest in land as between parties having conflicting claims thereto or a question of the amount of the rent annually payable by the tenant. Here the Munsif expressly held that the "relationship of landlord and tenant does not exist between the parties in respect of the Jama in suit." He did not decide any other question. Therefore, the lower Appellate Court had no jurisdiction to entertain the appeal.

Referred to *Shilabati Debi* v. *Roderigues* (1), *Gangadhar Karmakar* v. *Shekharbasini Dasya* (2), *Sashi Bhusan Hazrah* v. *Deno Moyee Dasi* (3).

(1) 35 C. 547; 12 C. W. N. 448.
(2) 35 Ind. Cas. 348; 20 C. W. N. 967 at pp. 971, 973; 24 C. L. J. 235.
(3) 34 Ind. Cas. 301.

Babu *Bepin Behari Ghosh II* (with him Babu *Atul Chandra Gupta*), for the Opposite Party.—I submit the Munsif not only decided the question of title to land but also decided the question as to the amount of rent annually payable by the tenant. He held that the Jama in suit did not belong to the plaintiff and thereby decided that the plaintiff had no title to the Jama as claimed. Even if it be supposed that the question of title was not decided in the manner provided for in the proviso to section 153, still it is impossible to say that the Munsif did not decide the question as to the amount of rent payable by the tenant. What did he decide? His judgment shows that the plaintiff alleged that the defendants held two Jamas under him, of one of which the rent was 3-12-0 and of the other of which the rent was 3-15-0. The Munsif has held that the defendants did not hold any Jamas of which the rent was Rs. 3-15-0, but he has held that the Jama as claimed by the plaintiff is identical with that alleged by the defendants. By the word "Jama" he evidently meant the *jote* or tenancy. Now the plaintiff claimed for the *jote* in suit an annual rent of Rs 3-15-0. But the Munsif has found that this Jama was a Jama of 3-12-0 as alleged by the defendants. Hence it is apparent that the question decided by the Munsif was that the rent annually payable was Rs. 3-12-0 as alleged by the defendants, and not Rs. 3 15-0 as claimed by the plaintiff. Therefore, I submit the Munsif's decision was appealable, as by it he decided the question of title to land as well as the question of rent annually payable.

Babu *Brojendra Nath Chatterji*, in reply.—Mere deciding a question of title to land won't do. The question must be decided as *between the parties having conflicting claims thereto*. There was no third party laying any conflicting claim to the land in suit. As to the argument of the other side that the Munsif decided the question of the amount of rent payable, I submit, that is obviously fallacious. The Munsif has held that the Jama in suit does not belong to the plaintiff. Therefore, the suit should be dismissed. If he had held that the Jama in suit did belong to the plaintiff, but its rent was Rs. 3-12-0 and not Rs. 3-15-0,

then of course it might have been said that the question of the amount of rent annually payable was decided. But this rent suit had nothing to do with the Jama of Rs. 3-12-0 which the defendant admitted to hold under the plaintiff. The suit was in respect of a Jama of which the annual rent was alleged to be Rs. 3 15-0, but the Munsif found that such a Jama was not held by the defendant under the plaintiff. Could it be believed that the Munsif would wholly dismiss the suit, if he had in reality held that the rent for the Jama in suit was Rs. 3-12-0 and not 3-15-0? The judgment clearly shows that the Jama sued for was non-existent, and, thorefore, the plaintiff was not entitled to a decree.

JUDGMENT.—This is a Rule calling upon the opposite party to show cause why the judgment and decree of the learned District Judge of Rangpur should not be set aside. The judgment and decree in question were passed in an appeal against a decision of the Munsif of Rangpur in a suit for rent. The Munsif in question had final powers under section 153 (*b*) of the Bengal Tenancy Act and the amount claimed in the rent suit was Rs. 19-11-0 only. The question on which this Rule depends is, whether any appeal lay to the District Judge. The point was raised in his Court and he held that the decision of the suit involved a question of title or of the variation of the rate of rent. To this decision we are unable to agree. All that the Munsif decided was that the relationship of landlord and tenant did not exist between the parties in respect of the Jama for which rent was claimed in this suit. For authority that the decision on such a point is not sufficient to make the proviso to section 153 applicable, we may refer to the case of *Shilabati Debi* v. *Roderigues* (1). Plaintiff's case was that the defendant held two Jamas under him one at Rs. 3-12-0 and one at Rs. 3-15-0, and the present suit was for arrears of the Jama of Rs. 3 15 0. The defendant admitted holding one Jama at Rs. 3-12 0 only. On these pleadings the remark of the Munsif that "in my thinking the Jama as claimed is identical with that alleged by the defendant" could not amount to a decision as to the rate of rent. The Munsif's remark, as it stands, is meaningless, since a Jama of Rs. 3-12-0 cannot be identical with a Jamma of Rs. 3-15-0, but apparently he meant that the land of the Jama admitted by the defendant was the only land held by him under the plaintiff and that the rent of this was Rs. 3-12-0 only. But this was not a decision of a question of the amount annually payable by the tenant. The remark of the Munsif was incidental and had nothing to do with the decision of the suit, since the suit was bound to fail on the finding that the relationship of landlord and tenant did not exist between the parties in respect of the Jama in suit. We accordingly hold that the order of the learned District Judge was without jurisdiction, since no appeal lay to him. We accordingly set it aside and restore the decree of the Munsif with costs in this Court (which we assess at one gold *mohur*) and in the lower Appellate Court.

Appeal accepted.

MADRAS HIGH COURT.
APPEAL SUIT No. 161 OF 1917.
February 20, 1918.
Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.
PARVATANENI VENKATARAMAYYA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
LANKA RAMBRAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Vendor and purchaser—Sale-deed—Indemnity clause—Vendor agreeing to clear disputes—Continuing covenant—Breach of covenant—Rights of covenantee—Suit for cancellation of sale and damages—Cause of action—Limitation Act (IX of 1908), Sch. I, Art. 115.

A deed of sale of land contained the following clause: "Should disputes of any kind arise at any time touching the said land on the part of anybody, we will clear them all with our own funds and allow this sale to continue to you uninterruptedly without any kind of loss to you." On attempting to obtain possession, the vendee was resisted by the tenants, who asserted occupancy rights in the land. The vendee thereupon sued the tenants, whose claim was finally upheld by the High Court. In a suit by the vendee against the vendor for cancellation of sale

and damages brought more than six years after the date of the sale:

Held, (1) that the provision in the sale-deed was an indemnity clause and should be construed as a continuing covenant; [p. 925, col. 2.]

(2) that the cause of action for the suit arose when it was held that the plaintiff's vendor had no Kudivaram right in the property and the suit was, therefere, within time under Article 115 of the Limitation Act. [p. 925, col. 2.]

Covenants which provide for a continuous exercise of obligations should be regarded as continuing covenants so long as the subject-matter in respect of which the duty is cast subsists. Therefore, though a cause of action may arise on the date of the covenant or as soon as there is a breach, the injured person is not bound to sue once and for all for present and prospective damages for the breach of the covenant. He is entitled to wait until he has exhausted all possible means of obtaining reparation before he has recourse to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of the intervener and for the expense he has been put to in attempting to vindicate his title against that party. [p. 925, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipattam, in Original Suit No. 24 of 1916.

Messrs. *K. Srinivasa Aiyangar, W. Chakrapani Nayudu* **and** *B. Narayanaswami Nayudu*, **for the Appellants.**

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—The 1st defendant sold the property in suit to the plaintiff on the 8th of December 1906. The document purports to convey both the Melvaram and Kudivaram rights in the property. It is common ground that possession of one of the items, namely, a house site was delivered to the plaintiff. He was unable to get physical possession of the rest of the property as the tenants asserted an occupancy right. Thereupon, he sued the tenants in the District Munsif's Court. He obtained a decree in ejectment on the 30th of December 1909. There was an appeal by the tenants. The lower Appellate Court reversed the Munsif's decision and dismissed the plaintiff's suit on the 13th of September 1910. The High Court confirmed that decree on 23rd August 1912. The present suit was instituted on 22nd August 1915 for cancellation of the sale or for damages in the alternative.

The Subordinate Judge has dismissed the suit on the ground that the cause of action arose on the date of the sale and that as the suit was filed more than 6 years after that date, it was barred by limitation. In this Court, reliance was mainly placed upon a clause in the deed of sale which is in these terms: "Should disputes of any kind arise at any time touching the said land on the part of anybody, we will clear them all with our own funds and allow this sale to continue to you uninterruptedly without any kind of loss to you." In our opinion this is an indemnity clause and should be construed as a continuing covenant. As was pointed out by Stirling, J., in *Jacob* v. *Down* (1), covenants which provide for a continuous exercise of obligations should be regarded as continuing covenants so long as the subject-matter in respect of which the duty is cast subsists. The instance of covenants for repairs is cited for this purpose. In our opinion, the clause in the deed which we have quoted is of the same character as a clause providing for continuous repairs; and consequently we hold that it is a continuous covenant. In this view, although a cause of action may arise on the date of the covenant or as soon as there is a breach, the injured party is not bound to sue once and for all for present and prospective damages for the breach of the covenant. The plaintiff is entitled to wait until he exhausts all possible means of obtaining reparation, before he has recourse to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of the intervener and for the expenses he has been put to in attempting to vindicate his title against that party: we must, therefore, hold that the suit will be in time if it was brought within 6 years of the date on which it was held by a Court of Law against him that neither he nor his vendor had any Kudivaram rights in the property. The language of Article 115 of the Limitation Act supports this view. See also *Secretary of State* v. *Pemmaraju Venkayya Garu* (2).

But there is one difficulty in this case to which apparently the attention of the Court below was not invited. The indem-

(1) (1900) 2 Ch. 156; 69 L. J. Ch. 493; 83 L. T. 191; 48 W. R. 441; 64 J. P. 552.

(2) 35 Ind. Cas. 254; 40 M. 910; 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575.

nity clause imposes the duty in the first instance on the 1st defendant. There is no issue on the question whether the 1st defendant was aware of the opposition by the tenants and whether he was asked to carry out his promise contained in the covenant. If the plaintiff had chosen to go to Court without calling upon the defendant to fulfil his undertaking, it may be that he is not entitled to any damages. Moreover, the question as to when the defendants' duty arose and whether there was an understanding that the plaintiff should wait until recourse to law was had, are considerations which ought to be taken into account before deciding the question of limitation finally. For these reasons, we are unable to accept the conclusion of the Subordinate Judge; we would draw his attention to the decision in *Hari Tiwari* v. *Raghunath Tiwari* (3), which seems nearer to the present case than all the other decisions quoted by him. Having regard to the fact that the real points in dispute have not been adjudicated upon, we have indicated the general principles on which questions of this kind should be tried. It may be necessary to recast the issues and to add additional issues in the view we have taken of the rights of the parties. The Subordinate Judge will hear applications in that behalf and pass the necessary orders.

We must reverse the decree of the Subordinate Judge and remand the suit to him for disposal in the light of the above observations. Costs in the appeal and in the memorandum of objections will abide.

M. C. P.

Appeal allowed; Case remanded.

(3) 11 A. 27; A. W. N. (1888) 254; 6 Ind Dec. (N. S.) 446.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 65 OF 1918.

July 9, 1918.

Present:—Mr. Justice Abdur Raoof.

MOHAN LAL—PLAINTIFF—PETITIONER

versus

TIKA RAM—DEFENDANT—OPPOSITE PARTY.

Construction of document—Instalment bond—Default in payment of instalment—Waiver of right to sue for entire amount—Limitation, commencement of.

An instalment bond provided that the money was to be re-paid by five annual instalments and that if there was any default in payment of any of the instalments, the creditor would have the power to recover the entire amount in a lump sum. The bond was executed in 1909 and default was made in payment of the first instalment, but the plaintiff waited till the term provided in the bond had expired, when he brought a suit stating that his claim for the first 2 instalments being barred by time, he made a claim only with regard to the remaining three instalments:

Held, that under the terms of the bond the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default, which right he had exercised and that, therefore, his suit with regard to the last three instalments was not barred. [p. 927, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes, Bareilly, dated the 13th August 1917.

Mr. *Sital Prasad Ghosh*, for the Appellant.

Mr. *P. N. Banerji*, for the Opposite Party.

JUDGMENT.—This was a suit brought upon an instalment bond in the Court of the Judge of Small Causes. The bond was for Rs. 175 with interest and it was to be paid by five annual instalments of Rs. 35 each. The method provided for the payment of the instalments was in these words. As regards the payment of the money it is agreed that the said amount will be paid by instalments in five years. It was further provided that if there was any default in payment of any of the instalments, then the creditor would have the power to claim the entire amount in the lump sum:—"*Dayin mausuf ko akhtiar hai ke kul rupia ek mushl ba sharah sul fi sadi do rupia mahwari tarikh tahrir tamasuk haza se ba erjai nalish adalat diwani wasul kar lewe.*" The document was written on the 23rd of February 1909. The first instalment would be payable, according to this bond, at the end of February 1910. It appears from the facts found by the Court below that nothing was paid on account of the first two instalments. The plaintiff then had a cause of action, if he so chose, to bring a suit at once for the recovery of the whole amount due under the bond He, however, did not choose to sue then. He has brought this suit after the term provided in the bond, and in paragraph 3 of his plaint he states that as the claim for the first two instalments is barred by time, he makes a claim only with regard to the

remaining three instalments. The claim was resisted in the Court below on the ground of limitation. The questions for consideration in the Court below were whether under the terms of the instalment bond in suit the cause of action arose on the first default, and whether the plaintiff ought then to have brought the suit and whether by reason of the fact that he allowed the limitation period to elapse his entire claim was barred by time and it was not open to him to sue for the remaining instalments as being within time. The real question for decision, however, was whether under the terms of the bond the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default and whether, as a matter of fact, he did exercise this right of waiver. On the face of the document there can be no possible doubt that he had such a right and his subsequent conduct shows that he did exercise it.

The learned Judge of the Court below has relied on the case of *Amolak Chand* v. *Baij Nath* (1) and has held that the plaints in the two cases were similar. The facts of that case, however, are clearly distinguishable from the facts of the present case. The facts of that case as stated at pages 457* and 458* were these. The instalment bond was dated the 7th of July 1904, the whole amount was repayable in $4\frac{1}{2}$ years in equal instalments of Rs. 75 payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates, the third instalment was due on the 7th of January 1906. Neither this nor any of the subsequent instalments were paid. On the 17th of August 1912, *i. e.*, six years and seven months after the 7th of January 1906, the plaintiff brought the suit. An examination of the plaint showed that the plaintiff sued to recover the full amount which was due on the 7th of January 1906 together with interest which fell due by reason of the default of the 7th of January. In his plaint he distinctly stated that the cause of action for the suit accrued on the 7th of January 1906. On these facts the learned Judges held that the plaintiff in that case had elected to take one of the two options given him by the bond, *viz.*, that one which entitled him to recover the full amount of the debt due by reason of the default in one instalment. They went on to say: "It is perfectly clear from the plaint itself that the plaintiffs have not waived that right, which entitled them to recover the whole of the balance due by reason of the default of the 7th of January 1906. In fact, they take their stand upon that provision and seek to enforce their right. The existence of a waiver is distinctly negatived by the plaint, which states that the right accrued on the 7th of January 1906. To enforce that right they had six years from that date." In the present case the plaintiff in distinct terms states that his claim as to the first two instalments was barred by time and that his suit related only to the three remaining instalments. He does not base his cause of action on the default of payment of the first instalment. He does not claim the entire amount due under the bond. He has no doubt claimed interest on the amounts due with respect to the two first instalments. But having regard to the cause of action stated in the plaint, he is not entitled to claim such interest. The learned Judges in the case mentioned above distinguish the case before them from the case of *Ajudhia* v. *Kunjal* (2) in these words:—"In regard to the ruling in *Ajudhia* v. *Kunjal* (2) an examination thereof shows clearly that it cannot apply to the facts of the present case. That suit was brought to recover the last three of the instalments that were due under that bond, and not the whole amount due by reason of a default in payment of an instalment. It appears to have been proved or assumed that the plaintiffs had forborne to sue, in other words, had waived their rights...in respect of the instalments that were due and had not been paid." These remarks make the case of *Ajudhya* v. *Kunjal* (2) fully applicable to this case. The facts of the present case and those of *Ajudhia* v. *Kunjal* (2) are almost parallel.

The case of *Chandan Singh* v. *Bidhya Dhar* (3) is also distinguishable from the pre-

(1) 20 Ind. Cas. 933; 35 A. 455; 11 A. L. J. 664.

*Pages of 35 A.—*Ed.*

(2) 30 A. 123; 5 A. L. J. 72; A. W. N. (1908) 36.
(3) 15 Ind. Cas. 856.

sent case. Mr. Justice Chamier distinguished the case before him from the case of *Ajudhia* v. *Kunjal* (2) upon the ground that the bond before him provided that in default of payment of any instalment, the debtor was bound to pay the whole amount at once. He held that that circumstance distinguished the case from *Ajudhia* v. *Kunjal* (2). The same reasoning is equally applicable in this case. In my opinion the learned Judge of the Court below did not correctly appreciate the terms of the bond in suit. The suit was within time and it ought not to have been dismissed as being barred by time. I allow this application, set aside the judgment and decree of the Court below and remand the case to that Court to be restored to its original number on the file and to be disposed of on the merits. The costs to abide the event.

Application allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2413 OF 1916.

June 5, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

KAILASH CHANDRA KANDOR

—PLAINTIFF—APPELLANT

versus

HARIHAR PATRA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Appeal—Minor respondent—Appellant, failure of, to furnish security for costs of guardian ad litem*—Dismissal of appeal against minor—Transfer of appeal—Decree against minor—Dismissal order, effect of.*

One of the respondents to an appeal in a mortgage suit being a minor, the District Judge appointed the Nazir of his Court to act as the guardian *ad litem* of the minor. The appellant, however, failed to furnish security for the costs of the guardian *ad litem* and the appeal was consequently dismissed as against the minor. Subsequently the appeal was transferred to the Subordinate Judge, who heard a Pleader instructed by a third person on behalf of the minor and decreed the appeal. A few days after, the Subordinate Judge, on being informed of the order passed by the District Judge, vacated his own order against the minor and dismissed the appeal as against him:

Held, that the order of dismissal passed by the the District Judge was a perfectly good order and was operative until it was set aside. [p. 930, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Midnapur, dated the 24th May 1916, modifying that of the Munsif, 1st Court at Contai, dated the 7th December 1914.

FACTS appear from the judgment and the arguments.

Babu *Jyotish Chandra Hazrah*, for the Appellant.—In this case the appellants brought a suit for sale against the minor respondent (mortgagor), who was represented by the Nazir of the Munsif's Court at Contai. The suit was dismissed and my client appealed, making the minor a respondent and treating the Nazir of the Munsif's Court as guardian *ad litem*. He was so made guardian because in the decree of the Munsif the Nazir of the Munsif's Court at Contai was described as guardian of the minor. Notice was duly served upon the Nazir of the Munsif's Court at Contai and he instructed a Pleader, who duly entered appearance. But the Nazir at the same time wrote a letter to the District Judge saying that he was going on leave, and asked for the District Judge's orders as to whether he could continue as a guardian while on leave. The District Judge received that letter in Chambers and passed an order in the order-sheet in the absence of the parties appointing the District Judge's Nazir as guardian *ad litem* of the minor and noted down that *talabana* was to be paid within three days. The order was not communicated to the appellant and after three days, *talabana* not having been paid, the appeal against the minor respondent was dismissed. Nobody knew of this order and the appeal was finally heard by the Subordinate Judge before whom the minor was represented by the Pleader instructed by the first Nazir, *i. e.*, the Munsif's Court Nazir. The appeal was allowed by the Sub-Judge. At the time of the drawing up of the decree, however, it was pointed out to the Subordinate Judge that the appeal against the minor had been dismissed by the District Judge. The Subordinate Judge thereupon vacated his judgment and drew up a decree dismissing the appeal.

I submit that the Nazir of the Munsif's Court was competent to represent the minor in all stages of the litigation. As he received the notice of the appeal and instructed a Pleader to appear, there was no occasion to pass any order appointing anybody else as

guardian. The order of the District Judge to that effect is without jurisdiction. Besides, the order was full of illegalities. The letter was received in Chambers, the order appointing the fresh guardian *ad litem* was passed in Chambers and *talabana* was called for in Chambers. The orders were never communicated to the appellant.

[FLETCHER, J.—Why did you not look to the order-sheet ?]

Because it is no part of the appellant's business. The rules of the High Court, Circular Orders, Volume I, Rule 39, page 83, direct that orders directing anything to be done by the parties *shall* be communicated to them or to their Pleaders and shall be signed by them or their Pleaders. Besides, the minor, although he has lost his case, cannot say that he went unrepresented. Therefore he cannot complain of any prejudice.

In any event if your Lordships be of opinion that the minor was not legally represented by the Pleader, even then the case ought to be remanded to enable the appellant to serve notice upon the Nazir of the District Judge, Midnapur, and have the appeal re-heard.

[FLETCHER, J.—Why did you not move to have the order of the District Judge dismissing the appeal against the minor set aside? We can't help you now.]

I cannot move against an interlocutory order. Besides I had no notice then.

Babu *Santimoy Majumdar*, for the Respondents, submitted that after the decree of the Subordinate Judge was drawn up, the appellant preferred a review of the order of the District Judge, which was dismissed for default.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Midnapur modifying the decision of the Munsif of Contai. The suit was brought to enforce a mortgage. Amongst the defendants was a minor, namely, the defendant No. 1, who appeared in Court through a guardian *ad litem*. The guardian *ad litem* appointed in the Munsif's Court was the Nazir, the Chief Ministerial Officer of that Court, and the Nazir seems to have acted all right. That gentleman, however, went on leave when the appeal was preferred against the judgment of the Munsif and the person who was officiating for him was supposed to have succeeded by virtue of his office to the position of the guardian *ad litem* of the minor defendant No. 1. Whether that was proper or not, it does not matter. However, the officiating Nazir of the Munsif's Court instructed a Pleader to appear on behalf of the minor. But before that—almost a month before—the District Judge had himself appointed an officer of his own Court to be the guardian *ad litem* of the minor and, the appellant having failed to give proper security for the costs of the guardian *ad litem* appointed by the District Judge, the appeal as against the defendant No. 1 was dismissed. That is how the matter stood at the date of the hearing of the appeal. At the hearing of the appeal what happened was this: The Pleader instructed by the officiating Nazir of the Munsif's Court who was, so far as I can see, never the guardian *ad litem* of the minor at all, appeared and argued the case, which he lost and the minor's rights were very seriously prejudiced. Seven days after that, the Subordinate Judge who heard the appeal was informed of what the District Judge had done, dismissing the appeal as against the minor defendant No. 1 on the ground that the plaintiff had been in default in not giving security for the costs of the guardian *ad litem*. Thereupon, the learned Subordinate Judge reviewed his judgment decreeing the suit against the minor defendant No. 1 and in lieu thereof dismissed it as against him. Subsequently the plaintiff made an application to the learned District Judge to set aside the order or decree dismissing the suit as against the defendant No. 1 for default in finding the costs of the guardian *ad litem*. That application was not heard, solely owing to the default of the plaintiff. The plaintiff did not provide the necessary materials to enable the Court to adjudicate on that and, having adopted that course, he has only got himself to thank if the *ex parte* order of the District Judge dismissing the suit against the minor defendant No. 1 for default is given effect to. The plaintiff had ample opportunity before the learned District Judge for showing that this order of dismissal made by him ought to be set aside. As he allowed that opportunity to pass for his own default, he must be bound by the order of dismissal. That

order of dismissal is a perfectly good order until it is set aside. In that view of the case, the present appeal fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 304 OF 1917.

June 19, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

SHEO GOBIND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Lala AMBIKA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Trespasser, position of—Owner, remedies of—Ejectment, suit for, after twelve years, maintainability of.

Although a landlord has an option to treat a person cultivating his land without his permission as a trespasser and to sue him for possession and damages in the Civil Court or to treat him as a tenant and to sue him for rent for the occupation of the same at a fair and equitable rate, he cannot exercise that choice with any effect after a hostile title has been acquired by the occupant by reason of his adverse possession for more than 12 years. The effect of the existence of adverse possession for such a period is to extinguish the remedy of the real owner and the proceedings, if any, taken by him in the Revenue Court to eject the occupant by notice, as if he were a tenant-at-will, are without jurisdiction. [p. 930, col. 2; p. 931, col. 1.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 19th June 1917, modifying that of the Munsif, South Unao, dated the 21st December 1916.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Mr. *P. C. Gupta*, for the Respondents.

JUDGMENT.—The dispute in these appeals relates to plots Nos. 52/2, 52/3 and 65/2 old, corresponding with Nos. 78, 79 and 80 new, *khasra*. The plaintiffs sued for possession of the said plots on the allegation that they were the owners thereof and that the defendants wrongfully got them ejected from the same through the Revenue Court. They further set up a title by adverse possession. The defendants denied the plaintiffs' title and pleaded that the land in dispute had a grove which was cut long ago and that the plaintiffs were estopped from asserting an adverse title.

The Court of first instance found in favour of the plaintiffs and decreed the claim, but the lower Appellate Court dismissed it in regard to plots Nos. 52/2 and 52/3 old, corresponding with Nos. 78 and 79 new, *khasra* and upheld the remainder of the decree. Both the parties appeal.

On behalf of the plaintiffs reliance is placed on what happened in two previous suits, filed by the predecessor-in-title of the defendants against the predecessor-in title of the plaintiffs in 1885 for the recovery of possession of plot No. 65 old *khasra* measuring 2 *bighas* 3½ *biswas* and plot No. 52 old *khasra* measuring 5 *bighas* 15 *biswas* 8 *biswansis* respectively. The suits were brought in the Court of the Munsif of Purwa. The allegation on behalf of the plaintiffs in those suits was that the former plot was *ban ar* land, of which the predecessor in-title of the present plaintiffs had taken wrongful possession and the latter was a grove, of which the trees had fallen down and which the predecessor-in-title of the present plaintiffs had wrongfully brought under cultivation. The predecessors-in-title of the defendants in both those cases set up their proprietary right, alleging that they were mortgagees of both the plots from Prag Kalwar, whose right to redeem the mortgage had become barred by time, and that they had been in adverse possession of the same for more than 12 years. On the date fixed for hearing of those cases, no one appeared for the then plaintiffs. The defendant was present. Both the suits were, therefore, dismissed for default on the 14th December 1886. The Courts below rightly held that the dismissal of the former suit in regard to plot No. 65 old *khasra* rendered a fresh suit in regard to the same unmaintainable and that it was not open to the defendants after the lapse of nearly 20 years to treat the plaintiffs as tenants and to seek their ejectment through the Revenue Court. Although a landlord has an option to treat a person cultivating his land without his permission as a trespasser and to sue him for possession and damages in the Civil Court or to treat him as a tenant

and sue him for rent for the occupation of the same at a fair and equitable rate, he cannot exercise that choice with any effect after a hostile title has been acquired by the occupant by reason of his adverse possession for more than 12 years. As pointed out in *Muhammad Taqi* v. *Muhammad Baqar* (1), the effect of the existence of adverse possession for such a period is to extinguish the remedy of the real owner and the proceedings taken by the defendants in the Revenue Court to eject the plaintiffs by notice, as if they were tenants-at-will, were without jurisdiction.

In regard to plots Nos. 52/2 and 52/3 old *khasra* the lower Appellate Court, however, observes that as they contained a grove which was mortgaged with the predecessor-in-title of the present plaintiffs, a suit for the resumption of the land after the grove was cut could have been instituted only in the Court of the District Judge and the institution of a suit in the Court of the Munsif of Purwa for the possession of the land in 1886 had, therefore, no effect. But the fact that the defendants held possession under the assertion of an adverse right since 1886 cannot be ignored. According to the predecessor-in-title of the defendants the land had ceased to retain the character of a grove prior to 1886 and had been brought under cultivation by the predecessor-in-title of the present plaintiffs. A suit to eject him as a trespasser was dismissed for default. The suit as then brought was entertainable in the Court in which it was brought and the right of the present defendants to resume the land is now barred by time.

It is pointed out that plot No. 80 new *khasra* includes No. 52/4 old *khasra*. But it cannot be said that plot No. 52/4 old *khasra* was not included in the former suit which related to the entire plot No. 52 old *khasra*, measuring 5 *bighas* 15 *biswas* 8 *biswansis*.

The appeal filed by the plaintiffs No. 304 of 1917 is, therefore, allowed and that filed by the defendants No. 334 of 1917 dismissed, the claim of the plaintiffs being decreed with costs here and hitherto. The defendants will bear their own costs throughout.

Appeal allowed.

(1) 20 Ind. Cas. 580; 16 O. C. 163.

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 1159 OF 1917.

March 14, 1918.

Present:—Mr. Justice Shadi Lal.

HAYAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat GULLAN—PLAINTIFF—RESPONDENT.

Custom—Alienation by sonless proprietor of ancestral property in favour of daughter in presence of collaterals, validity of—Mair Rajputs of Tahsil Chakwal, Jhelum District.

A sonless Mair Rajput of the Chakwal Tahsil of the Jhelum District is by custom competent to devise the whole of his ancestral estate in favour of his daughters in the presence of his brothers and nephews. [p. 932, col. 1.]

Although the initial presumption throughout the Punjab is against the power of alienation in respect of ancestral land in village communities and the *onus probandi* at the outset rests on the person asserting such a power, yet in cases of the Muhammadan tribes of the Jhelum District the presumption against the validity of a gift by a sonless proprietor to a daughter or daughter's son is not of great weight and may be easily shifted [p. 931, col. 2.]

Second appeal from the decree of the District Judge, Jhelum, dated the 16th February 1917.

Mr. *Nanak Chand*, for the Appellants.

Syed *Mohsin Shah*, for the Respondent.

JUDGMENT—The parties are Mair Rajputs of the Chakwal Tahsil of the Jhelum District, and the question for consideration is whether a sonless proprietor is competent to devise the whole of his ancestral estate in favour of his daughter in the presence of his brother and nephew. The Courts below have concurred in answering the question in the affirmative, and after hearing arguments and examining the evidence upon the record I see no adequate reason for dissenting from their conclusion.

As pointed out in Rattigan's Digest of Customary Law (Eighth Edition), paragraph 59, remark 2, although the initial presumption throughout the province is against the power of alienation in respect of ancestral land in village communities, and the *onus probandi* at the outset rests on the person asserting such a power, yet in cases of the Muhammadan tribes of the Jhelum District the presumption against the validity of a gift by a sonless proprietor to a daughter or daughter's son is not of great weight, and may be easily shifted, *vide*,

inter alia, *Sher Jang* v. *Ghulam Mohi-ud-din* (1). It appears from the list of cases appended to the judgment of the Munsif that the Mairs recognise a very extensive power of alienation in respect of ancestral property, and there are in that list four instances of the gift or devise of ancestral property in favour of a daughter or a daughter's son to the exclusion of a brother or brother's son. In *Fazl* v. *Musammat Bhagbari* (2) a Division Bench of this Court (Smythe and Roe, JJ.) held that among Mair Rajputs of the Chakwal Tahsil a proprietor without male issue can by custom make a Will leaving his entire estate to his daughter to the prejudice of his near collaterals. The judgment reported as *Faiz Bakhsh* v. *Jahan Shah* (3) also relates to Mair Rajputs of the Chakwal Tahsil and lays down that a gift by a childless proprietor of his entire estate in favour of two of his grand-nephews in the presence of other nephews and grand-nephews is valid by custom.

Upon the record there are two judgments by the Divisional Judge, dated 27th March 1916 (*Musahib Khatun* v. *Khalas*) and 6th April 1916 (*Lal Khan* v. *Haider*), both of which recognise the validity of a gift by a sonless Mair proprietor in favour of a daughter or daughter's son to the prejudice of his collaterals. On the other hand, we have only two compromises in which the property was divided between the collaterals and the daughters.

In view of the judicial authorities referred to above and the evidence adduced by the daughter, I am of opinion that even if the onus was on her to establish the validity of the Will in her favour, that onus has been fully discharged, and that the collaterals have failed to adduce any instance showing that the power of devise in favour of daughters is not recognised among the Mair Rajputs of the Chakwal Tahsil. Accordingly I affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 22 P. R. 1904; 40 P. L. R. 1904.
(2) 93 P. R. 1885.
(3) 96 P. R. 1907; 28 P. L. R. 1908.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2040 OF 1916.

July 3, 1918.

Present :—Mr. Justice Walmsley and Mr. Justice Panton.

MAMRAJ AGARWALA AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES CHHAGMAL AGARWALA AND OTHERS—DEFENDANTS—APPELLANTS

versus

AHAMAD ALI MAHAMAD—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Presumption—Suits Valuation Act (VII of 1887), s. 11—Under-valuation of suit—Prejudice to defendant.

In a suit for declaration of title, the plaintiff set up a *kobala* (conveyance) executed in his favour by his father. The defendant, a judgment-creditor of the father, pleaded that the *kobala* was voidable under section 53 of the Transfer of Property Act. Both the lower Courts, holding that there was no evidence that the plaintiff's father had any debts at the time of the *kobala*, decreed the suit, although it was proved that the *kobala* was executed in the very year in which the defendant obtained his decree against the plaintiff's father:

Held, that the decision of the lower Courts could not stand, as neither of them had considered the fact that the *kobala* was executed at a time when the executant was well aware of the probability of the decree of a substantial sum being passed against him, and also as neither Court in considering the evidence and facts of the case had set clearly before its mind the presumption created by clause (2) of section 53 of the Transfer of Property Act. [p. 933, col. 2.]

Where a suit which has been undervalued is tried by a Munsif's Court, the defendant can reasonably say that he has been prejudiced by the case being tried by a Court which had no jurisdiction to try it. [p. 934, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, Jalpaiguri, dated the 23rd May 1916, affirming that of the Munsif, 2nd Court at that place, dated the 23rd January 1915.

FACTS appear from the judgment.

Babu *Brojo Lal Chakravarti* (with him Babu *Hemendra Nath Bose*), for the Appellants—After the rejection of a claim case the plaintiff brought this suit for declaration of his title to the properties attached by a creditor in execution of a decree obtained against the plaintiff's vendor. The Munsif decreed the suit, holding that the *kobala* was really a gift and conveyed good title to the plaintiff, the *kobala* that was without consideration and that the presumption under section 53 of the Transfer of

Property Act did not arise with regard to subsequent debts and that there was no evidence to show when plaintiff's vendor became indebted. He also found the value of the properties in suit to be Rs. 3 000. On appeal the lower Appellate Court held that the *kobala* was a real document and not a *benami* transaction.

The lower Appellate Court has not at all considered the effect of section 53 of the Transfer of Property Act upon the transaction and the fact that the Munsif had no jurisdiction to try this suit, as the value of the subject-matter exceeded his pecuniary jurisdiction.

The presumption under section 53 is applicable to subsequent debts as well. Referred to *Palamalai Mudaliyar* v. *South Indian Export Co., Ltd.* (1) and *Sadashiv Vaman Dhamankar* v. *Trimbak Divakar Karandikar* (2).

Babus *Upendra Kumar Roy*, for Babu *Krishna Kamal Maitra*, for the Respondent.—Section 11 of the Suits Valuation Act cured the defect of jurisdiction, if any. No prejudice has been proved in this case. The plaintiff was entitled to value his suit at Rs. 300 as mentioned in the *kobala*. Referred to *Bibi Phul Kumari* v. *Ghansyam Misra* (3).

The lower Appellate Court not only affirmed the finding of the Munsif as to the bearing of section 53, Transfer of Property Act, upon the facts of this case but also found that the document was a real one and the inadequacy of the consideration, if any, was immaterial.

The question is whether a third person could raise the question of adequacy of consideration which was a matter between the assignor and the assignee. Referred to *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (4).

As to the cases referred to by the appellants, the principles enunciated therein apply equally to third persons and no distinction should be made on that score.

Babu *Brojo Lal Chakravarti* replied.

(1) 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239.

(2) 23 B. 146; 12 Ind. Dec. (N. s) 97.

(3) 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 35 C. 202; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.).

(4) 35 C. 410; 10 Bom. L. R. 230; 12 C. W. N. 393; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 102; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48 (P. C.).

JUDGMENT.

WALMSLEY, J.—Defendant obtained a decree against the plaintiff's father and in execution of that decree attached certain property. Plaintiff then objected that the property was his and not his father's and he filed a claim before the executing Court. That claim was dismissed. He thereupon brought the present suit for a declaration that the property attached by the decree-holder-defendant was his own property and not his father's. Defendant objected that the suit was undervalued as the property was worth not Rs. 300 but Rs. 3,000 and, therefore, the Munsif in whose Court it was instituted had no jurisdiction to try it. He also contended that the document was not genuine but that it was executed for the purpose of defrauding or defeating the father's creditors.

To take the second point first. The Munsif was of opinion that the document was intended to be a gift and that the consideration money set out in it was only nominal. On appeal the learned Subordinate Judge held that the consideration had actually been paid. Both the Courts then remarked no doubt, with reference to the provisions of section 53 of the Transfer of Property Act, that there was no evidence that the plaintiff's father had any debts at the time of the *kobala*. This seems to me rather an extraordinary remark to make, because the *kobala* was executed in the very year in which the defendant obtained his decree against the plaintiff's father. It is not apparent whether the decree was obtained before the *kobala* or after; but, at any rate, the suit had been instituted, and the plaintiff's father was well aware of the probability of a decree for a substantial sum being passed against him. That is a fact which both the lower Courts ought to have considered carefully. Their remarks show that they were thinking of section 53 of the Transfer of Property Act; but neither Court set clearly before its mind the presumption which is created by clause (2) of that section, and I think that in considering the evidence and the facts in this case they ought to have paid very great

attention to the presumption. They have referred to certain rulings as sufficient to justify the decision to which they have come. But the circumstances of those rulings are entirely different, because in those cases the dispute was not between a third person and one of the contracting parties but between the representatives of one contracting party and the other contracting party. This omission in the judgments of the lower Courts necessitates a remand.

Then, with regard to the other objection that the suit was tried by a Munsif who had no jurisdiction to try it, the Munsif remarked that the objection was disposed of by the decision in the case of *Bibi Phul Kumari* v. *Ghansyam Misra* (3). That view appears to me entirely wrong. Their Lordships of the Privy Council did not lay down any proposition such as is suggested by the Munsif. I think that, having found the value of the property to be Rs. 3,000, the Munsif should have gone on to hold that he had no jurisdiction to try the suit. It is objected that section 11 (2) of the Suits Valuation Act prevents us from entertaining the objection at the present stage. It appears to me, however, that the defendant can reasonably say that he has been prejudiced by the case being tried by a Court which had no jurisdiction to try it; and in the present instance, as the case is being remanded, I am the more unwilling to accept respondent's contention.

I think that the decrees of the lower Courts must be set aside, and the case be sent back to the District Judge for him to make it over for trial to a Subordinate Judge with jurisdiction. Costs of this Court and of the two lower Courts will abide the result.

PANTON, J.—I agree.

Decrees set aside; Case sent back.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 91 OF 1916.

June 12, 1918.

Present:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

Shri Pandit BADRI BISHAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BAIJ NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Privy to person to whom representation made, position of—Arrangement contrary to representation between parties to representation, effect of.

The benefit of an estoppel can be claimed either by the person to whom the representation is made or by his privy: and, the privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privity of estate commenced, the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation. [p. 937, col. 1.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 11th May 1916.

Mr. *A. P. Sen* and Babu *Basudeo Lal*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondents Nos. 1 and 2.

Babu *Bisheshwar Nath Srivastava*, for Respondent No. 2.

JUDGMENT.—The only question for decision in this appeal is one of estoppel.

The judgment of the Court below is to the effect that the plaintiffs, who are the appellants here, are estopped from suing on a mortgage executed in their favour which was the basis of their claim in the lower Court.

In order to elucidate the point before us it is necessary to refer to what took place previous to the present litigation.

In the year 1868 one Baldeo Bakhsh, who was the grandfather of the defendant-respondent Har Dayal, executed a mortgage in favour of one Daya Shankar in respect of a four annas share in a village called Satan. It is admitted that eventually the mortgagee obtained possession over the whole of the mortgaged property and that his representatives-in-interest were in possession till a short time ago.

In February 1912 the defendant Har Dayal executed a mortgage with possession in favour of the plaintiffs appellants Badri Bishal and Sheo Sahai. The mortgage

money was a sum of over Rs. 4,000 and a portion of the consideration was left with the mortgagees to redeem the mortgage of 1868. About a fortnight after this mortgage was executed, a suit was brought against the mortgagees on behalf of Har Dayal by his next friend Baij Nath for the purpose of having the mortgage-deed set aside on the ground that Har Dayal was a minor and that he had been tricked into making the mortgage in the defendants' favour. Shortly after this it is admitted that Baij Nath who appeared in the suit as Har Dayal's next friend was appointed guardian of the person and property of Har Dayal.

The suit was contended in the Court of the Additional Judge of Unao. Issues were framed and we have now to consider what took place on the 26th of March 1913 in the Court of the Additional Judge. The order-sheet of the record of that suit shows that the case was up for hearing on the date just mentioned in the presence of the next friend Baij Nath, who was represented by Babu Lakshmi Narain, Vakil. The defendants on that date were represented by a Vakil named Babu Prag Narain. It was intimated by the Pleaders to the Court that an arrangement had been come to between the parties and that payment of the money which the defendants had agreed to receive was not possible on that date, inasmuch as the banker who was to have brought the money to Court had been unable to produce it. The Pleaders asked the Court for four days' adjournment promising to put in a compromise on the next date for hearing. The learned Judge took down the statements of the Pleaders and the parties. Baij Nath, the next friend of the plaintiff Har Dayal, told the learned Judge that he had agreed to pay a fixed sum to the defendants, who in their turn had agreed to relinquish their rights under the mortgage-deed in suit. The general agent of the 1st defendant made the following statement:—"I have agreed to relinquish my right under the mortgage in suit if the sum fixed to-day is paid to my master Badri Bishal by plaintiff's next friend." A similar statement was made by the 2nd defendant Sheo Sahai, who was present in person. He deposed that he had agreed to relinquish his right under the mortgage in suit if the sum agreed upon was paid to himself and the other mortgagee.

After these statements had been recorded, the learned Judge fixed the 29th of March 1913 for the filing of the compromise. On the 29th of March 1913 what took place was this. The plaintiff's Pleader Babu Lakshmi Narain withdrew the plea of minority which had been set up in the plaint, and intimated that it ought to be considered that his client was of full age at the time he made the mortgage in the defendants' favour. The defendants on this date were represented by two Pleaders and both of the Pleaders informed the Court that they had no objection to the withdrawal of the plea, the fact being that the defence to the suit was that Har Dayal was of full age at the time the mortgage was made.

This statement having been made, the Additional Judge ordered the plaint to be returned to the plaintiff for amendment. Obviously it was necessary to alter the plaint in view of the withdrawal of the allegation that the plaintiff was a minor. The plaint was duly amended, signed by Har Dayal himself who was present, and lodged in Court. After this had been done, the learned Judge proceeded to inquire regarding the terms of the settlement. The plaintiff's Pleader admitted that the agreement was that the plaintiff was to pay a sum of Rs. 1,300 to the defendants, who were for this consideration to relinquish all their rights under the mortgage-deed. The general agent of the defendant, Badri Bishal was present in Court and when he was questioned regarding this matter, the only answer he could give was that he could not say exactly if Rs. 1,300 was the sum fixed. The matter, however, was made clear by the evidence of Babu Prag Narain, who was thereupon called as a witness. He deposed that the terms which were settled between the parties on the 26th of March 1913 were that the plaintiff was to pay a sum of Rs. 1,300 to the defendants and that the defendants were to give up their claim under the mortgage deed in suit. It was further agreed that the parties would bear their own costs. Having ascertained these facts the Judge proceeded to deliver judgment. He found that the parties had

come to terms in the sense above mentioned and he consequently directed that the plaintiff's claim to have the mortgage-deed of the 9th of February 1912 executed by him in favour of the defendants Badri Bishal and Sheo Sahai set aside should be decreed upon payment of Rs. 1,300 to the defendants. The judgment directed that the sum of Rs. 1,300 was to be paid on or before the 3rd of April 1913, failing which the plaintiff's claim would stand dismissed with costs.

In order to raise the money which he had to pay according to the directions contained in this judgment, Har Dayal on the 31st of March 1913 executed a mortgage of the four annas share of Mauza Satan in favour of Jagan Nath, who is the 2nd defendant in the present suit. Jagan Nath, it may be mentioned, is the full brother of Baij Nath who had been acting as the next friend of Har Dayal in the suit of 1912. The mortgage in favour of Jagan Nath was for a sum of Rs. 5,000. It was arranged that out of this money Rs. 1,300 should be deposited in Court to satisfy the decree of the 29th of March 1913. We find from the record (Exhibit B-16) that this sum of Rs. 1,300 was actually lodged in Court on the 31st of March by Har Dayal and his mortgagee Jagan Nath.

After the close of the proceedings in the Court of the Additional Judge, Badri Bishal and Sheo Sahai brought an appeal in this Court which was disposed of on the 10th of March 1915. The case was compromised in this Court between Badri Bishal and Sheo Sahai on the one side and Har Dayal on the other, and the result of the judgment of this Court was that the appeal of Badri Bishal and Sheo Sahai was allowed in consequence of which the decree of the 29th March 1913 of the Additional Judge was set aside. Jagan Nath the mortgagee and his brother Baij Nath were made parties to the appeal in this Court, but their names were removed from the record and it is common ground that whatever was decided in this Court in no way affects the rights of either Baij Nath or Jagan Nath, whatever they may be. We may mention here that after taking this mortgage of the 31st of March 1913 Jagan Nath brought a suit for redemption of the mortgage of 1868 and obtained a decree. He paid the money into Court on the 23rd of March 1914. The result, therefore, is that at the present moment Jagan Nath is in possession of the four annas share of Mauza Satan as a mortgagee.

Badri Bishal and Sheo Sahai, having managed to get the decree of the 29th of March 1913 set aside in appeal in this Court, have now brought the present suit in which they claim possession of the four-annas share under the mortgage which was executed in their favour on the 9th of February 1912. One of the defences which has been set up to this claim and the defence which the Subordinate Judge has accepted is that Badri Bishal and Sheo Sahai are estopped from setting up any rights under their mortgage of the 9th of February 1912. The Subordinate Judge has found in favour of the defendants and has dismissed the suit on this ground alone.

It is this question of estoppel which has been argued before us by the learned Counsel for the appellants. In our opinion the decision of the lower Court is perfectly correct. The facts have been stated in detail and it is impossible, in our opinion, for the appellants to contend that on these facts they are now in a position to set up their rights as mortgagees under the deed of the 9th of February 1912. It is perfectly clear that by the proceedings which were taken in the Court of the Additional Judge of Unao on the 29th of March 1913 the present plaintiffs surrendered whatever claim they had under this mortgage for a payment of Rs. 1,300 to be made to them by Har Dayal. Har Dayal had become the plaintiff in the case, and it is not to be doubted that there was a definite agreement between him and the present appellants. That agreement was communicated to the Court and a decree was passed upon it. On the strength of this agreement Jagan Nath respondent advanced the money on the mortgage of the 31st of March 1913, and it was out of this money that Har Dayal deposited in Court the Rs. 1,300 which he was bound to pay to Badri Bishal and Sheo Sahai. In these circumstances Jagan Nath has certainly the right to say that the present plaintiffs appellants cannot as against him

be heard to set up any rights under their mortgage of the 9th of February 1912. Jagan Nath claims title under Har Dayal, and the benefit of an estoppel can be claimed either by the person to whom the representation is made or by his privy. It is not to be doubted here that Jagan Nath is in privity of estate with Har Dayal. It may be that since the time the representation was made Har Dayal has come to some other arrangement with Badri Bishal and Sheo Sahai. That fact, however, cannot deprive Jagan Nath of the benefit of the estoppel, which passed to him as soon as he took a mortgage of the property on the 31st of March 1913. This finding is sufficient to dispose of the case. It is not necessary for us to inquire into the validity of the mortgage set up by Jagan Nath or whether the plaintiffs are in a position to deny the validity of that mortgage. It is sufficient for us to say that on the principle of estoppel they are debarred from setting up any rights under their own document, and, as the whole of their case is based upon the terms of that document and as it is upon the strength of this document that they are seeking possession as against Jagan Nath, the result is that their suit was rightly dismissed and their appeal must fail.

We affirm the judgment of the Court below and dismiss this appeal with costs to the answering respondents.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1384 OF 1915.

March 16, 1918.

Present:—Mr. Justice Chevis and Mr. Justice Broadway.

KISHEN NARAIN—PLAINTIFF—APPELLANT

versus

PALA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXXIV, r. 14—Transfer of Property Act (IV of 1882), s. 99, principle of, whether applicable to Punjab—Mortgage—Interest, suit for—Subsequent suit for principal and interest, maintainability of.

Section 99 of the Transfer of Property Act having been repealed by Order XXXIV, rule 14, Civil Procedure Code, which has been expressly held to be not applicable to the Punjab, the principle of that section can no longer be applicable to this Province. [p. 938, col. 1.]

Where a mortgagee has already sued and obtained a decree for interest at a time when he could also have sued for the principal, his subsequent suit for the recovery of the principal is barred by Order II, rule 2 of the Civil Procedure Code. [p. 938, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 20th February 1915.

Lala *Moti Sagar*, R. S., for the Appellant.

The Hon'ble Pandit *Sheo Narain* and Mr. *Sardha Ram*, for the Respondents.

JUDGMENT.—In this case the mortgagee sued for interest in 1908 and obtained a decree for Rs. 2,266-13 0 with charge on the property mortgaged. In execution proceedings he had the equity of redemption attatched. The judgment-debtor objected, quoting Order XXXIV of the Civil Procedure Code and urging that the mortgagee could not bring the property to sale on such a decree, and that if he wanted to sell up the property he should "get a decree according to law." The first Court disallowed his objections but on 27th October 1913 Mr. Clifford, Additional Divisional Judge, allowed the objections on appeal, holding that the lower Court's order was opposed to Order XXXIV, rule 14, Civil Procedure Code, and to *Jagan Nath* v. *Budhwa* (1), and that the latter ruling must be followed in preference to *Kashi Pershad Singh* v. *Jamuna Pershad Sahu* (2) on which the lower Court had relied.

The mortgagee then brought this suit for principal and interest, and it has been dismissed by the lower Court as barred by Order II, rule 2. Hence this appeal.

For the appellant it is urged that the respondent is estopped from pleading Order II, rule 2, as he has himself in his former objections invoked the aid of Order XXXIV, rule 14, which itself lays down that Order II, rule 2, is not to be a bar to a fresh suit in such cases. We are, however, of opinion that all that the judgment-debtor

(1) 2 P. R. 1907; 157 P. L. R. 1906.
(2) 31 C. 922.

meant to do when he quoted Order XXXIV was to claim the benefit of the principle embodied in the first part of clause (1) of the rule. He cannot have meant to rely on the whole of that rule, for the second clause of the rule expressly lays down that nothing in the first clause shall apply to any territories to which the Transfer of Property Act has not been extended. So Order XXXIV, rule 14 (1), does not apply to Delhi at all, and the second part of it cannot be used to evade the provisions of Order II, rule 2. Nor can the first part of it be applied, but it is, of course, arguable that the principle therein embodied may be applied, for in fact that is practically Rai Sahib Moti Sagar's second contention in this case. The respondent certainly never bound himself down to refrain from pleading Order II, rule 2, as a defence, and we are of opinion that in quoting Order XXXIV in his objections he only meant to rely on the principle embodied in the first part of Order XXXIV, rule 14, clause 1.

Whether Mr. Clifford's order was right or wrong we need not now decide. We can only hold that Order XXXIV, rule 14 clause (1), is inapplicable to the Punjab or Delhi, and we have considerable doubts whether *Jagan Nath* v. *Budhwa* (1) still holds good under the new Civil Procedure Code. But if Mr. Clifford's order was wrong, the decree-holder should have attacked it by further appeal. All that we have to decide now is the question of estoppel, and as we hold that the respondent never meant to rely on the latter part of clause (1) of Order XXXIV, rule 14, or to bind himself down not to plead Order II, rule 2, we hold that there is no estoppel.

Rai Sahib Moti Sagar's next contention is that even apart from Order XXXIV, rule 14, he can still maintain the suit, the principles of section 99 of the Transfer of Property Act being still applicable to the Punjab. But this section has been deliberately repealed by the Legislature, and has been replaced by Order XXXIV, rule 14, which has been expressly held to be not applicable to the Punjab. After this to apply the principles of section 99 is, in our opinion, out of the question. As is aptly said in *Mehr Bakhsh* v. *Sanghe Khan* (3),

(3) 33 Ind. Cas. 802; 18 P. R. 1916; 194 P. W. R. 1915.

"It is exceedingly difficult to see how, in view of the change of the law thus effected by the latest legislative enactment on the subject under consideration, the Courts of this Province, to which the Transfer of Property Act has never been extended, can recognize and act upon the technical rule embodied in section 99 of the Act." We note also that the principle embodied in section 99 is contained in the first five lines, and that the last two lines which say "he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43," can scarcely be described as containing a "principle."

Lastly Rai Sahib Moti Sagar urges that Order II, rule 2, is no bar because his client was not *bound* under the terms of the mortgage-deed to sue for principal and interest at once. True, but the fact remains that at the time when he sued for interest he could also have sued for principal; he did not do so, and so the subsequent suit is now barred by Order II, rule 2.

This appeal fails and is dismissed, but the appellant seems to be a heavy loser, and we pass no order as to costs of this appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2400 OF 1916.

June 17, 1918.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Walmsley.

KANAILAL KUNDU—PLAINTIFF—APPELLANT

versus

NITYA SARAN MUKHERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Contribution, suit for, maintainability of—One of several judgment-debtors satisfying decree—Liability of other judgment-debtors—Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Set-off—Claim barred at date of filing of written statement, whether can be set off.

A decree in a suit for maintenance, while providing that certain defendants in the suit should pay off the decretal amount within four months from the date of the decree, went on to order that on their failure to do so the money should be realised by sale

of the properties hypothecated. One of the defendants, who had since the decree become possessed of four-fifths of the properties charged, paid off the decretal amount and then sued the other defendants for contribution:

Held, that as it was quite unnecessary for the plaintiff to pay off the decretal debt or any part of it, the claim for contribution could not succeed. [p. 940, col. 2.]

A claim which has become barred by limitation at the time of filing of the written statement in a suit is not a debt legally recoverable by the defendant from the plaintiff and cannot, therefore, be allowed to be set off against the plaintiff's claim. [p. 941, col. 1.]

Appeal against the decision of the District Judge, Nadia, dated the 28th July 1916, reversing that of the Munsif, Krishnagore, dated the 16th December 1915.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"These appeals have arisen out of a suit for contribution. Akhoy Kumari became entitled to realise a sum for maintenance according to a decree. Under that decree certain property of the plaintiff was attached and to release it he was compelled to pay an amount to her, and he now seeks to obtain from the defendants the share of the amount paid by him which was due from them to the plaintiff.

The claim of Akhoy Kumari as against the present plaintiff and defendants was settled by the appellate decrees in a suit brought by Akhoy Kumari against them, and to ascertain the liability of the present plaintiff and defendants to Akhoy Kumari we cannot go behind those decrees.

The Subordinate Judge in that suit held that certain property was subject to a charge for the maintenance money due to Akhoy Kumari and that the present plaintiff (defendant No. 7 in that suit) purchased four-fifths of that property with knowledge of the charge. At the same time he exonerated the present defendants from personal liability for the maintenance. On appeal the District Judge held that the defendants were personally liable and there was no charge on the property purchased by the plaintiff and he had no notice of the charge.

On appeal the Hon'ble High Court set aside the decree of the District Judge as regards the plaintiff (defendant No. 7 in that suit) and also modified that decree so as to exempt defendant No 5 from personal liability. The result is that the property of which the plaintiff has purchased four fifths share, remains subject to a charge for the maintenance and all the defendants, except defendant No. 5, are personally liable. However, Akhoy Kumari, in releasing defendant No. 5 from personal liability, cannot equitably make the remaining defendants personally liable for more than six-sevenths of the maintenance charge.

From the *ekrarnamah* referred to in Exhibit B it is clear that the maintenance allowance was, by agreement between all those liable, to be realised, if it fell into arrears, by the sale of the hypothecated property. So that the allowance should be regarded in the first instance as a charge upon that property and should only be realised personally from the defendants in case Akhoy Kumari failed to realise it by the sale of the property.

In this view of the case the defendants are not liable at all for contribution * * * *"

Babu *Mohendra Nath Roy* (with him Babus *Manmatha Nath Roy* and *Surendra Kumar Roy*), for the Appellant.—I come under section 69 of the Indian Contract Act. The learned Judge refers to Order VIII, rule 6, illustration (*g*) of the Civil Procedure Code. Here plaintiff claimed jointly against all the defendants and one of the defendants No. 6 cannot claim a set-off against him separately. Upon what principle can he claim such a set off? I submit on no principle is the defendant entitled to claim a set off.

[CHITTY, J.—How do you get out of section 70 of the Indian Contract Act?]

He paid off the decretal amount for the benefit of myself and of other judgment-debtors. Therefore, he is not entitled to get that from me alone, but from others as well.

Babu *Hara Prasad Chatterjee* (with him Babus *Manmotho Nath Mukerjee* and *Satindra Nath Mukherjee*), for the Respondents.—As to the first point I am under no liability to contribute at all. On the other hand I can claim a set-off.

[CHITTY, J.—If the suit is dismissed against you your set-off is gone.]

KANAILAL KUNDU *v.* NITYA LAL MUKHERJEE.

Your Lordships have jurisdiction to grant equitable relief.

In *Ramdhari Singh* v. *Parmanund Singh* (1) it has been held that there is a right of set-off not only in cases of mutual debts but also in cases of cross demands, arising out of the same transaction. Under the Indian Contract Act, section 70, the plaintiff is bound to pay compensation to me.

[CHITTY, J.—You do not fill the same character as in Order VIII, rule 6, illustration (*g*). You can only claim against defendant No. 7 and you cannot claim against the other defendants.]

The provisions of the Civil Procedure Code are not exhaustive. They do not take away from parties their equitable rights of set-off. Order VIII, rule 6, illustration (*g*), is applicable in cases of joint claims but if the claim is both a joint and separate one as in the present case, it won't apply.

[CHITTY, J.—You paid the sum for which you claim set-off, *i. e.*, Rs. 430, which was paid by you in satisfaction of another decree of Akhoy Kumari Debi for maintenance on April 1911. How can you claim it in September 1914 when the present suit was filed, for it was time-barred? For the rule says "legally ecoverable," and so even an equitable set-off must be claimed within time, not to speak of your set-off in this case, which is in respect of an ascertained sum of money.]

In *Sheo Saran Singh* v. *Mahabir Pershad Shah* (2) it has been held that limitation is no bar to a set-off. Provisions of the Civil Procedure Code do not take away the right to equitable set-off.

[CHITTY, J.—But that is not the case of a set-off by a defendant in a suit. An equitable set-off is an unascertained sum. But this is the case of a definite legal set-off.]

My submission is that section 70 of the Indian Contract Act is not applicable in this case.

[CHITTY, J.—But your claim to a set-off is barred by limitation.]

JUDGMENT.—This is an appeal by the plaintiff Kanailal Kundu arising out of a suit for contribution brought by him against a number of defendants. We are now only concerned with Gopal Das Mukherjee defendant No. 5 or rather, as that defendant is dead, his legal representatives, and with Mohini Mohan Mukherjee, the defendant No. 6.

Gopal Das Mukherjee defendant No. 5 was expressly exempted from personal liability under the decree in favour of Akhoy Kumari Debi passed by this Court, and the learned Pleader for the appellant admits that he cannot press the appeal as against the representatives of this defendant, more particularly as Gopal Das Mukherjee had no further interest left in the properties charged.

As against defendant No. 6 it is urged that he was made personally liable by the decree of the lower Appellate Court in favour of Akhoy Kumari Debi and that he is liable to contribute. The answer to the plaintiff's suit for contribution against this defendant is that the decree of the Court of first instance in the maintenance suit, while providing that certain defendants should pay off the decretal amount within four months from the date of the decree, went on to order that, on their failure to do so, the money should be realized by sale of the properties hypothecated. It was, therefore, quite unnecessary for the plaintiff to pay off this debt, or any part of it, in order to save the properties charged from being sold. His reason for doing this is obvious, because we are told that he has now become possessed of four-fifths of the properties charged. It was, therefore, to his benefit to save the properties charged from the burden of this debt at the expense of the persons who were his co-defendants in that suit. We think, therefore, that his suit against the defendant No. 6 was rightly dismissed by the learned District Judge.

Then comes the question of the set-off which was claimed by defendant No. 6 in his written statement. He asked that a decree might be passed in his favour for Rs. 345-12-6, which represented the four-fifths share which was held by the plaintiff in the property together with interest. It appears that the defendant No. 6 made a payment of Rs. 430 on 12th April 1911. He did this to save from

(1) 21 Ind. Cas. 716; 19 C. W. N. 1183.
(2) 32 C. 576; 2 C. L. J. 73.

attachment, not the properties which were charged with the payment of maintenance of Akhoy Kumari Debi, but other properties of his own which had been attached by that lady in execution of her decree. Here again, the defendant No. 6 was equally at fault with the present plaintiff in paying off money which he was not really bound to pay. He might have answered in those execution proceedings that the lady must first proceed against the properties charged and it would certainly have been to his advantage to do so because, as we understand, he has no further interest in those properties. However that may be, his right to contribution from the plaintiff or any other of his co-judgment-debtors accrued from 12th April 1911. This suit was filed on 17th September 1914 and his written statement claiming the set-off was filed on 28th January 1915. By that time any claim which he had against the plaintiff for contribution had become time-barred, and it could not be said to be a debt legally recoverable by the defendant No. 6 from the plaintiff. For this reason alone his claim to set-off must necessarily fail. There is the further objection to his set off regarded as a substantive claim, that he was under no obligation to pay this money and that he ought not to have paid it but should have insisted on the plaintiff Akhoy Kumari Debi proceeding against the properties charged.

This appeal must be dismissed against the representatives of defendant No. 5 with costs. It must also be dismissed against the defendant No. 6 as regards contribution, but the decree in his favour for set-off must also be reversed and his claim on that account dismissed. As between him and the plaintiff we make no order as to costs.

WALMSLEY, J.—I agree.

Appeal dismissed;

Decree varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1938 OF 1916.

April 15, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts Trotter.

GASPARI LOUIS—DEFENDANT—APPELLANT

versus

REV. FR. C. P. GONSALVES—PLAINTIFF—RESPONDENT.

Canon Law—Roman Catholic Church, constitution of and law applicable to—Church adopting rules different from those of parent body, effect of—Custom, proof of—Question of law or fact.

The Church of England is an *established* church and is, therefore, subject to the ordinary Courts of Law not only as to matters temporal but even as to matters of doctrine. [p 942, col. 2.]

The Roman Catholic Church is not an *established* church but a voluntary association, and any member who joins that church will be bound by any rules which it has framed for its internal discipline and for the management of its affairs [p. 942, col. 2; p. 943, col. 1.]

Long v. *Bishop of Cape Town*, (1863) 1 Moo. P. C. (N. S.) 411; 15 E. R. 756; 138 R. R. 553 and *Merriman* v. *Williams*, (1882) 7 A. C. 484; 51 L. J. P. C. 95; 47 L. T. 51, followed.

If a branch voluntary association adopts rules which differ materially from those of the parent body, then the members of that association will not be members of the parent body but will be an independent organisation with their own rules. [p. 943, col. 1.]

The Canon Law recognises no distinction between the spiritual and temporal powers of the Papacy, and the Episcopate and a member of any church which is part and parcel of the Universal Catholic Church would be bound by the Canon Law. [p. 943, col. 1.]

If a church, while adopting in the main the doctrines of the Roman Catholic Church, has yet erected certain rules different from the rules of the Catholic Church in matters of discipline and management, those rules must be proved in the same way in which a custom would have to be proved in a Court of Law. [p. 943, col. 1.]

Questions of custom, though they may in the end become questions of law, are at the outset necessarily questions of fact. [p. 943, col. 1.]

Where an appointment as manager of a Vicar in a Roman Catholic Parish Church by the Bishop was questioned on the ground that he was not appointed by the *junta* composed of the heads of houses in a village as was the custom and that the delegation of any authority by the Bishop was only permissive:

Held, (1) that whether the church be viewed as a branch of the Roman Catholic Church or as a voluntary association the appointment was valid [p 943, col. 1.]

(2) that the question whether the custom was for the *junta* to appoint was one of fact on which the finding of the lower Appellate Court could not be interfered with in second appeal. [p. 943, col. 1]

Second appeal against the decree of the District Court, South Canara, in Appeal Suit No. 502 of 1915, preferred against the decree

of the Court of the District Munsif, Udipi, in Original Suit No. 232 of 1914.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *K. P. Lakshmana Rao*), for the Appellant.—The plaintiff has no right to sue. The appointment of Vicar for the church in question rests with the *junta*, *i. e.*, the heads of houses. They have not exercised their right and the plaintiff was not nominated by them. The Bishop had no power to appoint the plaintiff as Moktessor. In matters spiritual, the Parish Church is no doubt bound by the authority of the Canon Law, but the temporal possessions of the church and rights of property are governed by the law of the land.

Mr. *B. Sita Rama Row*, for the Respondent.—The church in question is bound by the Canon Law as it is part of the established Catholic Church. The Bishops, to whom the Pope's authority is delegated, have absolute control over the churches in their diocese in matters both spiritual and temporal. The right claimed on behalf of the *junta* is only of a permissive character and it is open to the Bishop to resume the power delegated to them at his will. The lower Appellate Court has found that there was no recognised or binding custom whereby the appointment of Moktessor vested in the *junta*. That finding cannot be interfered with in second appeal.

JUDGMENT.—This suit, together with an execution petition which turns upon it, was brought by the Reverend Gonsalves, Vicar of the Roman Catholic Parish Church at Kalianpur, for arrears of rent due by tenants of church property. The only defence with which we are concerned is the defence that the plaintiff was not entitled to sue, as his appointment as Manager or Moktessor of the church property was not a valid one. The Vicar was appointed by the Bishop upon the 14th November 1914 and the facts leading up to the appointment were these. The temporal affairs of the church were ordinarily administered by a body known as the *junta*, composed of the heads of houses in the village. This body has been in existence for something like thirty years and has claimed and exercised the right to appoint the Moktessor. The last Moktessor appointed by the *junta* was a Mr. Louis, who resigned his appointment in 1913. Attempts were then made to get the *junta* to appoint a successor, but the meeting held was so disorderly that no valid appointment could be made, and the Vicar so informed the Bishop. The Bishop thereupon appointed the Vicar to the office of Moktessor pending further arrangements. In that capacity he brought this suit and the validity of his appointment is challenged.

The plaintiff puts his case at its highest on this broad ground. This church is part of the Universal Catholic Church and is bound by its laws, that is to say, by the Canon Law, and it is an unquestioned tenet of the Canon Law that the temporalities of the church vest in the Pope whose authority may be regarded as delegated to the Bishops to the extent of their several dioceses. On this view any further delegation of his complete authority over the church property by the Bishop is merely permissive and can be resumed by him at will.

On the other side it was argued that the authority of the Canon Law is confined to the spiritual side and could not affect rights of property or kindred rights in the temporal possessions of the church, which would be governed by the law of the land as administered by the Courts.

We may say at once that we think any analogies drawn from the decisions relating to the property of the English Established Church are not really applicable to the present case. The Church of England is properly described as established just because of this unique feature about it, that it is subjected to the ordinary Courts of Law not only as to matters temporal but even as to matters of doctrine. This is due to a variety of historical causes which need not now be examined. The Roman Catholic Church is not an established church. It is what is described as a voluntary association in the English cases; and the result of those cases, of which the most important are *Long* v. *Bishop of Cape Town* (1) and *Merriman* v. *Williams* (2), seems to be this: If you join a voluntary association, you will be bound by any

(1) (1863) 1 Moo. P. C. (N. S.) 411; 15 E. R. 756; 138 R. R. 553.

(2) (1882) 7 A. C. 484; 51 L. J. P. C. 95; 47 L. T. 51.

rules which it has framed for its internal discipline and for the management of its affairs. You may adopt the doctrines of the established or any other church *en bloc*, but if the voluntary association has adopted rules which differ materially from those of what may be called the parent body, the members of that association will not be members of the parent church but will be an independent organization with their own rules. It seems to us that the appellant in this case is in a dilemma. If his church is part and parcel of the Universal Catholic Church, as apparently he wishes it to be regarded, he must be assumed to be bound by the law of the church, (*i. e.*,) the Canon Law, and if that be so, it is clear that the control of temporalities vests in the Bishop, since the Canon Law recognizes no distinction between the spiritual and temporal powers of the Papacy and its local representatives, the Episcopate. If this church is to be regarded as an independent voluntary association which while adopting in the main the doctrines of the Roman Catholic Church has yet erected certain rules different from the rules of the Catholic Church in matters of discipline and management, then those rules must be proved in the same way that a custom would have to be proved in a Court of Law. Questions of custom may often in the end become questions of law, as in the familiar instances where the Courts have to say whether a custom is reasonable, or is not inconsistent with the law of the land, or with the terms of some document, such as *e. g.*, a contract. But at the outset they must necessarily be questions of fact. You must first prove that the thing is done before you can go on to enquire whether it legally may be done. Looking at the case from this point of view, it seems sufficient to say that the learned Judge has found that the evidence put forward has failed to support the contention that the *junta* has established a recognised custom of holding in its hands the appointement of a Moktessor. He has found as a fact that such appointments as they have made have been merely permissive as a matter of convenience and that the Bishop has never relinquished his claim to be the final repositary of the power of appointment. We think that even if this be regarded as a voluntary association, a person who joins it must be considered as *prima facie* subscribing to the rules of the Catholic Church as embodied in the canons, unless he can give affirmative proof of an established usage to the contrary. The learned Judge by his finding has negatived the existence of such a rule in the present case, and as we do not think he misdirected himself in law in coming to that finding of fact, we cannot disturb it.

The appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2239 OF 1916.

June 20, 1918.

Present :—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

HARA KUMAR SAHA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM CHANDRA PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 75—Instalment bond—Default in payment of instalment—Waiver, forbearance to sue, whether amounts to—Evidence Act (I of 1872), s. 92—Oral undertaking by creditor to waive right to enforce bond, admissibility of.

A mere forbearance to sue for the whole amount of a bond payable by instalments, on default in payment of one or more instalments, is not a waiver within the meaning of Article 75 of Schedule I of the Limitation Act. [p. 944, col. 2.]

Where a registered bond payable by instalments provided that on default in payment of two consecutive instalments the creditor would be entitled to sue for the whole amount due under the bond:

Held, that a subsequent oral undertaking on the part of the creditors at the request of the debtors to waive their right to enforce the payment of the whole amount on two successive defaults was a variation of the contract and was, therefore, not admissible in evidence under section 92 of the Evidence Act [p. 945, col. 1.]

Appeal against the decree of the District Judge, Dacca, dated the 27th May 1916, confirming that of the Officiating Subordinate Judge, Dacca, dated the 22nd April 1915.

HARA KUMAR SAHA *v.* RAM CHANDRA PAL.

FACTS appear from the judgment.

Babu *Dwarka Nath Chakrabutty* (with him Babu *Gopal Chandra Das*), for the Appellants.—The appeal is on behalf of the appellants and arises out of a registered instalment bond executed by the defendants Nos. 1, 2 and 3 and the father of defendant No. 4 on the 9th August 1905 The suit has been dismissed on the ground of limitation, and the question involved is one of waiver. The terms in the bond were that in case of default in two consecutive instalments, the plaintiffs would be entitled to sue for the realization of the whole of their dues. The last instalment to be paid under the original bond was Asar 1322 B. S. The last payment was made in Baisak 1313. The present suit was instituted in Jaist 1321. In 1313 B. S. at the request of the defendants the plaintiffs promised them indulgence and said that they would not insist upon their right to sue for the realization of the whole of their dues in case of default. The question is—Is a promise in advance to waive some right or to show some favour equivalent to varying the terms of the contract? I submit not. It is a promise to give up a right to sue which accrues on the contract. The contract is in no way modified if there is waiver of a right to sue at the request of the debtor at the time when the right to sue arises on the default. Mere abstinence from suing is evidence of waiver. Refers to *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1), *Abinash Chandra Bose* v. *Bama Bewa* (2). To give up a right which accrues on the contract, is not varying the terms of the contract. It was a refraining from suing at the request of the debtor, and section 92 of the Evidence Act has no application in a case like this.

Dr. *Sarat Chandra Basak*, for the Respondents.—There could be no waiver before the instalments actually fell due. It is a clear case of variation of the contract as made by the registered bond. No question of waiver arises in this case and under section 92 of the Evidence Act variation of the contract cannot be proved by oral evidence. Upon the facts found, the Courts below have rightly held that the suit is barred by limitation.

Babu *Gopal Chandra Das*, in reply, referred to the case of *Ajudhia* v. *Kunjal* (3).

JUDGMENT.

CHITTY, J.—I have had the advantage of reading the judgment which is about to be delivered by my learned brother and I agree that the appeal must fail. It may now be taken to be settled, so far as this Court is concerned, that mere forbearance to sue is not sufficient proof of waiver on the part of the plaintiff. In this case the plaintiffs feeling that difficulty set up another case that in 1312, when default was first made, they had arranged with the defendants not to insist in the future on the clause in the bond, which provided that on failure of two instalments the whole amount would become due. To this contention there are two objections. The first is one of fact that no such arrangement was pleaded nor was it found by the Courts to have been actually made. What did take place was that in 1312 there was a default and a waiver of the plaintiffs' rights in respect of that default, with the result that further instalments were paid, the last instalment being that for Baisakh 1313. If it be argued that there was such an arrangement with regard to future payments, the answer would be that such an arrangement would amount to a variation of the contract which could only be effected by a writing similar to that of the contract itself, namely, a writing registered. The appeal is dismissed with costs.

WALMSLEY, J.—The plaintiffs prefer this appeal. The defendants, or their predecessors, owed a large sum of money to the firm which is now represented by the plaintiffs, and on Sraban 24th, 1312, they executed a bond by which they agreed to pay Rs. 3,000 by monthly instalments of Rs. 25. The bond was registered. It contained a provision that if the defendants made default in two consecutive months, the creditors should be entitled to sue for the whole amount due under the bond. It is found by the lower Courts that the defendants paid ten instalments only, the

(1) 11 C. W. N. 903.
(2) 4 Ind. Cas. 17; 13 C. W. N. 1010 at p. 1013.
(3) 30 A. 123; 5 A. L. J. 72; A. W. N. (1908) 36.

last payment being the one made on Baisakh 31st, 1313.

The present suit was instituted on June 13th, 1914 (Jaith 30th, 1321), and is for 72 instalments beginning with the instalment payable for Jaist 1315.

Both the lower Courts have held that the suit is barred by limitation. On this question I need only refer to the case of *Girindra Mohun Roy Chowdhury* v. *Bocha Das* (4), where all the earlier cases were considered. According to the view expressed in that judgment, the present suit is barred by limitation, even though the demand is confined to the instalments which would have fallen due in the six years preceding the institution of the suit.

The plaintiffs, however, tried to avoid this difficulty by seeking to prove that in Asvin 1312 there was an oral undertaking on their part, made at the request of the defendants, to waive their right to enforce payment of the whole on two successive defaults. The lower Courts have held that evidence of such an oral undertaking is barred by section 92 of the Evidence Act, and if the effect of the undertaking was to modify the original registered contract they are correct.

It is now urged for the plaintiffs that the undertaking did not modify the contract, and that it amounted to nothing more than a promise on their part to show indulgence to the defendants as long as they chose to do so. Assuming that such was the effect of the undertaking, it seems to me that the plaintiffs are not in any better position. If it did not have the effect of modifying the original contract, that contract stands intact, and if it is not shown that as a fact the right conferred by the contract was waived, the suit is barred. It is said that the promise explains the subsequent inaction on the part of the plaintiffs and that the right was waived each month as default was committed: but that argument leads the plaintiffs into difficulties: if they did not take action because their promise had deprived them of the right to do so, they are faced by the provisions of section 92 of the Evidence Act; if their right to demand immediate payment of the whole continued undiminished, they have no evidence of waiver to offer except mere forbearance to sue, and a vague promise to show indulgence made before the last payment and the subsequent defaults cannot convert such forbearance into waiver.

I think that the decision of the lower Courts is correct, and that the appeal should be dismissed with costs.

Appeal dismissed.

(4) 1 Ind. Cas. 49; 36 C. 394; 9 C. L. J. 226; 13 C. W. N. 1004.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1927 OF 1914.

December 19, 1917.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

PUTHIYA PANDIKASALIYAL ABDULLA KOYA—DEFENDANT No. 4—APPELLANT

versus

MAVILERI EACHARAN NAIR, DECEASED, AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 3 AND LEGAL REPRESENTATIVES OF DECEASED—RESPONDENT No. 1—RESPONDENTS.

Malabar Law—Karnavan, rights of—Management delegated to another, resumption of—Melcharth, grant of, before expiry of Kanom term, validity of—Improvident transactions by Karnavan, effect of.

It is open to the Karnavan of a Malabar Tarwad, who has delegated his duties to another, to resume the management at any time. [p. 946, col 2.]

If a Karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the Tarwad, this would be a ground for removing him from Karnavastanam, but a particular lease cannot be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the Tarwad. [p. 946, col. 2.]

The grant of a Melcharth by a Karnavan before the expiry of the previous Kanom does not render it *ab initio* void, but it will not bind the grantor's successor. [p. 946, col. 2.]

Cheria Chirikandan v. *Krishnan Nambiar*, 16 Ind. Cas. 341; 27 M. L. J. 690; 12 M. L. T. 600, *Raman Nambiar* v. *Raman Nambiar*, 25 Ind Cas. 578; 27 M. L. J. 175; 1 L. W. 540 and *Moidin Kutti* v. *Kunhi Koyan*, 27 Ind. Cas. 1007; 27 M. L. J 691, distinguished.

Second appeal against the decree of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 142 of 1913, preferred

against the decree of the Court of the District Munsif, Quilandi, in Original Suit No. 638 of 1911.

FACTS appear from the judgment.

Mr. *Govinda Marar*, for the Appellant.—The actual Karnavan was the 1st defendant. He had the power to grant the lease and this power was not affected by the fact that, by a delegated authority from 1st defendant, the 2nd defendant was discharging the Karnavan's duties. The arrangement was only tentative and it was open to 1st defendant to resume management when he pleased.

The lower Court was wrong in holding that a lease granted by a Karnavan, to be binding on the Tarwad, must be beneficial to it. The grant of a lease does not amount to an alienation of the property and an improvident lease will only diminish the income whereby the liabilities have to be met. Such a grant may be a ground for dismissing the Karnavan, but the lessee cannot be prejudiced by it. A Karnavan has large discretion in the management of the Tarwad property.

Mr. *C. Madhavan Nair*, for the Respondents.—The *de facto* Karnavan only can grant a lease and not the Karnavan who is out of office. A Karnavan has not unlimited discretion in the grant of leases. If he is reckless in management and grants improvident leases prejudicial to the Tarwad, the latter cannot be bound by it.

The Melcharth in this case was granted two years before the prior Kanom term expired. It is, therefore, invalid. *Cheria Chirikandan* v. *Krishnan Nambiar* (1), *Raman Nambiar* v. *Raman Nambiar* (2) and *Moidin Kutti* v. *Kunhi Koyan* (3).

JUDGMENT.—In this case the 1st defendant as Karnavan of the Tarwad granted a Melcharth to the 4th defendant, whereby he empowered him to recover 2 items of property held under 2 leases, the term of one of which had expired and the term of the other would expire in 2 years. This Melcharth has been held by the lower Courts to be invalid apparently on two grounds, that is, (1) that the 2nd defendant was the *de facto* Karnavan, and (2) that the lease was not beneficial to the Tarwad. As regards the first point it is not disputed that 1st defendant was actually Karnavan, and consequently, although he may have allowed 2nd defendant to discharge the duties of Karnavan, it was open to him to resume the management at any time. On the second point the learned Vakil for the appellant argues that a Karnavan has absolute powers as regards leases, and leases granted by him cannot be questioned on the ground that they are not beneficial to the Tarwad. The Karnavan, by the grant of a lease, does not alienate Tarwad property and although the income of the Tarwad may be diminished by the grant of improvident leases, that is mainly a matter which concerns the Karnavan alone, for it reduces the income out of which he has to meet liabilities. No doubt if a Karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the Tarwad, this would be a ground for removing him from Karnavastanam, but we do not think that a particular lease can be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the Tarwad. To fetter a Karnavan's discretion in this way would be to render his whole management of the property liable to criticism and reversal at any moment.

It is then argued for the respondent that the grant of this lease, 2 years before the expiry of the term under which the land was held, is *ipso facto* invalid and reliance is placed on *Cheria Chirikandan* v. *Krishnan Nambiyar* (1) and *Raman Nambiar* v. *Raman Nambiar* (2) and *Moidin Kutti* v. *Kunhi Koyan* (3). These cases are, however, only authority for holding that a Melcharth granted by a Karnavan before the expiry of the previous term will not bind his successor, and not that such Melcharths are necessarily invalid *ab initio*.

In this view we think that the decision of the lower Courts is wrong and in allowance of the second appeal we dismiss the plaintiff's suit with costs throughout.

[This second appeal coming on for hearing on 19th December 1917 in pursuance of the order of this Court, dated the 21st November 1916, the Court delivered the

(1) 16 Ind. Cas. 391; 27 M. L. J. 690; 12 M. L. T. 600.

(2) 25 Ind. Cas. 578; 27 M. L. J. 175; 1 L. W. 540.

(3) 27 Ind. Cas. 1007; 27 M. L. J. 691.

following.]

JUDGMENT.—The guardian of 17th and 19th respondents has now been made a party. Mr. Madhavan Nair on his behalf has nothing new to argue. We, therefore, for the reasons stated by us on 24th October 1916 allow the second appeal and dismiss plaintiff's suit with costs throughout.

M. C. P.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1340 OF 1916.

July 1, 1918.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Ryves.

LALA RAM—PLAINTIFF—APPELLANT

versus

THAKUR PRASAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (c), O. XXI, r. 92—Execution—Sale of house—Suit for possession by auction-purchaser—Plea that house could not be sold, admissibility of—Estoppel.

Plaintiff, who was the purchaser of a house in execution of a decree and had obtained formal delivery of possession, brought a suit for actual possession of the house. The claim was contested on the ground that the house claimed was the house of an agriculturist and was, therefore, not liable to sale in execution of a decree in view of the provisions of section 60 (*c*) of the Code of Civil Procedure:

Held, that the defendant having failed to take the objection in execution of the decree and the sale having become conclusive as between him and the plaintiff, it was not open to him to contend that the sale ought never to have taken place and conveyed no title to the purchaser. [p. 948, col. 1.]

Second appeal from a decree of the Subordinate Judge, Mainpuri, dated the 13th April 1916.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *Girdhari Lal Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for possession of a house which originally belonged to the defendant-respondent. In execution of a decree obtained against the said defendant the house was sold by auction so far back as the 23rd of November 1910 and it was purchased by the plaintiff. He obtained formal delivery of possession, but as he did not get actual possession he brought the present suit. The claim was contested on the ground that the house claimed was the house of an agriculturist and was, therefore, not liable to sale in execution of a decree in view of the provisions of section 60 (*c*) of the Code of Civil Procedure. This objection prevailed in the Courts below and the suit was dismissed. The plaintiff has preferred this appeal and he raises two questions.

The *first* is that the lower Appellate Court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of clause (*c*) of section 60; and *secondly*, even if the house was of the description mentioned in that clause, whether after the sale and confirmation of sale it was open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it. As regards the first point the lower Appellate Court says that it was a fact not disputed that the defendant was a tenant and that the house in dispute was an appurtenance to his tenancy. We must accept this statement of fact as correct and assume that the house in dispute is an appurtenance to the tenancy of an agriculturist as such. If an objection had been taken before the auction-sale it ought not to have been sold, but the question which arises is, whether after the sale and the confirmation of the sale its validity can now be questioned by the defendant as against whom the sale, has become conclusive by reason of its confirmation Under Order XXI, rule 92, after a sale has taken place and has been confirmed, the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant-judgment debtor was not aware of the execution proceedings; so that as between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold. If objection had

been raised on behalf of the defendant before the auction-sale, the Court would have had jurisdiction to consider and decide whether the property was of the description mentioned in section 60 (*c*), and if it had decided that the property was liable to sale and no appeal had been preferred against such decision, the sale of the property could never be questioned. In the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant, after the lapse of so many years from the date of the sale, to contend that the sale ought never to have taken place and conveyed no title to the purchaser. This view is supported by the decision of this Court in *Umed* v. *Jas Ram* (1) and also by the decision referred to in the judgment in that case. The rulings of the Bombay High Court in *Pandurang* v. *Krishnaji* (2) and of the Calcutta High Court in *Dwarkanath Pal* v. *Tarini Sankar Roy* (3) are to the same effect. The only case in which a contrary view appears to have been held is the unreported judgment of a Single Judge of this Court in Second Appeal No. 327 of 1910, decided on the 16th of January 1911. In that case the learned Judge held that an objection as to attachment and sale could not be made before the auction sale. We are unable to agree with this view and we do not feel ourselves justified in following that ruling in the face of the other rulings to which we have already referred. The result is that we allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's suit with costs in all Courts.

Appeal allowed.

(1) 29 A. 612; A. W. N. (1907) 193; 4 A. L. J. 519.
(2) 28 B. 125; 5 Bom. L. R. 799.
(3) 34 C. 199; 5 C. L. J. 294; 11 C. W. N. 513.

MADRAS HIGH COURT.

CIVIL APPEAL No. 231 OF 1917.

July 12, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

S. A. CHELLAPPA CHETTY—DEFENDANT No. 1—APPELLANT

versus

E. PR. VR. S. SUBRAMANIA CHETTY AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 6 AND 2 TO 5—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 60—Deposit for term, payable on demand after expiry of term—Suit for recovery of deposit—Limitation—*Maral *deposit—'Deposit in name of one person* maral *another,' meaning of—Rights of* maral *man—Nattukottai Chetties, practice of.*

A suit for recovery of money deposited for a term which is re-payable on demand after the expiry of the term is governed by Article 60 of the Limitation Act, as the money is still left in deposit after the termination of the term. [p. 949, col. 2; p. 950, col. 2.]

'A deposit in the name of one person *maral* another' means only that the deposit was made on the recommendation or introduction of the latter, and the *maral* man can neither be regarded as a trustee in respect of the money nor has he a right to operate on it, as by directing the transfer of the deposit in the name of another person. [p. 950, col. 1.]

Though a usage has sprung up among Nattukottai Chetties that, when money is deposited on the *maral* of a third party, it should not be allowed to be drawn out unless with the consent of the intermediary, the usual remedy by suit is open to the depositor when the *maral* man declines to give his consent, and the hands of the Court are not tied down by the usage. [p. 950, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 51 of 1916.

Messrs. *K. Srinivasa Aiyanyar*, *C. S. Venkatachariar* and *C. V. Rayagopalachariar*, for the Appellant.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—Two questions arise in this appeal. The first question is whether the defendants Nos. 1 to 5, with whom the suit deposit was made, were justified in acting on the order of the 6th defendant to transfer the deposit which was in the name of the plaintiff to the name of the plaintiff's wife, because the deposit had been made with them in the plaintiff's name *maral* the 6th defendant. *Maral* literally means that the deposit had been made on the recommendation or introduction of the 6th defendant.

Defendants Nos. 1 to 5 have treated it as if it meant that the money was deposited to the order of the 6th defendant, so that the 6th defendant was authorised to operate on the deposit although it was in the name of the plaintiff. In Appeal No. 17 of 1913 there was some discussion on the meaning of the word *maral* and it was suggested that it might mean that the money could not be withdrawn by the person in whose name it had been deposited without the consent of the person under whose *maral* the deposit had been made. Some of the evidence in this case, including the evidence of one of the defendants' own witnesses, goes to show that that is the meaning. Whether that be so or not, the evidence for the defendants Nos. 1 to 5 altogether fails to show that a deposit in the name of one man under the *maral* of another justifies the firm with whom the money has been deposited in acting on the orders of the person under whose *maral* the deposit has been made without the authority of the person in whose name the deposit stands. We, therefore, agree with the Subordinate Judge that defendants Nos. 1 to 5 were not justified in transferring this deposit from the name of the plaintiff to the name of the plaintiff's wife and in subsequently transferring it to another firm on the order of the 6th defendant, under whose *maral* it continued to be when deposited in the name of the plaintiff's wife.

The only other serious question in the case is one of limitation. There is no direct evidence as to the terms upon which this money was deposited, so far as the date of the repayment goes. But in Exhibit I, which is a letter from one member of the defendants' firm to another forwarding a Hundi, Exhibit B, it is said that the money was to be credited in the name of the plaintiff under the *maral* of the 6th defendant for 6 Thavanais with interest at a rate exceeding the two months' Thavanai interest of E. R. by 1/32 of a rupee, and Mr. K. Srinivasa Aiyangar has argued that this shows that the agreement was that the money should be deposited for a term of 6 Thavanais and should be repayable at the end of 6 Thavanais, and consequently it was not money deposited under an agreement that it shall be payable on demand, within the meaning of Article 60 of the Limitation Act.

Now in the first place, I do not think that that is the effect of the evidence. The surrounding circumstances show that the money was deposited in the name of a minor and in connection with the marriage of a minor, and it cannot have been the intention of the parties that it should be repayable at the end of 6 Thavanais. The agreement appears to have been that at any rate for 6 Thavanais interest should be payable at a rate exceeding *nadappu* interest by 1/32 of a rupee. This is also borne out by the way in which the deposit was dealt with after it had been transferred to the name of the plaintiff's wife, because in Exhibit IX we find that interest is allowed at 1/32 of a rupee in excess of the *nadappu* rate for 3 Thavanais and afterwards at the *nadappu* rate, so that the agreement seems to have been simply that at any rate for 6 Thavanais interest should be paid in excess of the *nadappu* rate.

Now Mr. Srinivana Aiyangar contended that it was not open to the plaintiff or those acting on his behalf to demand the money back until the expiration of 6 Thavanais. I am not satisfied that that is so. But on a full consideration of the question, I think it makes no difference. Supposing that the agreement was that the money should be deposited for 6 Thavanais and be not repayable until the end of 6 Thavanais and thereafter that it should remain on deposit payable on demand, I think that that would come within the terms of Article 60 of the Limitation Act, and I need only refer to what I had already said with regard to the history and meaning of this Article in *Balakrishnudu* v. *Narayanasawmy Chetty* (1), where I pointed out that the Legislature in 1877 treated deposits of money repayable on demand as a special class of loans which ought to have a special starting point. Coming, as I do, to the conclusion that this money was intended to be left on deposit after the expiration of the 6 Thavanais, it seems to me that Article 60 is clearly applicable and, therefore, that the suit is not barred.

(1) 24 Ind. Cas. 852; 37 M. 175

KUNJ BIHARI PRASAD *v.* BASDEO PRASAD.

In other respects, I agree with the Subordinate Judge, and dismiss the appeal with costs.

We do not pronounce any opinion as to the respective rights of the 6th defendant and the other defendants *inter se*.

SESHAGIRI AIYAR, J.—I entirely agree. Having regard to the fact that the decision in this case rests largely upon the construction to be placed on the Tamil word *maral*, I wish to add a few words. It is not denied that the natural meaning of the term is "through" or "on the recommendation of." The evidence discussed by the Subordinate Judge shows that it is in this sense that Chetties use the expression. No doubt there is also evidence that a usage has sprung up among Chetties that when money is deposited on the *maral* of a third party, it should not be allowed to be drawn out unless it be with the consent of the person who is the intermediary. This practice is mainly attributable to the fact that usually third persons intervene to recommend a Bank to a depositor who is a young man and in order that that young man may not waste money, the precaution has been taken by the Banks not to allow him to draw it out unless he has the consent of the *maral* man. Evidence also shows that where the *maral* man declines to give his consent the usual remedy by suit is open to the depositor; of course, the hands of the Court are not to be tied down by the usage; the necessity for the consent of the *maral* man is obviated by a decision authorising the taking away of the money from the Bank and the Bank is safeguarded. The practice and the evidence show that the *maral* man is neither the trustee in respect of the money nor has he any right to operate on it. This conclusion of mine is supported by the judgment which the learned Chief Justice referred to, namely, the judgment of this Court in Appeal No. 17 of 1913, of which one of the members had very large and considerable practice in litigation among Chetties. It seems to me, therefore, that the money on deposit remained as the money of the plaintiff and the defendants were not justified in allowing it to be deposited first in the name of the plaintiff's wife and subsequently in allowing it to be transferred to another firm.

On the question of limitation, the Subordinate Judge has discussed the evidence and has come to the conclusion that the original condition of the deposit was that it should be drawn out on demand. It may be said that the evidence is not very full or conclusive, but even supposing that the only possible conclusion upon the evidence is as spoken to by the 2nd defendant himself, that there was an agreement that the money should remain with the Bank for a year certain (that is, 6 Thavanais of 2 months each) and that it should be drawn out thereafter on demand, I entirely agree with the learned Chief Justice that Article 60 of the Limitation Act is not made inapplicable by that fact. I think the history of the Article given by the learned Chief Justice in *Balakrishnudu* v. *Narayanasawmy Chetty* (1) clearly shows that in such a case it would still be a case of deposit repayable on demand.

I, therefore, agree in holding that the appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 367 AND 392 OF 1916.

April 16, 1918.

Present :—Mr. Lindsay, J. C.

KUNJ BIHARI PRASAD—DEFENDANT—APPELLANT

versus

Mahant BASDEO PRASAD, MINOR, UNDER THE GUARDIANSHIP OF *Rai Bahadur* KISHEN LAL—PLAINTIFF—RESPONDENT.

Appeal, second—Finding of fact, when binding—Evidence not considered, effect of—Trespass—Chhajjas *projecting over neighbour's land*.

The High Court is competent to determine a point of fact in second appeal if it appears from the judgment of the lower Appellate Court that it failed to consider all the evidence on the record relating to that point. [p. 952, col. 1.]

KUNJ BEHARI PRASAD *v.* BASDEO PRASAD.

Erection of *chhajjas* (cornices) in a house so as to project over a neighbour's land constitutes a trespass on that land. [p. 953, col. 2.]

Appeals from the decrees of the District Judge, Gonda, dated the 3rd August 1916, modifying the order of the Munsif, Utraula (Gonda), dated the 1st July 1916,

Mr. *John Jackson* and Babu *Aditya Prasad*, for the Appellant.

Babu *Ram Chandra* and Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—These are cross-appeals arising out of a suit which was filed in the Court of the Munsif of Utraula in the Gonda District. The plaintiff was a minor, one Mahant Basdeo Prasad, and the two defendants were Kunj Bihari Prasad and Jagdish Prasad. The allegations upon which the plaintiff came into Court were that the defendants, who are owners of a house situated on a plot No. 727, situated in the village of Chhapiya, had encroached upon an adjacent plot of land No. 728, which belongs to the plaintiff, by extending their house to the south. It was stated that by reason of this encroachment, which the plaintiff said had been made within two years from the suit, a certain road, leading from the north to the south past the corner of the defendants' house, had been narrowed so as to interfere with the free passage of persons going backwards and forwards to the temple of which the plaintiff is the Mahant. A further allegation was to the effect that along the east and south sides of the house the defendants had erected *chhajjas* or cornices which projected over plot No. 728 and which constituted a trespass on the plaintiff's property. A third complaint was that the defendants had opened new doors on the east and south sides of their house and that they were in the habit of causing obstruction on the plot No. 728 by placing various articles outside these doors and by tethering cattle and by doing similar other acts. The plaintiff, therefore, prayed for removal of so much of the building of the defendants as encroached upon his plot No. 728. He also prayed for the removal of the *chhajjas* or cornices and for the closing up of the new doors which the defendants had opened.

The main defence in the case was that the alleged encroachment was no encroachment at all. The defendants stated that the new portion of the house regarding which the plaintiff was complaining had been built some 6 or 7 years before the suit upon the site occupied by old walls. They further claimed that the *chhajjas* constituted no encroachment or trespass on the plaintiff's land and they also denied that any new doors had been opened. They pleaded in any case that the plaintiff was not entitled to have the doors closed.

On the main question in the case, namely, whether the house of the defendants had been so built as to encroach on plot No. 728, the Court of first instance came to a finding in favour of the plaintiff. The Munsif, however, did not think it necessary to order removal of the entire portion of the defendants' building which encroached upon the plaintiff's land. He ordered a corner of it to be removed so as to remove any obstruction to the road leading from the north to the plaintiff's temple. He held that the *chhajja* on the east side of the defendants' house interfered with the convenience of passengers and he ordered its removal accordingly. As for the *chhajja* on the south side of the house he was of opinion that it caused no inconvenience and he refused to make any order for its removal. As for the case about the doors he gave directions that the doors should be closed.

The defendants went in appeal to the District Judge and the plaintiff filed cross-objections. The result was that the learned Judge, differing from the Court of first instance, found that there had been no recent encroachment on the plaintiff's land No. 728. He reversed the order of the first Court directing the removal of a portion of the defendants' building. As regards the *chhajjas* he affirmed the order of the first Court. As for the case about the doors he was of opinion that the defendants were entitled to open as many doors in their house as they chose and consequently he set aside that portion of the first Court's order which directed the doors to be closed.

Both parties come here in appeal and I deal first with the appeal of the plaintiff No. 392 of 1916. The main question for decision here is with respect to the encroach-

ment alleged to have been made by the defendants on plot No. 728. It is argued that the judgment of the lower Appellate Court is wrong in this respect and that the order of the first Court ought to have been allowed to stand.

Referring to the map which was prepared during the trial in the first Court by a Commissioner Babu Sant Bakhsh, the portion of the defendants' premises which the plaintiff alleges to constitute an encroachment on his land is an oblong delineated in pink on the map and running lengthwise from east to west between the letters D and E. The amount of the encroachment is alleged to be about 8 feet.

Prima facie the finding of the learned District Judge that this portion of the defendants' house is not a fresh encroachment upon the plaintiff's land is a finding of fact which cannot be disturbed in second appeal. It is argued, however, that the learned Judge has not referred to certain important pieces of documentary evidence on the record, which were relied upon in the Court of first instance and which it is argued the learned Judge ought to have dealt with in his judgment, especially as he proposed to interfere with the finding arrived at by the Munsif. For the purpose of arriving at his decision the learned Judge relied principally upon two statements; one of these was the statement of a Commissioner, Babu Satish Chandra, who was appointed to inspect the site. According to his statement the portion of the defendants' house, which is marked pink upon the map, was not a new building, that is to say, Babu Satish Chandra was of opinion that the walls, although new, had been erected upon old foundations. The learned Judge says that to his mind the statement of Babu Satish Chandra on this point is conclusive. He also relied very strongly upon the evidence of an old Qanungo, named Dhanpat Rai, who gave evidence in the case on the defendants' behalf. His story was that in the year 1884 he had been ordered to prepare a map of the boundaries of the plaintiff's plot No. 728. A copy of the map which was prepared by him in that year together with a copy of the *khasra* which he prepared by way of explaining the map were on the record and the originals were also summoned from the Revenue Court. I have no doubt that if the statement of the Qanungo Dhanpat Rai can be accepted in its entirety, the decision of the learned Judge is correct. The Court of first instance thought, the evidence of the Qanungo was unreliable but the learned Judge, as he was perfectly entitled to do, took the opposite opinion. It is, however, the fact that although the learned Judge in the opening portion of his judgment sets out that he has considered all the oral and documentary evidence in the case, he does not in his judgment discuss certain documentary evidence which it is claimed supports the case of the plaintiff. I have been referred in this connection to three documents. One of these is a map of the *abadi* of Mauza Chhapiya which was prepared at the time of the Settlement in 1901. This map is relied on by the plaintiff for the purpose of showing that at the time when it was prepared the road at the south-east corner of the defendants' house was some 13 odd feet wide. According to the Commissioner's map prepared during the trial in the first Court the road is now only $7\frac{1}{2}$ feet wide, and so it is claimed that this constitutes clear evidence of the fact that the original boundary of the defendants' house has been advanced to the south so as to narrow the width of the road to about half of its previous extent. Another map to which I am referred is Exhibit 4, a partition map which was prepared in the year 1892. If we accept the measurements shown on this map, the total length of the eastern wall of the defendants' house from north to south was at that time only about 82·5 feet. According to the map now prepared by the Commissioner the total length would be 92 feet, thus showing that the southern boundary had been advanced by a distance of over 8 feet. This latter map was examined by the Munsif. He was not prepared to rely on it exclusively as proof of the encroachment, saying that he could not trust a map of such a small scale for the purpose of coming to a definite conclusion in the plaintiff's favour. So far as the Settlement Map of 1901 is concerned, I have to observe that it is on a very small scale and that it would be practically

impossible to hold that it proves conclusively that the space between the width of the road at the south-east corner of the defendants' house was 13 feet odd. Being on a small scale the minutest error in making a copy of the map or in taking measurements by it would lead to false conclusions. The difference of a pin's point in making a measurement would correspond to an error of perhaps 8 or 10 feet on the ground. As regards the partition map of 1892 it supports to a certain extent the case of the plaintiff. It is a map on a larger scale than the map which was prepared in 1901. At the same time there is this much to be observed that the road regarding which the complaint is now made is not delineated upon this particular map. The corner of the tank which faces the south-east corner of the defendants' house is not shown on this map. On the other hand, it seems to me that the statement of the Qanungo which the learned Judge has accepted is entitled to preference as against these pieces of evidence. We have the fact that the Qanungo was deputed for the purpose of defining the boundaries of plot No. 728 which is the plaintiff's property. We have it also that he prepared a map, that he set up boundary pillars and that he had prepared a *khasra* explaining the map. These documents were before the Qanungo at the time he gave his evidence. The result of the Qanungo's statement is that in the year 1884 the southern boundary of the defendants' house extended south of the pillar No. 15 which he set up on that occasion. He states quite clearly that this particular pillar was not at the south-east corner of the defendants' house but was some distance north of that corner. Another important fact to which he deposes is that according to the correct measurements the north-west corner of plot No. 728 was found to be inside the defendants' house; in other words, in the year 1884 an encroachment had already been made and a portion of plot No. 723 had been built over by the defendants. He explains that for the purpose of marking the north-west corner of plot No. 728 he set up a pillar No. 1 at a spot outside the defendants' house and one *gattha* south of the correct spot, the reason being that he was unable to set up a boundary pillar inside the defendants' premises. He has further stated in his evidence that the line between pillar No. 15 and pillar No. 1 ran due east and west. If this be so, then it seems to me that comparing his statement with the map of the Commissioner which I have now before me it must be held that the portion of the defendants' house delineated in pink was in existence, though possibly, not in the same form, in the year 1884.

I have given all this evidence my careful attention and the conclusion I arrive at is that the plaintiff failed to establish that the portion of the defendants' house delineated in pink constituted a fresh encroachment which he was entitled to have removed. I think the proper conclusion is that the encroachment had taken place so far back as the year 1884. The judgment of the lower Appellate Court on this point must, I think, be supported.

The next question I have to deal with is that of the *chhajjas*. It is fairly obvious that these *chajjas*, which admittedly are of recent construction, constitute a trespass on the plaintiff's land No. 723. The learned Judge concedes that the maxim "*cuius est solum, ejus est usque ad cœlum*" applies to the case and if that be so, it seems to me to necessarily follow that the *chhajja* on the south side of the defendants' premises constitutes just as much a trespass as does the *chhajja* on the east side, though it may be the fact that it does not cause so much inconvenience. It is not to be doubted that the plaintiff is entitled to relief in respect of this *chhajja* on the south side, for as the learned Counsel observes, if this *chhajja* is allowed to remain for a period of 20 years, the defendants will acquire a right of easement. The question was not to be determined merely upon considerations of convenience. Once it was found that the trespass had been committed and that the effects of the trespass could be removed it was the duty of the Courts, I think, to give the plaintiff relief; and I am therefore, of opinion that the Courts below should have

passed an order for the removal of the *chhajja* on the south side.

Lastly there remains the question of the doors. The learned Counsel for the plaintiff-appellant admits that he is not entitled to ask that the doors should be closed, but he says that he is entitled to an order restraining the defendants from using these doors for any purpose other than those of ingress and egress and from using the land outside their house for the purpose of tethering cattle or causing any other obstruction to the free use of the land by the plaintiff. It seems to me that this argument cannot be controverted and I think the plaintiff was entitled to this relief. So much for the plaintiff's appeal.

The appeal of the defendants (No. 367 of 1916) relates to the eastern *chhajja* the demolition of which has been ordered by the Court below. As to this my opinion is, for the reasons already given above, that the defendants have no case at all. The *chhajja* undoubtedly constitutes a trespass and the plaintiff is certainly entitled to have this erection removed.

The result, therefore, is that I allow the appeal of the plaintiff-appellant in part and order the decree of the lower Appellate Court to be varied by the insertion of a direction for the removal of the *chhajja* along the south side of the defendants' house within three months from the date of this decree. I further give the plaintiff-appellant an injunction restraining the defendants from using the doors of their house for any other purposes than ingress and egress and directing the defendants not to use the ground on the east or south side of their house for the purpose of tethering cattle or to cause any other obstruction to the free use by the plaintiff of the land in question. As for the defendants' appeal I order it to be dismissed. I leave the parties to bear their own osts.

Appeal No. 367 *dismissed*;
Appeal No. 392 *partly allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 822 OF 1916.

May 18, 1918.

Present:—Mr Justice Tudball and Mr. Justice Abdur Raoof.

MOTI RAM—PLAINTIFF—APPELLANT

versus

BANKE LAL—DEFENDANT—RESPONDENT.

Mortgage suit—Prior mortgage paid off by purchaser of equity of redemption—Lien of purchaser not recognised in final decree—Suit, separate, to enforce lien, maintainability of—Civil Procedure Code (Act V of 1908), ss. 11, 47—Res judicata.

Defendant brought a suit on a mortgage against the plaintiff, who was the purchaser of the equity of redemption of the mortgaged property and had paid off a prior mortgage. The plaintiff set up the prior mortgage as a shield and the preliminary decree recognised his lien. But no mention of his lien was made in the final decree and the property was sold and purchased by the defendant, who took possession of it without discharging the plaintiff's lien. The plaintiff thereupon applied to be put in possession of the property until his lien was discharged. The application was rejected and plaintiff then brought a suit to recover the amount of his lien:

Held, that the suit was barred both by the principle of *res judicata* and by section 47 of the Civil Procedure Code. [p. 956, col. 2.]

Second appeal from a decree of the District Judge, Agra, reversing that of the Subordinate Judge, Muttra.

Mr. *Shiam Krishna Dar*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The facts of this case are as follows:—The property in dispute was owned by one Kallan. There was an usufructuary mortgage upon it for the sum of Rs. 290. It was subsequently mortgaged to Banke Lal, the defendant, under two deeds dated the 20th of February 1895 for Rs. 150 and 27th of June 1895 for Rs. 150. The property, *i.e.*, the equity of redemption, was subsequently sold in execution of a decree on the 28th of March 1900 and was purchase by the plaintiff, Moti Ram. In that year 1900, Banke Lal brought a suit on his first deed of the 20th of February 1895 for sale of the property and he joined Moti Ram as a defendant. In this suit Banke Lal mentioned the prior usufructuary mortgage and the fact that Rs. 290 thereon was due to Mathura Prasad, the mortgagee. He offered to pay

this sum. He prayed for a decree for sale. He paid off the Rs. 290. His decree was dated the 16th of July 1900 and he got a final decree for sale on the 23rd of February 1901. In neither of these decrees was there any specific mention of the sum of Rs 290, but it was actually paid into Court by Banke Lal and was withdrawn by the prior mortgagee in July 1901. The property was not sold as Moti Ram came to terms with Banke Lal. A certain sum of money was paid down in 1901 and other sums were paid on subsequent dates up to the year 1904, when the full claim of Rs. 737 odd was paid off by Moti Ram. This included the sum of Rs. 290 mentioned above. In 1909 Banke Lal brought a suit on the basis of his second mortgage, dated the 27th of June 1895, and he asked for sale of this property. Moti Ram was impleaded as a defendant. He proceeded to hold up as a shield his rights which had accrued to him by payment of the sum due on the two prior mortgages mentioned above, *i.e.*, the sum of Rs. 737 odd. In his defence he made a mistake in figures, but it was finally admitted that the sum which he had paid was Rs. 737 odd. His case was that the plaintiff Banke Lal had no right to sell this property without first paying off to him the above-mentioned sum. The Court in its judgment held that he was legally entitled to hold up this shield; and it held further that the property could only be sold "*subject to his lien*," (whatever the Judge may have meant thereby). A preliminary decree for sale was drawn up and mention of the lien was entered therein. The decree-holder Banke Lal applied for his final decree in accordance with the preliminary decree. Notice was issued to Moti Ram. He did not appear. A final decree was drawn up, which was simply an order for the sale of the property without mentioning Moti Ram's lien in any way. The property was then put to sale in execution of the decree and was purchased by Banke Lal himself. Banke Lal did not deposit any sum for payment to Moti Ram. He applied for possession as auction-purchaser and in May 1912 was put into possession by the Court. Thereupon Moti Ram made an application to the Court, pointing out that the money had not been paid to him and asking that he might be re-placed in possession of the property until the money had been paid. The Court held that it could not go into this matter in the course of the execution of the decree and that if Moti Ram had any remedy he must seek it by a separate suit, hence the suit out of which this appeal has arisen. Moti Ram has claimed to recover the sum of Rs. 737 *plus* interest from Banke Lal by sale of the property in question. The Court of first instance decreed the claim. The lower Appellate Court dismissed it as being barred by limitation. It held that Moti Ram was driven to sue upon the two original mortgages and as they dated back to 1895 in the one case and prior to that in the other, the suit was barred by limitation.

The pleas taken before us are, first of all, that the present suit is a suit to enforce a liability created by the judgment which was passed between the parties in Banke Lal's second suit; that Article 122 applies, and that the suit is within time. In the alternative it is urged that it is a suit to enforce a charge under Article 132; that no charge arose in favour of the plaintiff until the decision of the suit or at least until the years 1901 to 1904 when he paid the money; since which time there have been certain acknowledgments of liabilities made by Banke Lal, which under section 19 of the Limitation Act would operate to extend limitation. There has been a great deal of discussion over the meaning of sections 74 and 101 of the Transfer of Property Act, but we do not think that they are at all relevant to the point that we have to decide. Section 101 of the Transfer of Property Act does not apply to the case in question. Moti Ram was not the owner of a charge or encumbrance who had become absolutely entitled to the property. He was a person who had become entitled to the property by auction-purchase: who subsequently paid off two prior mortgages and when he was sued by Banke Lal, he, by the application of equitable principles, was entitled to hold up the payments that he had made as a shield and to demand that Banke Lal should repay to him that sum before he could oust him from the property. The judgment in the suit between him and Banke Lal did not

create a liability. It merely declared the right of Moti Ram and did not create it. We do not think that Article 122 has any application to the facts of the present suit. In both the Courts below the defendant raised the plea that this suit was barred by the provisions of section 47 of the Code of Civil Procedure. The first Court dismissed this plea in two lines. The lower Appellate Court did not touch it, It has been raised and discussed before us. We have summoned the Collector's record of the sale proceedings in order to satisfy ourselves as to what took place therein between the parties; but it has been of no assistance, as the proclamation of sale is not to be found in it. If this suit were treated as one upon the original mortgages, it would be barred by limitation. It clearly cannot be treated as a suit based upon the previous judgment and to enforce a liability created thereby, and Article 122 of the Limitation Act does not apply. Nor does Article 132 apply. Even if it did, the bar of limitation would still be there as we have not been able to find the alleged acknowledgments.

The plaintiff's present position is due to his own negligence. He was duly impleaded in Banke Lal's last suit and he rightly raised the plea that the property could not be sold until the sum of Rs. 737 had been paid to him. The Court passed a wrong decree directing the property to be sold subject to his lien. It ought to have directed Banke Lal to pay the money before he put the property to sale. The plaintiff remained satisfied with that decree.

If we assume that the Court meant by the words "*subject to the lien of Moti Ram*" that the money was to be paid before the property was sold, then Moti Ram has been most negligent. Even when the final decree was prepared, he did not appear to see that the decree was properly drawn up and as a matter of actual fact it omitted all mention of his rights.

When the decree was put into execution and notice issued to him, he did not appear and the property was sold and possession awarded. He then came into Court and asked to be re-placed into possession. The Court refused his plea and he did not appeal.

It is clear that no separate suit will now lie. The matter was one that ought to have been raised and actually was raised between the parties in the previous litigation and Moti Ram asked for the relief to which he was entitled, *viz.*, that the property should not be sold until he had been paid off. The Court's decree did not in terms grant him that relief. If its decree be taken as a refusal to grant the relief he cannot now sue for it again.

If it be taken as having granted him that relief, he ought to have enforced it in the execution department and no separate suit will lie. If the present suit be treated as an application in the execution proceedings, he is met with the fact that the final decree is silent on the point and no attempt has been made to make it agree with the preliminary decree. If that error be now amended, he will then be met with the fact that when notice was issued to him he took no objection and when after the property had been sold he came into Court and the Court refused to give him his relief in those proceedings, he remained satisfied with that order. The principle of the rule of *res judicata* must be applied. He ought to have appealed and obtained his relief then and there. He cannot re-open the point again by a fresh application in the execution proceedings. We can see no way of giving him relief now, and he has merely himself and his own negligence to thank for his present difficulty.

The appeal must fail and we dismiss it. In the circumstances of the case, however, we order the parties to bear their own costs of this appeal.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 5 B OF 1918.

August 19, 1918.

Present :—Mr. Mittra, A. J. C.

KHETSIDAS RADHAKISAN MARWARI —PLAINTIFF—APPLICANT

versus

HARBA MARATHE—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 144 *C.*

KHETSIDAS RADHAKISAN *v.* HARBA MARATHE.

XXI, r. 43—Execution—Attachment of cattle—Supratdar, *liability of, whether can be enquired into by executing Court.*

The liability of a *supratdar* or depositary of property attached in execution of a decree who has made default, cannot be enquired into by the executing Court but must form the subject of a separate suit.

Application for revision of the order of the Munsif, Yeotmal, dated the 26th November 1917, in Execution Case in Civil Suit No. 162 of 1917.

Mr. *W. H. Dhabe*, for the Applicant.

Mr. *Atmaram Bhagwant*, for the Non-Applicant.

ORDER.—The question raised in this petition of revision is whether the liability, if any, of the non-applicant No. 1 can be enforced by an order of the executing Court. The non-applicant was a Supratdar or depositary of cattle attached under Order XXI, rule 43, and entrusted to him in accordance with Circular I-31 on his executing a security bond to the extent of the value of the said livestock for its production in good condition when required. The applicant who had applied for rateable distribution, after an attachment of the cattle at the instance of another decree-holder, complains that the cattle had been returned without the order of the Court to the judgment-debtor who had compromised with the attaching creditor, and whose compromise was certified to the Court. The Munsif has held that the matter cannot be enquired into by the executing Court but must form the subject of a regular suit.

For the applicant reliance is placed upon *Nathoo Ram* v. *Kamal Ram* (1), where Obbard, J. C., held that the Court has an inherent power to enforce a security-bond given under similar circumstances. This case, however, was dissented from by Ismay, J. C., in *Joshi Powar* v. *Jiwraj Hazarimal* (2). Both these cases were decided under the Code of 1882. The applicant's Pleader relies upon section 151 of the present Civil Procedure Code (Act V of 1908) as supporting the view taken by Obbard, J. C.

Section 151 runs thus :—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

The terms of the section are very wide and if an order can be passed under this section to enforce the depositary's liability, that order will not obviously be a decree and will not be open to appeal.

Section 145 of the Civil Procedure Code deals with the liability of a surety. It is clear that the Supratdar was not a surety for the judgment-debtor. It may, however, be noted that section 145 declares that the surety shall, for the purposes of the appeal, be deemed a party within the meaning of section 47.

Order XL, rule 4, enables the Court to enforce the duties of a Receiver by directing his property to be attached and sold. It is clear that the Supratdar in this case was not appointed a Receiver. An appeal lies under Order XLIII, rule 1 (*s*), from such an order. In both these instances where proceedings may be taken for the enforcement of the liability of a person other than the parties to the suit, an appeal has been given by law. In *Nathoo Ram* v. *Kamal Ram* (1) the Court declined to say whether the order was appealable or not, and whether, if unjust, it could be impeached by a separate suit.

The mode in which the liability of the depositary is to be enforced has also been considered in that case. There being no decree, the depositary's property cannot be attached and sold in the absence of a statutory power as now contained in Order XL, rule 4. It has also been pointed out by Ismay, J. C., that the refusal of the depositary to deliver up the attached property cannot be summarily dealt with in the Mofussil as a contempt of Court. For these reasons I agree with the later ruling in *Joshi Powar* v. *Jiwraj Hazarimal* (2), and dismiss this application for revision with costs. I fix Rs. 10 as Pleader's fees in this Court.

Revision dismissed.

(1) 12 C. P. L. R. 149.
(2) 13 C. P. L. R. 104.

SESHI AMMAL *v.* VAIRAVAN CHETTIAR.

MADRAS HIGH COURT.

APPEAL SUIT No. 419 OF 1917.

July 24, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

SESHI AMMAL AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

VAIRAVAN CHETTIAR BY HIS AUTHORISED AGENT RAMASWAMI CHETTIAR, AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

Contract Act (IX of 1872), ss. 249, 251, 261, 263—Partnership—Contract by partners—Debt contracted after death of partner by surviving partner for performance of contract—Estate of deceased partner, liability of—Remedy of creditor.

The estate of a deceased partner is not liable for a debt contracted by the surviving partner to enable him to perform a contract entered into during the former's lifetime. The creditor is entitled to proceed against the surviving partner personally and against the assets of the partnership which the surviving partner has power to pledge in discharge of an obligation created by the partnership. [p. 959, col. 2; p. 960, cols. 1 & 2.]

Per *Wallis, C. J.*—Section 263 of the Contract Act cannot override the express provisions of section 261. [p. 959, col. 2.]

Per *Seshagiri Aiyar, J.*—Unhampered by authority, the plain interpretation of sections 251, 261 and 263 of the Contract Act read together would seem to be that a deceased partner's estate would be liable for obligations necessitated by the process of winding up the partnership business. The implication of section 261 seems to be that the estate should not be answerable for fresh liabilities created solely after the death of the partner. It is difficult to construe section 263 as not dealing with devolution caused by the death of a partner. The expression "partners" in that section must mean those who constituted the partnership before it was dissolved by the death of one of them and *prima facie* in the case of dissolution by death the same liability would attach as before death, provided the obligation was incurred for winding up the business. [p. 959, col. 2.]

Appeal against the decree of the Court of the Additional Temporary Sub-Judge, Tanjore, in Original Suit No. 29 of 1917 (Original Suit No. 95 of 1916 on the file of the Sub-Judge, Negapatam).

Mr. *T. R. Venkatrama Sastri*, for the Appellant.

Messrs. *A. Krishnaswami Aiyar* and *M. Subraya Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The main question argued in this appeal is as to the liability of the defendants Nos. 2 and 3, the representatives of a deceased partner of the 1st defendant, for an advance of Rs. 2,301 made by the plaintiff to the 1st defendant after his partner's death to enable him to take up bills of lading for, and obtain delivery of, goods which had been ordered by the partners during the lifetime of the deceased partner but did not come forward until after his death. While section 249, Indian Contract Act, makes any partner liable for all debts and obligations incurred while he is a partner in the usual course of, business by or on behalf of the partnership, section 261 provides that the estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death. The debt now sued for was an obligation incurred by the firm after his death and, therefore, is covered by the section. It is true that it was incurred by the surviving partner to enable him to perform a contract entered into during the lifetime of the deceased partner, but this is not enough to take it out of the section. Section 263, no doubt, provides that "after a dissolution of partnership the rights and obligations of the partners continue in all things necessary for the winding up the business of the partnership", but these provisions cannot override the express provisions of section 261 that obligations created by the firm after the death of the deceased partner are not binding on his estate. "It may be taken as a general proposition that the estate of a deceased partner is not liable to third parties, for what may be done after his decease by the surviving partners." Lindley on Partnership, Bk. IV, Chap. 3, s. 2, page 708 (8th Edition). Section 9 of the Partnerships Act, 1890, makes the estate of a deceased partner liable in a due course of administration for all debts and obligations of the firm incurred while he was a partner. At Common Law the estate of a deceased partner was not entitled to the benefit of, or liable under, partnership contracts, and equity seems only to have imposed a liability in the case of contracts entered into by the partnership in the lifetime of the deceased partner. It has been held under section 9 of the Partnership Act in *Bagel* v. *Miller* (1) that the representa-

(1) (1903) 2 K. B. 212; 72 L. J. K. B. 495; 88 L. T. 769; 8 Com. Cas. 218.

tives of a deceased partner could not be sued in a County Court together with the surviving partner for the price of goods ordered by the partnership during his lifetime but not delivered till after his death on the ground that the obligation to pay was not incurred while he was a partner, though, apparently, the Court considered some other remedy was available against his representatives on the contract to purchase made during his lifetime, as to which see *M'Clean* v. *Kennard* (2). In this case the suit debt was binding on the partnership assets, which the first surviving partner had power to pledge in discharge of it, and I think, as regards the amount in question, the decree must be against the 1st defendant personally and against the partnership assets in his hands. We modify the decree accordingly and dismiss the appeal in other respects. Parties to pay and receive proportionate costs throughout.

SESHAGIRI AIYAR, J.—I agree. The short and interesting point raised by Mr. Venkatarama Sastriar is *res integra* in this country and has very meagre authority in favour of it in England. The facts are that a firm consisting of two partners ordered goods during the lifetime of both of them. After consignment and before delivery one of them died. The survivor borrowed money to honour the bill of lading and took possession of the goods. The lender now sues to enforce the liability on the assets of the partnership as well as on the properties of the deceased partner. The learned Vakil for the legal representatives of the deceased partner contends that the estate is not liable. The sections of the Indian Contract Act bearing on the point are sections 251, 261 and 263 As regards section 251 it is not denied that the honouring of the bill of lading and the acceptance of the goods are acts "necessary for or usually done in carrying on the business." Therefore, if the co-partner were alive he and his estate would have been bound. Section 261 refers to obligations incurred after the death of the partner and expressly exempts the estate of the deceased from liability for such obligations. In this case the obligation to pay for and to accept the goods was incurred during the lifetime of the deceased partner. It is true that the borrowing was after but the borrowing, in my opinion, is only the substitution of a new liability for an existing one and not the creation of a fresh liability. The implication of the section seems to be that the estate should not be answerable for fresh liabilities created solely after the death of the partner. Then comes section 263. It is difficult to construe this section as not dealing with devolution caused by the death of a partner. The expression *partners* must mean those who constituted the partnership before it was dissolved by the death of one of them and *prima facie* in cases of dissolution by death, the same liability would attach as before death, provided the obligation was incurred for winding up the business. It cannot seriously be argued that the acceptance of the goods ordered and their payment were not necessary for winding up the business. Consequently, subject to the special apportionment of liability between private debts and partnership debts mentioned in section 262, it seems fairly clear, from the language of section 263, that the deceased partner's estate would be liable for obligations necessitated by the process of winding up the business. Unhampered by authority, this seems to be the plain interpretation of the sections referred to.

Mr. Venkatarama Sastriar relied strongly on *Bagel* v. *Miller* (1) for his contention already referred to. The decision certainly supports him. The learned Chief Justice, Lord Alverstone, says: "There may be an obligation, but not the obligation alleged in the present case." Section 9 of English Partnership Act, on which the decision is based, provides that "after his death his estate is also severally liable in a due course of administration for such debts and obligations." The judgment may be said to have proceeded upon the unsustainability of the form of action commenced by the plaintiff, and not on a denial of the liability of the estate of the deceased partner to contribute. The observation of Channel, J., "The plaintiff's remedy is not by

(2) (1874) 9 Ch. 336 at p. 344; 43 L. J. Ch. 323; 30 L. T. 186; 22 W. R. 382.

means of an action for goods sold and delivered" supports this suggestion. But the weight of authority is against restricting the principle of the Lord Chief Justice's decision to forms of action alone. Lord Lindley at page 708 says:—"With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition that the estate of the deceased partner is not liable to third parties for what may be done after his decease by the surviving partners".

In 22 Halasbury in the note to paragraph 47 the law is thus stated: "But though he has authority to pledge the partnership property, this does not enable him to bind his partners personally". The authority quoted for this proposition, namely, *Blaine* v. *Holland* (3), does not support it. Pollock in his Digest of the Law of Partnership puts the above statement of the law as an illustration to section 9 of the Partnership Act. Sir H. H. Shephard in his commentaries upon sections 261 and 263 of the Contract Act inclines to the view that the estate would not be liable. It must be stated that there is practically no difference in language between the sections of the English Partnership Act and those of the Indian Contract Act on this ground.

As I felt considerable doubt on the question, with diffidence, I examined the American Law on the subject. In 30 Cyclopædia of Law and Procedure, page 634, it is mentioned, "As a rule, however, the estate of the deceased partner cannot be made directly liable to third persons by the contracts of the survivor." In this state of authorities, I feel compelled to hold that the contention of the learned Vakil for the appellant should be accepted. The result of this view would be to restrict the operation of section 263 so as to give the surviving partner alone, and not the creditor, a right to proceed against the estate of the deceased partner in regard to an obligation incurred for winding up the business of the partnership. This does not, in my opinion, stand in the way of the creditor proceeding against the assets of the partnership. The surviving partner is before the Court, and he represents the partnership effectually, and a decree against him can be executed against the assets of the partnership in his hands. I would modify the decree by directing that for the sum of Rs. 2,300 and odd borrowed after the death of the husband of the 2nd defendant, the assets of the partnership in the hands of the 1st defendant would be alone liable. The latter will also be personally liable as mentioned by the learned Chief Justice. I agree in the order as to costs.

M. C. P.

Appeal allowed;
Decree varied.

(3) (1889) 60 L. T. 285.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 30 OF 1918.

May 23, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

GUR BAKHSH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS—APPLICANTS

versus

CHUTTA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, para. 17—Evidence Act (I of 1872), s. 92, prov. (2)—Arbitration Award by some only of arbitrators, validity of—Agreement, oral, that decision of majority of arbitrators would be binding, whether can be proved—Court, whether can remit award.

Where a matter was referred to the arbitration of several persons without the intervention of a Court, and the deed of agreement to refer explicitly stated that whatever award was made by the arbitrators would be binding on the parties to the reference, and the award was made only by a majority of the arbitrators:

Held, (1) that it could not be proved under section 92, proviso 2 of the Evidence Act, that there had been a contemporaneous separate oral agreement between the parties to the effect that the decision of a majority of the arbitrators would be binding on the parties; [p. 961, col. 2.]

(2) that the award having been made by some only of the arbitrators was a nullity. [p. 961, col. 2.]

The powers of the Court in a proceeding under paragraph 20, Schedule II, of the Code of Civil Procedure are exhausted as soon as the Court decides either to file the award or refuses to file it. [p. 962, col. 1.]

GUR BAKHSH SINGH *v.* CHUTTA SINGH.

Revision against the order of the Subordinate Judge, Hardoi, dated the 27th July 1918.

Syed *Nabi Ullah*, for the Applicants.

Mr. *A. P. Sen* and Babu *Manni Lal*, for the Opposite party.

JUDGMENT.—On the 10th September 1917 a reference to arbitration was made by certain persons in regard to certain matters in dispute between them relating to the property left by *Musammat* Rani, the widow of Tilak Singh. Four arbitrators were appointed, two of whom were described as *panches* and the other two as *sarpanches*, with a provision that whatever award was made by them would be binding on the parties to the reference. On the 23rd November 1917 an award was made by three of the persons above referred to. The award did not state whether the fourth arbitrator Lachhman Prasad had joined in the arbitration or not. On the 1st December 1917 Arjun Singh and certain other persons, who were parties to the reference, applied under paragraph 17, Schedule II, of the Code of Civil Procedure for the filing of the agreement of reference to arbitration, no mention having been made therein of the fact that an award had already been made. The application mentioned that four arbitrators had been appointed, one of whom was to act as *sarpanch* or head arbitrator, but it did not state that the award was to be made by a majority, if the remaining arbitrators did not agree. The defendants denied having executed the said agreement and pleaded *inter alia* that there was no formal sitting or enquiry by the arbitrators, that two of the arbitrators made an award and got the third to sign it, that the fourth arbitrator refused to join in the arbitration or to sign the award and that the said award was invalid on account of misconduct of the arbitrators and the failure of two of them to join in the same. The applicants subsequently admitted that an award had been made by three of the arbitrators and asked the Court to file the award and to pass a decree in accordance with it, treating the award as having been made by a majority of the arbitrators. They asserted that the parties had agreed at the time the agreement was executed that an award by a majority of the arbitrators would be valid and binding. They wanted to produce evidence in support of that contention, but the Court below held that oral evidence inconsistent with the agreement could not be admitted.

In the *United Kingdom Mutual Steamship Assurance Association* v. *Houston* (1) it was held that where a matter was referred for decision to three arbitrators, all three must concur in the making of the award and that the award made by only two of them could not be treated as valid. In *Lala* v. *Abdus Samed* (2) it was similarly ruled that on a reference to several arbitrators together, where there was no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator. The effect of these decisions is to lay down that an agreement must be taken for what it is worth, and that, if it does not mention that an award by a majority would be valid, the award should be made by all the arbitrators unanimously. Section 92, proviso 2, of the Evidence Act permits evidence to be given as to the existence of any separate oral agreement in regard to any matter on which a document is silent and which is not inconsistent with its terms. But in considering whether or not any of those provisions applies, the Court has to take into consideration the degree of formality of the document concerned.

The agreement in the present case comprises all the terms and covenants governing the arbitration. It states that whatever decision is given by the arbitrators, *panches* and *sarpanches* included, shall be acceptable to and be binding on the parties. The suggestion that there was a contemporaneous separate oral agreement to the effect that the decision of a majority would be binding is obviously inconsistent with the tenor of the agreement, which had been reduced to writing, and the production of oral evidence to vary that agreement cannot be permitted. The award was, therefore, on the face of it a nullity.

The matter cannot be referred back now to the same arbitrators, because as laid

(1) (1896) 1 Q. B. 567; 65 L. J. Q. B. 484.
(2) 17 Ind Cas. 320; 16 O. C. 94.

DAULAT RAI *v.* JAGAT RAM.

down in *Mustafa Khan* v. *Phulja Bibi* (3), the powers of the Court in a proceeding under paragraph 20 Schedule II, of the Code of Civil Procedure are exhausted as soon as the Court decides either to file the award or refuses to file it. In regard to an agreement of reference to arbitration dealt with in paragraph 17, Schedule II, of the Code, the situation is somewhat different. The applicants admitted soon after an application was made under that paragraph that it was irregular, inasmuch as an award had already been made before the application was filed. The Court below treated the subsequent proceeding as one under paragraph 20, Schedule II, of the Code and refused to file the award. From that order an appeal lay under section 104 of the Code. The present application for revision is, therefo e, irregular.

The application is accordingly dismissed with costs.

Revision rejected.

(3) 27 A. 526; A. W. N. (1905) 86; 2 A. L. J. 416.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 804 OF 1917.

April 8, 1918.

Present:—Mr Justice Chevis.

DAULAT RAI—PLAINTIFF—APPELLANT

versus

JAGAT RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 169, 176—*Civil Procedure Code (Act V of 1908), O. XXII, r.* 3—*Appeal - Death of respondent - Notice not served on representative—Appeal decreed* ex parte—*Application for re-hearing - Limitation—Death of appellant—Appeal dismissed for default—Application to bring representative on record Procedure.*

The pre-emptor and the vendee both appealed from a decree in a pre-emption suit. Before the appeals could be heard the vendee died, and his appeal was dismissed for default. The pre-emptor applied to bring the representative of the deceased vendee on the record. The application was granted, but before the notice could be served on the representative the pre-emptor's appeal was decreed *ex parte*. The vendee's representative thereupon made an application (*a*) for setting aside the *ex parte* decree in the pre-emptor's appeal and (*b*) for getting himself substituted on the record as appellant in his father's place:

Held, (1) that no notice having been served on the applicant, limitation for the application for re-hearing the appeal which had been decreed *ex parte* commenced from the date on which the applicant had knowledge of the decree: [p 962, col. 2.]

(2) that as the deceased vendee could not make default, his representative had the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar. [p. 963, col. 1.]

Miscellaneous appeal from the order of the District Judge, Multan, dated the 14th November 1916.

Mr. *Hargopal*, for the Appellant.

Mr. *Cooper*, for the Respondents.

JUDGMENT.—This judgment will cover the connected Appeal No. 2805 of 1917. Jagat Ram plaintiff sued for pre-emption and the first Court passed a decree for possession on payment of a certain sum. Both plaintiff and the vendee lodged appeals. On the 14th November 1916 the vendee's appeal was dismissed, as neither he nor his Pleader was present.

On the same day the plaintiff lodged an application saying the vendee had died in October 1916 and that his son Daulat Rai should be brought on to the record as his representative. This was granted, and notice issued but was not served. Notice again issued, and then the plaintiff's appeal was accepted *ex parte* on 9th January 1917, though notice to Daulat Rai had not yet returned and was afterwards received back unserved.

On 13th March 1917 Daulat Rai applied through Amir Chand, Pleader, (1) for setting aside the *ex parte* decree and (2) for getting himself brought on to the record as appellant in his father's place.

The District Judge holds that the former application is time-barred, and that the latter is futile as such an application can only apply to pending suits or appeals.

The District Judge overlooks that where notice has not been served, limitation for an application for re-hearing the appeal dates from the time when the applicant had knowledge of the decree, see Article 169. And as to the other application I need only refer to the Privy Council

ruling, *Debi Bakhsh Singh* v. *Habib Shah* (1), as authority for holding that a dead man is not a defaulter, and that in such a case the representative can get the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar.

The District Judge also held that the applications had not been put in by a proper agent, but Lala Amir Chand was instructed by Naunidh Rai, who is Daulat Rai's general agent.

I accept both these appeals, and set aside the orders under appeal and also the order of the District Judge, dated the 14th November 1917, dismissing Jetha Nand's appeal and his order of 9th January 1917 accepting Jagat Ram's appeal.

The District Judge will first pass an order bringing Daula Rai on to the record as appellant in place of his deceased father, and will then hear both appeals and dispose of them on the merits.

Stamp on appeals to this Court to be refunded; other costs of appeal to this Court to be costs in the cause.

Appeal accepted.

(1) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 25 M. L. J. 148; 14 M. L. T. 33; (1913) M. W. N. 566; 16 O. C. 194; 40 I. A. 150 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 52 OF 1916.

June 4, 1918.

Present :—Mr. Lindsay, J. C., and Mr. Daniels, A. J. C.

RAJ BACHAN SINGH—DEFENDANT—APPELLANT

versus

SHATRANJI *alias* BHANWAR LALJI, MINOR, UNDER THE GUARDIANSHIP OF HIS FATHER, MAHARAJ KUNWAR SARDAR SINGHJI—PLAINTIFF—RESPONDENT.

Will—Execution, proof of—Presumption—Sound disposing mind, what is—Burden of proof.

A plaintiff who sets up a title under a Will must satisfy the Court that the Will was "duly executed", that is to say, he must furnish proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator. The ordinary rule is that the execution of a Will by a competent testator raises a presumption that he knew and approved of the contents of the Will; and ordinarily the competency of the testator is presumed, if nothing appears to rebut the ordinary presumption. But where the mental capacity of the testator is challenged by evidence, it is the duty of the Court to find whether upon the evidence it is established that the testator was of sound disposing mind and did know and approve of the contents of the Will. In order to constitute what is known in law as "a sound disposing mind," it must be shown that the testator was able to understand his position, able to appreciate his property and able to form a judgment with respect to the parties whom he chose to benefit. [p. 965, col. 2; p. 966, col. 1.]

Woomesh Chunder Biswas v. *Rashmohini Dasi*, 21 C. 279; 10 Ind. Dec. (N. S.) 818, followed.

Appeal from the decree of the Subordinate Judge, Tahsil Mohanlalganj, Lucknow, dated the 18th March 1916.

The Hon'ble *Syed Wazir Hasan*, Messrs. *Mohammad Nasim* and *Mohammad Wasim*, for the Appellant.

Mr. *St. George Jackson*, Babus *Sita Ram*, *Harnam Sunder Lal Varma* and Pandit *Shiva Narain Shukla*, for the Respondent.

JUDGMENT.—The appellant in this case, Raj Bachan Singh, was the defendant in the Court below to a suit for declaration brought by the plaintiff-respondent Shatranji *alias* Bhanwar Lalji.

The plaintiff is a minor, his age at the time of the institution of the suit being ten years, and the purpose of the suit was to obtain a declaration of the plaintiff's right to certain property specified in the plaint—a right which he alleged he derived under a Will executed by his maternal grandfather Raj Gobardhan Singh.

The property in dispute admittedly forms part of what was known originally as the Bhira Estate in the Kheri district. A reference to List No. 1 prepared under section 8 of the Oudh Estates Act (Act I of 1869) shows that the Bhira Estate was conferred upon four persons, one of whom was Raj Sadho Singh. It is admitted that Raj Gobhardhan Singh was the son of Raj Sadho Singh, and it further appears that subsequent to the date of the grant the estate was divided up into

several portions. It is not now denied that at the time of his death Raj Gobardhan Singh was in possession of four portions of the Bhira Estate, which are described in the proceedings as Taluqas or Taluqdari Mahals. The names of these Taluqas are set out as being Bijua, Ramnagar, Daulatpur and Nighasan.

The estate as originally granted was a List No. IV estate, the rule of succession being that where the owner dies intestate the property descends according to the ordinary law to which members of the intestate's tribe and religion are subject.

Raj Gobardhan Singh had no male issue. He had an only daughter *Musammat* Raj Kunwar *alias* Bitto Saheb, who was married in the month of April 1903 to Maharaj Kunwar Sardar Singhji, the second son of the Ruling Chief of Shahpura in Rajputana. This lady gave birth to a son, the plaintiff in the present case, in the month of June 1904. She died in July of the same year about a month after the birth of the child. Gobardhan Singh died in March 1905, leaving three widows Rani Suraj Kunwar, Rani Devi Kunwar and Rani Dammar Kumari Devi. It is proved that shortly after the death of Raj Gobardhan Singh mutation in respect of the immoveable estate left by him was made in favour of two of these Ranis, namely, the senior and the junior Ranis. These ladies were placed in possession of 30 villages each, constituting the estate which had been left by their husband, and the order for mutation was passed in accordance with the terms of a Will purporting to be the Will of Raj Gobardhan Singh which was produced in the Revenue Courts in the month of June 1905. The plaintiff in this suit claims that under the Will in question he has a vested interest in the property left by Raj Gobardhan Singh and that he has the right to succeed as absolute owner of the property on the death of the survivor of the widows of Raj Gobardhan Singh. It may be mentioned here that since the death of Raj Gobardhan Singh one of his widows, who is described as the "*manjhli*" (middle) Rani, has died. Under the terms of the Will she took no share in the estate, but was entitled to a grant of maintenance at the rate of Rs. 250 a month.

The Will left by Raj Gobardhan Singh also contains a bequest in favour of the defendant-appellant Raj Bachan Singh to take effect on the determination of the life-estates created in favour of the widows. It is not disputed that Raj Bachan Singh is the nearest male collateral relative of Raj Gobardhan Singh now alive. He is a somewhat distant kinsman of Gobardhan Singh, the fact being that his great grandfather and Gobardhan Singh's grandfather were full brothers.

In September 1912 the Allahabad Bank brought a suit against the three Ranis of Raj Gobardhan Singh and the parties to this present suit to recover money due on certain mortgages said to have been executed by Gobardhan Singh. In the course of that suit the present defendant-appellant denied the genuineness and validity of Gobardhan Singh's Will, and it is this denial which has furnished the cause of action for the present declaratory suit.

The claim of the plaintiff here was resisted in the Court below on a variety of grounds. It will not be necessary for us for the purpose of disposing of this appeal to notice all the grounds of defence which were taken in the Court below. It was alleged for example that the plaintiff was not the son of Raj Gobardhan Singh's daughter. That position has now been abandoned. The defendant denied the execution of the Will. In his written statement he had put forward various allegations for the purpose of pleading that the Will could have no operation in law. There were averments of fraud, which were ultimately struck out of the written statement on the ground that the defendant declined to verify or vouch for the truth of them. The result of the exclusion of these pleas of fraud was that the only averment which was left in the written statement and which attacked the valicity of the Will was one to the effect that the testator Raj Gobardhan Singh was an ignorant and illiterate man who was incapable of understanding the language or the purport of the Will now produced in Court. The case for the defendant, therefore, was that this document upon which the plaintiff relied did not and could not represent the intentions of Raj Gobardhan Singh and could not in these

circumstances take effect as a valid disposition of Gobardhan Singh's property.

The genuineness and validity of the Will were the principal matters for discussion and decision in the Court below. The Subordinate Judge has found that the Will is a genuine and valid document. He has found that it was duly executed and attested on the date on which it purports to have been executed and attested. He has also found that Raj Gobardhan Singh was of sound disposing mind and that he knew and approved of the contents of the Will which, according to the Subordinate Judge, was prepared agreeably to the instructions given by Raj Gobardhan Singh himself. Acting upon this finding the learned Subordinate Judge gave the plaintiff the declaration which he sought, and now the defendant has come here in appeal and has attacked the judgment of the Court below on various grounds which are set out in the thirty paragraphs contained in the memorandum of appeal.

We may state here that the learned Advocate for the appellant has not attempted to argue all the matters which are raised in the petition of appeal. He has confined his arguments to a few points only, and the first and principal one of these is the genuineness and validity of the Will in suit. It is claimed here that on the evidence placed before the trial Court the finding that the Will was duly executed by Raj Gobardhan Singh is erroneous. We are asked to hold that it was proved that Gobardhan Singh, although not in any way of unsound mind, was a man of no education and of feeble understanding who could not possibly have understood the language in which the Will is written, and that he could not have understood or approved of the dispositions of his property which are set out in the Will; in short, that he never had any real intention of bequeathing his estate in the manner and on the terms set out in the Will.

The original Will was produced in Court and is marked as Exhibit 92 on the record. It is a registered document, which according to the endorsements was presented for registration and registered in the office of the Sub-Registrar of Lakhimpur on the 15th of November 1903. At the bottom of the deed, which purports to be in the handwriting of one Murli Manohar now deceased, are to be found the signature of Raj Gobardhan Singh as executant and the signatures of two attesting witnesses Roshan Lal and Zamin Ali, who have been examined in the case. The text of the Will purports to have been written on the 29th of August 1903, but the story for the plaintiff is that although the Will was drawn up and ready for execution on the date last mentioned, it was not actually executed or attested until the time it was presented for registration on the 13th of November 1903.

It may be observed here that some importance attaches to the dates which we have referred. The Will being the Will of a Taluqdar and purporting to dispose of property which is *taluqdari* property, regard must be had to the special provisions of section 13 of Act I of 1869, which provide that in certain cases of bequest (of which the present case is one) the Will in order to take effect must be registered within one month from the date of its execution. It has been argued here that as a matter of fact the Will, if it was ever properly executed at all, was executed on the 29th of August 1903 as soon as it was ready and that consequently registration having been delayed beyond the period of one month just referred to, the Will has no effect in law.

Before proceeding to an examination of the evidence which is relevant for the purpose of deciding the question of execution and the further question of the legal validity of the document in suit, we may refer to the law which applies to suits in which a Will is propounded by a plaintiff. We have been referred to a great many authorities, principally decisions of the English Courts, on this question. Most of the cases which were cited before us have been referred to in a judgment of the Calcutta High Court reported as *Womesh Chunder Biswas* v. *Rashmohini Dasi* (1). We accept the law as laid down in this ruling of the Calcutta Court.

A plaintiff who sets up a title under a Will must satisfy the Court that the Will was "duly executed", that is to say,

(1) 21 C. 279; 10 Ind. Dec. (N. S.) 818.

he must furnish proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator. The ordinary rule is that the execution of a Will by a competent testator raises a presumption (sufficient, if nothing appears to the contrary) that he knew and approved of the contents of the Will; and ordinarily the competency of the testator is presumed, if nothing appears to rebut the ordinary presumption. But where the mental capacity of the testator is challenged by evidence, it is the duty of the Court to find whether upon the evidence it is established that the testator was of sound disposing mind and did know and approve of the contents of the Will. What constitutes a "sound disposing mind" has been defined in one of the English cases referred to in the Calcutta report [*Sefton* v. *Hopwood* (2)]. According to this authority it must be shown that the testator was able to understand his position, able to appreciate his property and able to form a judgment with respect to the parties whom he chooses to benefit. If the testator has this capacity, it is sufficient for the purpose of showing that he had what is known in law as "a sound disposing mind."

We have already indicated the line of defence which was set up regarding the capacity of Raj Gobardhan Singh. It was not stated that he was in any way of unsound mind. The allegation was that he was an uneducated man, of a low degree of intelligence and that he was incapable of understanding the language or purport of the Will which he is said to have executed. We have, therefore, to consider the evidence which was put forward by the defendant in support of this plea, consisting of statements made by some sixteen witnesses all of whom profess to have had some acquaintance, more or less intimate, with the character and manner of life of Raj Gobardhan Singh. The whole of the evidence on this part of the case has been analysed at great length by the learned Subordinate Judge in his judgment. The evidence has again been read over to us at the time of the hearing of the appeal and we do not deem it necessary to subject it to further recapitulation and analysis. We may say at once that our estimate of the evidence agrees generally with that which was formed by the Judge of the trial Court and we are satisfied that it falls very far short of proving that Gobardhan Singh was a man of less than ordinary mental capacity.

To begin with, it is evident that some of the witnesses who depose in support of the defendant's case had very meagre opportunities of forming an opinion regarding the mental power of the testator. It is further manifest that a good deal of the evidence of those of the witnesses who profess to have had a more extensive acquaintance with Gobardhan Singh's ways of life was biased and in parts certainly untrue. Some of the evidence has been discarded altogether by the learned Subordinate Judge, for example, the testimony of a Hakim named Niamatullah Khan who was examined as defendant's witness No. 16. The admissions of this witness in the course of cross-examination lead us to the conclusion that he was hired for the purposes of the suit and was prepared to stick at nothing, not merely to support the case put forward by the defendant but to carry it much further than the defendant was himself prepared to go. This witness ventures to assert on the strength of an alleged medical acquaintance with Gobardhan Singh which began and terminated many years ago that Gobardhan Singh was a man whose mental faculties were impaired. The witness describes him as suffering from what he calls "Humuq" or imbecility. We agree with the learned Subordinate Judge that no reliance whatever can be placed upon this man's testimony. Then we have the statements made by other witnesses describing various eccentricities of behaviour on the part of Raj Gobardhan Singh. If it be assumed that all these statements are true (though we think the assumption would in some instances at least be a very rash one), all that they tend to show in our opinion is not that Gobardhan Singh, to quote the words of the deponents themselves, was a "fool" but a rough, uneducated man of unpleasant manners. Gobardhan Singh,

(2) (1858) 1 F. & F. 579.

according to these witnesses, spoke nothing but the coarse village dialect and was unable to comprehend the more elegant language affected by his visitors. According to their evidence he seems to have been a man who was lacking in any sense of dignity and a man who comported himself in defiance of the conventions of polite society—conventions which he seems to have been ignorant of or to have despised. Some of the acts attributed to Gobardhan Singh, on the strength of which the witnesses have expressed their opinion that he was a man of mean intelligence, would suggest to us rather that Gobardhan Singh was the possessor of a fund of rough humour which the witnesses themselves had not the intelligence to appreciate. What they describe as acts of imbecility might equally well be understood to be the efforts of a man who had a strong propensity for practical joking. It is asking too much of us to invite us to assume that a man who had not the manners to send for a groom to hold his visitors' horse or to offer his friends a chair is a person of low mental calibre, nor are we prepared to believe that a rough and boorish man who walked with a line of beaters and made facetious remarks to a Deputy Collector about the lack of game is necessarily a person who is in any way mentally deficient. Some of the witnesses who were most vigorous in their declarations regarding Gobardhan Singh's immoderate use of intoxicants cut a poor figure in cross-examination. In many instances their affected knowledge dwindled down in cross-examination to information which had been picked up in the course of idle gossip. One witness, who committed himself to the opinion that Gobardhan Singh was a fool because he was fond of singing, had to admit that he had never listened to any of Gobardhan Singh's preformances. The same witness referred to Gobardhan Singh's indulgence in a certain form of sport which for the want of a more suitable expression we may describe as "lark fighting". This was described by the witness as being a striking example of Gobardhan Singh's infirmity of mind. In cross-examination, however, the witness was constrained to admit that he had only seen Gobardhan Singh following this harmless pastime on one occasion. It would, we think, be useless to describe in detail the various acts to which the defence witnesses refer. It may be that Gobardhan Singh was a bit of a buffoon, but we decline to draw the conclusion that he was a man of less than ordinary mental power. After reading all the evidence produced on this head for the defence we think that Gobardhan Singh may be fairly described in the language which was used by one of the defendant's own witnesses, a respectable Taluqdar named Saiyed Raza Husain who was on intimate terms with Gobardhan Singh. He speaks of him as being an uneducated man of ordinary intellect who could converse in the ordinary Urdu language and understand it.

Another defence witness is Sheo Dayal D. W. No. 11, who knew Gobardhan Singh for many years and was in fact in his employ for a time. While he did his best to support the case for the defendant, he was obliged to admit in cross-examination that although Gobardhan Singh was of "weak intellect", he nevertheless had sense enough not to sign documents until their meaning had been explained to him. The witness says distinctly that when any matter was under discussion Raj Gobardhan Singh used always to ask for explanation of things he did not understand. We think we may safely act upon this statement which was obviously made with considerable reluctance and, if we do, the matter of Gobardhan Singh's capacity to make a Will is disposed of at once. It may be mentioned that this same witness further deposed that Gobardhan Singh knew that he had an estate, that there must be an heir to his estate, and that he had quite sufficient understanding to be able to express an opinion as to who his heir and successor should be. The witness also speaks of Gobardhan Singh as being able to read and write the Hindi language. We need only refer to the deposition of another witness Merdai Lal D. W. No. 12, who started life as a menial servant in Gobardhan Singh's employment. He says he was with Gobardhan Singh for about 24 years and while he was ready to depose to various acts of imbecility committed by Gobardhan

Singh, he stated in cross-examination that Gobardhan Singh had sufficient intelligence to be able to talk about his heir and to indicate where his estate should go after his death. The question of Gobardhan Singh's testamentary capacity may, we think, be allowed to rest upon these statements. We think it, however, proper to mention that although Gobardhan Singh's two widows were examined as witnesses in the case, no question seems to have been put to them for the purpose of eliciting any information regarding their husband's mental powers. It would almost seem from the manner in which this part of the case was presented that Gobardhan Singh must have reserved his eccentricities of behaviour for people outside his family circle. Not a single question was asked of these ladies for the purpose of showing that Gobardhan Singh was in the habit of using intoxicants freely and yet we have the statement of a defence witness, one Thakur Gobardhan Singh (D. W. No. 17), who went the length of saying that he had never seen Raj Gobardhan Singh sober outside his house.

The last comment which we shall make on this part of the case is that the defendant, who admittedly lived next door to Gobardhan Singh, who was constantly in Gobardhan Singh's society and who from all accounts was managing Gobardhan Singh's estate for him for some time before his death, did not think it fit to enter the witness-box to support the case put forward by him in his written statement. Obviously if these stories which the defence witnesses told about Gobardhan Singh's manner of life and habits are true, the defendant was in a position to depose to his own impressions gathered from an intimate personal experience. He has, however, chosen to leave the task of proving this part of his case to a miscellaneous collection of outsiders, and his keeping away from the witness-box is hardly to be explained or excused on the ground that he is deeply interested in the result of the suit. There can, we think, be no doubt that Raj Gobardhan Singh in spite of his rough ways was a good natured man. This is the testimony of his old servant Mandai Lal. It is also proved by evidence on both sides that Gobardhan Singh always showed a kindly disposition towards the present defendant appellant. He treated him very kindly and entrusted the management of his estate to him. Bearing in mind the conduct of Bachan Singh since the time of Raj Gobardhan Singh's death and in particular his conduct with regard to the present suit, it might well have been suggested that if any folly is to be imputed to Gobardhan Singh the most conspicuous and convincing proof of it is to be found in the fact that he treated Bachan Singh so well. Raj Gobardhan Singh, if he could come to life again, would probably acknowledge readily that his kindly treatment of Bachan Singh, viewed in the light of subsequent events, has laid him open to the imputation of a serious lack of discretion.

We have no doubt, therefore, that Raj Gobardhan Singh had a sound disposing mind; and we proceed now to examine the evidence relating to the preparation and execution of the Will. The three principal witnesses on this part of the case are Kamta Prasad, Zamin Ali and Roshan Lal. The two last-named witnesses are attesting witnesses of the Will. Kamta Prasad does not profess to have been present at the time the Will was actually signed by the testator. He deposes, however, to events which took place up till the time the draft of the Will was prepared.

Three other witnesses, whose evidence is material on this part of the case, are the two Ranis Suraj Kunwar and Dammar Kumari Devi and a man named Parbhu Dayal. Both the Ranis depose that Gobardhan had expressed to them his intention of making a Will in favour of his daughter's son. The evidence of the junior Rani is more particular in this respect, and we have it from her statement that her husband during his lifetime showed her the Will on one occasion. She also deposes that she found the Will in a box after her husband's death.

Kamta Prasad is a man who was in the service of Gobardhan Singh for a considerable period and according to his story, Gobardhan Singh first expressed his intention of making a Will at a time when a suit known as the Mallanpur suit was going on. In order to explain what the witness means in this connection, it is

necessary to refer shortly to this litigation. The history of it is to be found in Volume VIII, Oudh Cases, at page 94 [*Musammat Parbati Kuar* v. *Rani Chandrapal Kuar* (3)]. The suit was brought by one Parbati Kunwar claiming the property which had been left by her father Milap Singh. Her suit was resisted by a number of defendants and it is proved that Gobardhan Singh himself was a defendant in the suit, being at that time in possession of some property which the lady was claiming. The main defence which was set up to her claim was that under a family custom daughters were excluded from inheritance, and her suit was dismissed on the finding that the custom was proved to exist. The learned Counsel for the respondent in addressing us on this part of the case has pointed out that Gobardhan Singh did not actually file any written statement of defence in the suit just mentioned. It appears, however, that he was represented by an agent and that the agent intimated to the Court that his principal took the same line of defence as the other defendants in the case.

To continue the story of Kamta Prasad, he says that Gobardhan Singh first conceived the idea of bequeathing the estate to his daughter some 5 or 6 months before the marriage of the girl took place. According to the witness the reason which prompted Gobardhan Singh to make a Will in favour of his daughter was that the present defendant Bachan Singh, who was the nearest male heir, had no sons of his own but had only a daughter. According to Kamta Prasad, Gobardhan Singh expressed an apprehension that if the estate devolved upon Bachan Singh he would make it over to his daughter, and consequently Gobardhan Singh thought he might as well make a disposition of his estate in favour of his own daughter. The witness proceeds to state that a draft Will was prepared on these lines by one Murli Manohar, who was in the service of the estate and who is now dead. Afterwards Gobardhan Singh made certain alterations in the draft, the principal one being the introduction of a clause by which the estate was bequeathed to his daughter's son, if she should have any, after the termination of the life-estate in favour of the widows. The daughter's right to succeed was postponed to her son according to the new arrangement. Kamta Prasad's story is that this alteration in the Will was suggested to Gobardhan Singh by a Pleader named Babu Sheo Bakhsh Rai, who was consulted at Lakhimpur at the time the draft of the Will was being prepared. The witness goes on to say that after these changes had been made a fresh copy of the Will was prepared, namely, the document which is now before the Court. The witness speaks of the contents of this document being read over to Gobardhan Singh, who afterwards put the document away in his box. Kamta Prasad was not present at the time the Will was executed and he was, therefore, unable to depose to the events which happened later, that is to say, in the month of November 1903.

The evidence of this witness has been exposed to a good deal of criticism. It has been suggested that his story regarding the motive of Gobardhan Singh in making this Will is a false, story and we have also been asked to find that his statement regarding the circumstances in which the bequest came to be made in favour of the daughter's son is also untrue. It is pointed out in particular that Kamta Prasad's story regarding the advice or suggestion given by Babu Sheo Bakhsh Rai was introduced at a late stage of his story.

We are not much impressed by this criticism and we agree with the Subordinate Judge in thinking that in substance this story of Kamta Prasad is perfectly true. No doubt, as has been pointed out, there are some variations between the statement of Kamta Prasad and that of Roshan Lal, which we shall presently consider; but it is fair to say as regards these that they are discrepancies of minor importance and that they are probably due to the fact that the witness was being examined and cross-examined regarding events which had taken place some twelve years before the date upon which he was giving his evidence. In circumstances like these it would be unreasonable to expect a witness to remember every petty detail or to preserve an accurate recollection of events in their chronological sequence. Kamta Prasad was subjected to a very severe cross examination, and it is due to him to say that nothing was elicited

(3) 8 O. C. 94.

in the course of it which can reasonably be pointed to as indicating that he was giving false evidence.

We next proceed to discuss the evidence of Roshan Lal, one of the attesting witnesses in the case. Like Kamta Prasad he makes certain statements relating to a point of time anterior to the execution of the Will. In some respects his story regarding the story of the preparation of the Will does not agree with that of Kamta Prasad. As to this fact we are content to accept what the Subordinate Judge has found in this connection, namely, that the discrepancies between Roshan Lal's story on this part of the case and the story of Kamta Prasad are really of no importance whatever. To come now to the important statements of Roshan Lal, he began his evidence by saying that Gobardhan Singh executed a Will in favour of his daughter's son. The witness says he attested it and that the other attesting witness was Zamin Ali. He deposed that the attestation took place in the office of the Sub-Registrar of Lakhimpur. His first statement regarding the execution of the Will by Gobardhan Singh was that Gobardhan Singh's signature was already on the Will. He stated that Gobardhan Singh admitted before him that he had executed the Will and asked him to attest it. Accordingly he made the attestation in the Sub-Registrar's office and the Will was thereafter registered in his presence. In answer to a question put by the Court the witness stated that he did not remember whether Gobardhan Singh had or had not signed in his presence. He admitted, however, that he had given evidence regarding the execution of this Will in the Court of the Tahsildar in the year 1905. Before this statement was put to him, he was asked if he could remember what he said on that occasion. His story was that he could not, but that he was prepared to say that any statement he made before the Tahsildar was true. Roshan Lal confirmed the statement of Kamta Prasad regarding the preparation of the Will by Murli Manohar and he too states that Murli Manohar read the Will over to the Raja. The witness was cross-examined at very great length and clearly a very strenuous effort was made to break down his credit. He admitted that in the suit which was brought by the Allahabad Bank a year or two before the institution of the present suit he had told the Court that he had attested a Will of Gobardhan Singh but was unable to say where Gobardhan Singh had got it written. He admitted that he told the Court on that occasion that Gobardhan Singh did not sign the Will in his presence but that it bore his signature. When this statement was put to the witness in cross examination, he stated plainly that it was not a true statement. He explained that when he was being examined in the Bank case his memory must have failed him at the time. He said that he had come to Court on that occasion in a hurry and the Will was not shown to him. He went on to say that at the time he was making his deposition in the present case, he was able to say definitely that the Raja actually did sign the Will in his presence in the office of the Sub Registrar. This statement was made in the course of cross-examination. The witness admitted that in his examination in-chief he failed to make a definite statement on this point, but his explanation was that he had stirred up his memory since the time his examination began and that at the time his answer was given he was thoroughly assured that the Raja executed the Will in his presence. His last statement regarding the execution of the Will reads as follows:—"The Sub Registrar read the Will to the Raja and then told him to sign it and get it attested. It was then he signed and after it we attested."

It is not to be doubted that Roshan Lal's evidence is open to the adverse criticism which has been freely bestowed upon it. The Subordinate Judge seems to have thought that Roshan Lal was a witness who in the matter of giving false evidence was prepared to sail as near the wind as he dared. We are inclined to agree with the Subordinate Judge on this point, and we think there is reason to suspect that some attempt had been made to tamper with the witness. We have it that although a summons was duly served on him, Roshan Lal kept away from the Court and it was only when the plaintiff, who was bound to call him as being one of the attesting witnesses, applied to the Court

for a warrant for his arrest that he appeared in Court. We think it is a fortunate circumstance that the plaintiff was able to show that Roshan Lal was examined on two occasions in the year 1905 shortly after the death of Gobardhan Singh for the purpose of proving the execution of the Will. The record of those statements still exists, and it was no doubt the knowledge of this fact that helped to keep Roshan Lal in the present case from committing downright perjury. Exhibit 13 is a copy of the statement which Roshan Lal made to the Tahsildar of Lakhimpur on the 19th of July 1905 in the course of the mutation proceedings. Obviously the original Will was before the Court at that time and after seeing it Roshan Lal deposed that he identified the signatures of Gobardhan Singh on the Will—signatures which he said were made in his presence in the office of the Sub-Registrar. He told the Tahsildar that he was one of the attesting witnesses, that Zamin Ali was the other attesting witness, that the Will had been written by Murli Manohar who was then dead, that the Raja took the Will to the Sub-Registrar and handed it over for registration and that it was then that he made the signatures on the Will in the Sub-Registrar's office.

The word "signatures" used in the plural is to be explained by the fact that there are three signatures of Gobardhan Singh on the document, one at the bottom of the document intended to be his signature as executant, the other two signatures are on the back of the document and are made underneath the two endorsements made by the registering officer on the 13th November 1903.

Exhibit 90 is a certified copy of another statement made by Roshan Lal to the Tahsildar of Nighasan on the 28th of July 1905. The original Will was not produced before this Tahsildar, but Roshan Lal deposed that he had already given evidence before the Lakhimpur Tahsildar regarding the original Will. His statement to the Tahsildar of Nighasan agrees with what he stated before the Tahsildar of Lakhimpur. We agree with the Subordinate Judge that Roshan Lal's attempt to explain away the statement he made in the Bank case regarding the execution of this Will is a clumsy one, but we are not prepared to reject his statement on this ground as being false and unreliable. With regard to some of the contradictions which appear in his evidence, it is fair to make allowance for the very long period which elapsed between the time of the events deposed to and the time on which the witness was giving his evidence. We must attach very great importance to Roshan Lal's present statement, namely, that the story he told in the Courts of the two Tahsildars was the true story regarding the execution of the Will. At the time the Will was produced in the Revenue Courts there was no particular reason why Roshan Lal should have made anything but a straightforward statement; and besides at that time the circumstances attending the execution of the Will were all fresh in his memory. A good deal has happened since the time Roshan Lal gave evidence before the Tahsildars; and it is only too probable that some attempt has been made to corrupt him and induce him to give false evidence. This conjecture is, we think, fortified by the fact that he appeared as an unwilling witness in the present suit.

The next witness Zamin Ali entered Gobardhan Singh's service in the month of November 1903, only a few days before the date of the registration of the Will. There is documentary evidence on the record to prove that the power-of-attorney which Gobardhan Singh gave this witness was registered at Lakhimpur on the 10th of November 1903, that is to say, three days before the Will was registered. Zamin Ali began his evidence by saying that he did not remember whether or not Gobardhan Singh signed the Will in his presence. He was able, however, to say that Gobardhan Singh made his signatures on the back of the Will in his presence. The document was then shown to the witness. He admitted that it bore his signature and that his signature was dated the 13th of November 1903. It is important to note, moreover, that the witness signed as "Mukhtar-am" (general attorney) of the Bijua Estate. The witness admitted that Roshan Lal attested the document on the same date and that the attestation took place in the office of the Sub-Registrar. The witness

was pressed for an answer as to whether the Raja signed the Will in his presence in the Sub-Registrar's office; his answer was that he did not remember. He deposed that the Raja had asked him to attest saying that he had executed the Will. The witness was then confronted with the statement which he had made before the Tahsildar in the mutation proceedings in the year 1905 (Exhibit 14). This document having been put to him the witness made the following answer:— "I did tell the Tahsildar that the Raja signed in the Sub-Registrar's office in my presence and that I attested. The statement is true and correct." The witness went on to explain that without his memory having been refreshed by hearing his previous statement read out to him, he could not have recollected all that had taken place at such a distant time. He was, however, prepared to say after hearing his previous statement that as a matter of fact the Raja did sign the Will at the registration office in his presence. The witness, it may be remarked, does not profess to know anything about the contents of the Will. He says he never read it and he was unable to say whether the Will had been read out in the Sub Registrar's office. Roshan Lal's story on this point was that the Will had been read out. The cross-examination of this witness brought out nothing to his discredit. He merely reiterated the statements he had made in his examination-in-chief. In answer to a question put by the Court he deposed that after the Will had been executed, he heard the Raja discussing the matter with one Nil Kanth Dauj Sah who was employed for some time as a manager. His story was that Nil Kanth told the Raja that he had done wrong to make such a Will. The Raja's answer was that he was sorry for having done so and would cancel it. We may dismiss this statement as being pure invention. We do not believe a word of it.

Lastly there is the evidence of the witness Parbhu Dayal. He was not called upon to attest the document, but he swears that he was present at the registration office at the time the Will was presented and that he saw the Raja sign the Will and saw the two witnesses Roshan Lal and Zamin Ali attest it. It is the fact that neither Roshan Lal nor Zamin Ali made any mention of the presence of this man at the registration office at the time the Will was put in. The Subordinate Judge says that it is not necessarily to be assumed from this fact that Parbhu Dayal was not there. There is no reason to disbelieve the story of Parbhu Dayal that he was in the employment of Raj Gobardhan Singh. He says that he was called to Lakhimpur at the time this document was registered and that he went there bringing with him some money which the Raja wanted. We are not prepared to differ from the view which the Subordinate Judge took regarding the evidence of Parbhu Dayal.

What then is the sum and substance of the statements of all these witnesses, statements which we are prepared to accept as being in the main true accounts of what took place? They show to us very clearly that the Raja had made up his mind to make a Will, first, in favour of his daughter and, afterwards, when the suggestion was made to him, in favour of his daughter's son. A great deal of argument has been addressed to us regarding the probabilities of such a thing having taken place.

It is pointed out that the Raja in the Mallanpur case had taken up the line that daughters were excluded from inheritance and so, it is said, being conscious of this fact, it is not likely that he would have made up his mind to make a Will either in favour of his daughter or of her son, if she had one. It is one thing to say that a custom of exclusion of daughters existed in this family, but it is another thing to say that Gobardhan Singh necessarily approved of the custom. Being a Taluqdar he had full powers to dispose of his property as he thought fit and if, as we believe, he entertained great affection for *Musammat* Bitto who was his only child, then we can see no reason whatever why Gobardhan Singh should not have decided to defy the custom and to pass the property on to his daughter or her children; and we think there is every reason to believe the story told by Kamta Prasad regarding the motive which prompted Gobardhan Singh to prepare this Will. If Bachan Singh had no son of his own and if there was any likelihood

of his handing over the property to his daughter, then we think Gobardhan Singh might very well make up his mind to see that his own daughter or her children should get the benefit of his property rather than Bachan Singh's daughter.

Another argument put forward is that Gobardhan Singh could never have intended to make a Will of this kind in view of the fact that he was greatly displeased with the family into which his daughter was married. In fact evidence has been led for the defence to show that Gobardhan Singh was so much dissatisfied with his daughter's marriage that he expressed an intention of never having anything to do with her. We may say at once that we believe that all the evidence given to this effect is false. The man who might have been expected to give the best evidence on this part of the case was Bachan Singh himself. He, however, as we have already mentioned, preferred to remain away from the witness-box. It is proved that Bachan Singh was present at the marriage and took a prominent part in the marriage ceremonies and festivities. He now asks the Court to believe that certain events took place at the time of the wedding which incensed Gobardhan Singh so much that he shut himself up and refused to have anything to do with the proceedings. This story has been allowed to be told by two outside witnesses, one of whom is a retired Sub-Inspector of Police named Ghulam Yazdani; another is D. W. No. 1, a fellow named Liakat Ali Khan who follows the profession of a *mukhtar* or *karinda*. According to Liakat Ali Khan's statement at the time when the marriage took place he (the witness) was in the service of the Taluqdar of Kothwara. He mentions that the Taluqdar was unable to attend the wedding but went some little time afterwards in order to pay his congratulations to Gobardhan Singh. According to Liakat Ali Khan on that occasien the Raja told the Taluqdar of Kothwara that it was a good thing he had not been present at the wedding because he (Gobardhan Singh) had been disgraced. He said that his daughter had lost her religion (*be dharam hogai*). As regards this statement we need only refer to the evidence of Saiyed Raza Husain, the Taluqdar who was employing Liakat Ali Khan at this time. His story is that no such conversation ever passed between Gobardhan Singh and himself. We have no hesitation, therefore, in disposing of Liakat Ali Khan's story as being untrue. As for the evidence of the Sub-Inspector we are unable to attach much importance to it. It appears that he was sent to Gobardhan Singh's house for the purpose of keeping order at the time of wedding festivities. He was not invited there as a guest, and his cross-examination tends to show that his knowledge of the events he deposes to was acquired by hearsay. Other evidence was given for the purpose of showing that Gobardhan Singh practically cut off all connection with his daughter. The lie to all this has been given in the evidence of the two Ranis, whose statements we are prepared to accept. We might observe here that neither of these ladies is the mother of *Musammat* Bitto who was Gobardhan's daughter by another wife. It can hardly be suggested, therefore, that they have any particular interest in supporting the plaintiff's case. They deny altogether that Gobardhan Singh was displeased with the marriage and they swore that presents were sent on various occasions to the lady after she had gone to her husband's home. There is also evidence from the Shahpura estate which proves, in our opinion, conclusively that these presents were actually sent and we, therefore, dismiss as fiction the story that Gobardhan Singh had made up his mind to have nothing more to do with his daughter or any child that might be born from her. Even the defendant's witnesses were not prepared to go the length of saying that Gobardhan Singh had ceased to have any regard for his child. We have the statement of the witness Mendai Lal that Gobardhan Singh had a great affection for Bitto and that he was not in any way displeased with her marriage.

Another objection put forward to the story regarding the execution of the Will is the circumstance that the act of execution was postponed for a considerable period. It is argued that there was no reason why, if the Will in its present form was ready for execution at the end of August 1903, it should not have been there and then signed and attested.

It is hardly to be expected that any

definite evidence should be forthcoming for the purpose of explaining the delay in execution. Kamta Prasad indeed suggests that the Raja was suddenly called away, after the fair copy of Will had been prepared, by reason of his wife's illness. That statement may or may not be true, but it is as likely as not that Gobardhan Singh determined not to be in too great a hurry about making a final decision regarding the disposal of his estate. The evidence all shows that he took a long time in discussing the matter before he arrived at the stage of having a preliminary draft prepared; and it is by no means unlikely that he was further determined to deliberate over the matter before he finally decided to put his name to the Will. While it may be an unusual thing for a document of this kind to be presented for registration without having been previously executed, we are not prepared to say that this circumstance is so suspicious as to justify us in rejecting the story of the witnesses regarding the execution and attestation.

To sum up this part of the case, we think the learned Subordinate Judge has expressed a correct appreciation of the evidence which was before him. He refers in his judgment to certain pieces of circumstantial evidence which fortified him in accepting the statements of the plaintiff's witnesses. He points in the first place to the fact that the Will was produced very shortly after the death of Gobardhan Singh. He further points out that at the time the Will was produced and the mutation proceedings were going on, Bachan Singh was still the manager of Gobardhan Singh's estate. It is not to be doubted that Bachan Singh knew all about this Will from the very moment it was produced, if not before, and it is impossible to suppose that the terms of this Will could have been kept from his knowledge, and yet we have it that a Will about which so much is said in the present suit was allowed to go unchallenged by Bachan Singh up till the time the suit was brought by the Allahabad Bank in the year 1912. Then again, as the learned Judge observes, the publicity attending the execution and attestation of the Will is a strong point in favour of the view that it is an absolutely genuine document, and due weight must also be given to the fact that it was registered. We have no hesitation, therefore, in affirming the finding of the Court below. We believe that this Will was as a matter of fact executed by Gobardhan Singh on the 13th of November 1903, that it was attested on the same date by the two witnesses Roshan Lal and Zamin Ali, that it was prepared in accordance with instructions given by Gobardhan Singh, that it was read over and explained to him after the fair copy had been drawn out and that it expresses correctly the intentions which Gobardhan Singh had formed regarding the disposal of his estate. It is not necessary for us to find that Gobardhan Singh could have understood every single word contained in the Will. Most probably he could not understand such of the expressions as are technical and high-flown, but we entertain no doubt whatever that Gobardhan Singh did intend that his property should pass after the death of his widows to his daughter's son; and we have no reason, therefore, for supposing that he did not understand and approve of the contents of the Will. In our opinion, the plaintiff has established everything which under the law he was bound to establish for the purpose of obtaining a declaration that the Will was a genuine and valid document.

This is the main part of the appellant's case and we have only now to deal with one or two other points relating to the construction of the Will and to the form of the decree which the Subordinate Judge has granted. As regards the construction of the Will, the view taken by the learned Subordinate Judge is that it creates a vested remainder in favour of the plaintiff which is to take effect in possession immediately on the termination of the life-estates created in favour of the two widows. As regards the ten villages which under the Will are to go to Bachan Singh for life after the death of the two widows, the Subordinate Judge declared that the plaintiff has a contigent remainder.

It has been argued very strenuously that we ought not to find on the language of the Will that the plaintiff has any vested interest in the property bequeathed to him. We are asked to find that Gobardhan Singh could only have intended that the plaintiff was to have this pro-

perty in the event of his surviving the two widows. To this one answer is that if Gobardhan Singh had any such intention, it would have been very easy for him to give expression to it by providing in the Will that the plaintiff was only to take the estate in case he survived the Ranis. The fact, however, is that there is nothing in the language of the document to indicate that Gobardhan Singh had any such intention. There is a gift of a life-estate to the Ranis with an absolute gift over to the daughter's son, and it is not denied that this language, if given its due legal effect, amounts to the bequest of a vested remainder in favour of the present plaintiff. But it is said we ought not to construe the language of the Will by the rules which would be observed in dealing with the Will of a testator in England. It is argued that Gobardhan Singh knew nothing about vested or contingent remainders and that it is more natural to suppose that he intended the property to go in the usual way it would go according to the provisions of the Hindu Law. If Gobardhan Singh was content to let his property devolve according to the Hindu Law, there appears to have been no particular reason why he should have gone to the trouble of making a Will, at any rate of making a Will containing the directions which we find in the document now before us. We have already expressed our belief that it was the intention of Gobardhan Singh to prevent this property from going away to the daughter of Bachan Singh, and this being so, there can, we think, be no good reason why we should not assume that in order to anticipate such a contingency Gobardhan Singh had made up his mind that the property should go into the family into which his daughter had married. We have no doubt, therefore, that the Subordinate Judge was perfectly right in holding that under the terms of this Will the plaintiff has a vested interest in the estate left by Gobardhan Singh. We may conclude our observations on this part of the case by drawing attention to the fact that although the question of the nature of the interest taken by the plaintiff under the Will was the subject of an issue in the Court below, no argument was addressed to the Court by the defendant's learned Counsel. It is only when the case comes up here in appeal that it has been argued seriously that the interest of the plaintiff in the property is not a vested interest.

Before concluding our judgment we have to refer to one point which it was sought to make on behalf of the appellant, a point which is raised in paragraph 26 of the memorandum of appeal. It is complained that the Subordinate Judge wrongly refused to allow the issue of a commission for the examination of Sir Harcourt Butler, who was at the time the trial was going on the Lieutenant-Governor of Burma. The object of applying for the issue of this commission was to obtain Sir Harcourt's evidence regarding his opinion of the state of mind of Raj Gobardhan Singh with whom, it is said, he was acquainted many years ago at the time when he was the Settlement Officer of the Kheri district. The application for the issue of a commission was made to the Court on the 5th January 1916, *i.e.*, more than a year after the institution of the suit. On the 6th of January the Subordinate Judge refused to issue the order. It appears from the proceedings of the Court below that an affidavit was filed in support of the application for the issue of a commission. The learned Subordinate Judge pointed out that certain material particulars were not disclosed in the affidavit. He further pointed out that no suggestion to call Sir Harcourt Butler was ever made until the 5th of January 1916, after the plaintiff had closed his evidence. At the time the application was presented the evidence of the defence witnesses was being taken. In these circumstances we think the Subordinate Judge was thoroughly justified in refusing to issue a commission.

Lastly there remains the form of the declaration contained in the decree. We have already said that we agree with the finding of the Subordinate Judge that the plaintiff has a vested interest in the property bequeathed to him by Raj Gobardhan Singh, and so far as the decree declares the nature of this interest we can see no reason to interfere. The plaintiff, who has succeeded in establishing the genuineness and validity of the Will, is certainly entitled to have an expression of the

opinion of the Court regarding the nature of the interest which has accrued to him.

There remains, however, the question as to whether in the circumstances the Court was justified in making any declaration regarding the nature of the plaintiff's interest in the ten villages which were referred to in the Will. With regard to this portion of the property the position is this. The villages are named by name in the Will, and it is provided that after the demise of all the three widows of the testator these villages are to be held by Raj Bachan Singh for the period of his life. It is further provided that, if Bachan Singh should have a son, the ten villages are to descend to him in full ownership after the termination of Bachan Singh's life estate. Further it is provided that in the event of Bachan Singh's having no male issue, the ten villages are to revert to the estate after Bachan Singh's death and are to become the property of the testator's daughter. From this last clause in the Will it would appear that this provision was made at the time when Gobardhan Singh was still minded to dispose of his estate in favour of his daughter and before it had been suggested to him that the bequest in the first instance should be made in favour of the daughter's son, if she had one.

After hearing the argument of the learned Counsel on both sides we have come to the conclusion that in view of the contingencies which may happen, the interest of the plaintiff in these ten villages is so remote and uncertain that it would be premature and futile to give any declaration regarding it in the present case. In the first place both the widows are still alive and one of them is a comparatively young woman. In the next place Bachan Singh is at present not much over 40 years of age, and it may very well happen that a son may still be born to him, in which case of course the ten villages will pass to his issue. In these circumstances we think the plaintiff cannot reasonably call upon the Court to give any pronouncement regarding the nature and extent of his interest in the ten villages just mentioned and we direct, therefore, that the decree of the Subordinate Judge be modified in this respect by striking out the declaration contained in paragraph 3 of the lower Court's decree, which reads:—

(3) "That he has a contingent remainder in the said excepted items Nos. 2, 6, 7, 11 to 14, 18, 21 and 61."

In other respects the decree is affirmed and we dismiss this appeal with costs to the respondent.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1457 OF 1917.

August 14, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

SREERAM NARASIAH—PLAINTIFF—APPELLANT

versus

BOMMIREDDI VENKATARAMIAH—DEFENDANT NO. 3—RESPONDENT.

Mortgage of moveables—Mortgagor in possession—Purchaser, bona fide, from owner without notice of mortgage, position of—Contract Act (IX of 1872), s. 108, applicability of.

A *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of the encumbrance. [p. 977, col. 1.]

Second appeal against the decree of the District Court, Cuddappah, in Appeal Suit No. 71 of 1916, perferred against the decree of the Court of the District Munsif, Nandalur, in Original Suit No. 153 of 1915.

Messrs. *E. Doraisami Aiyar* and *C. Bakthavatsalu Naidu*, for the Appellant.

Mr. *K Koti Reddi*, for the Respondent.

JUDGMENT.—Plaintiff obtained a mortgage of certain properties including a bull, with which alone we are concerned here. The bull was left in the mortgagor's possession and was eventually purchased by 3 d defendant from the mortgagor's vendee. The hypothecation of moveables has been recognised in Indian Courts [*vide Shyam Sunder* v. *Chaita* (1) and *Shrish Chandra Roy* v. *Mungri Bewa* (2)] but that is not the question for consideration now. We have to determine whether a *bona fide*

(1) 3 N. W. P. H. C. R. 71.

(2) 9 C. W. N. 14.

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purchaser for value of hypothecated goods without notice of the hypothecation is bound by it. There is no direct authority on the point, nor is hypothecation of moveables recognised by any Statute. We are, therefore, thrown back upon principles of equity and justice.

Under section 108 of the Indian Contract Act a person in possession of moveables, although not the owner, can pass the property in the goods to an innocent purchaser. Much more, then, would it appear that the real owner could pass the property, which was only subject to an undisclosed hypothecation. Even if we are to apply the principles of English Law on this question, which is perhaps doubtful, we find that it has been held that goods included in a bill of sale and left with the original owner can be purchased in the ordinary course of business by a *bona fide* purchaser: *National Mercantile Bank* v. *Hampson* (3). When goods are left in the possession of the mortgagor, a wide door is opened for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has, by his omission to secure possession of the goods, facilitated the commission of the fraud. In this view we think that a *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it.

The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(3) (1880) 5 Q. B. D. 177; 49 L. J. Q. B. 480; 28 W. R. 424.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 477 OF 1918.

April 8 1918

Present:—Mr. Justice Broadway.

GANESHA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

PANJU SINGH—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Art. 2, applicability of—Limitation Act (IX of 1908), Sch. I, Art. 141—Suit by reversioner after death of widow—Limitation applicable.

A suit by a reversioner to recover possession of ancestral land after the death of the alienor's widow is governed by Article 141 of the Limitation Act and not by the Punjab Limitation Act, even where the alienor died after the latter Act came into force, inasmuch as the reversioner could not sue for possession during the lifetime of the widow of the alienor [p. 978, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Lahore, dated the 21st December 1917.

The Hon'ble Mr. *Muhammad Shafi* and Mr. *Muhammad Rafi*, for the Appellants.

Lala *Amar Nath Chopra*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal has arisen are these. In 1899 Kishen Singh and Mahna Singh alienated certain lands in favour of Devi Das, etc. Kishen Singh died in March 1905 and was succeeded by his widow who, however, died in April 1906. In March 1917 Panju Singh, a reversioner, instituted a suit for possession of half of the land so alienated, the defendants being the descendants of Devi Das, etc., the original alienees. Panju Singh's suit was dismissed as barred by the Punjab Limitation Act I of 1900. On appeal the learned District Judge held that inasmuch as the reversioner could not sue for possession during the lifetime of the widow of the alienor, Article 141 of the Indian Limitation Act applied and not the Punjab Limitation Act I of 90 , and that the suit was, therefore, within time. He accordingly remanded the case for decision on the merits.

Against this decision Ganesha Ram, Gopi Ram and Munshi Ram, the defendants, have preferred this appeal and on their behalf I have heard Mr. Shafi, while Lala Amar Nath Chopra has addressed me on behalf of Panju Singh. Mr. Shafi referred me to *Sahib Dad* v *Rahmat* (1), *Rasul Bakhsh* v. *Nabi Bakhsh* (2), *Khiali Ram* v. *Gulab Khan* (3), *Miran Bakhsh* v. *Ahmad* (4), *Jiwana* v. *Abdullah* (5), *Sohnu* v. *Labha* (6)

(1 90 P. R. 1904; 88 P. L. R. 1904 F. B.).

(2 9 P. L. R. 1906.

(3 11 Ind. Cas. 792; 33 P. R. 1911; 190 P. L. R. 1911.

(4 145 P. R. 1907.

(5) 2 Ind. Cas. 962; 64 P. R. 1909; 56 P. L. R. 1909; 62 P. W. R. 1909.

(6) 7 Ind. Cas. 476; 62 P. R. 1910; 98 P. W. R. 1910; 111 P. L. R. 1910.

and *Bhagat Singh* v. *Sher Singh* (7). I have also consulted the unreported cases referred to in *Sohnu* v. *Labha* (6). These cases support the view expressed by the learned District Judge, and Mr. Shafi has sought to differentiate them by pointing out that in all of them the alienor had died before Act I of 1900 came into force. This was the precise line taken before the learned District Judge and after giving careful consideration to Mr. Shafi's argument I am of opinion that the view taken by the learned District Judge is correct. It is in consonance with *Miran Bakhsh* v. *Ahmad* (4), which decision has been referred to in most of the other cases cited with approval.

Following that decision I dismiss this appeal with costs.

Appeal dismissed.

(7) 24 Ind. Cas. 212; 29 P. R. 1914; 156 P. L. R. 1914.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 297 OF 1917.

June 13, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

JOGENDRA NATH BHUNYA—PLAINTIFF—APPELLANT

versus

MOHINDRA GHORA AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Reversioner, relinquishment by, of portion of estate in favour of widow, effect of.

Where an expectant reversioner relinquished his title to a portion of the inheritance in favour of the widow by a deed of agreement in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance:

Held, that neither the reversioner nor any person claiming through him could set up that the deed of agreement was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow. [p. 979, col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Midnapur, dated the 20th November 1916, affirming that of the Munsif, 4th Court, Tamluk, dated the 26th April 1915.

FACTS material to the report are as follows:—

One Krishna Majhi died leaving him surviving his widow Putti Dasi and a sister's son Haradhan Maity, defendant No. 3 in the present suit. After the death of Krishna Majhi his widow Putti Dasi and the nephew Haradhan entered into an agreement by a deed dated 4th June 1903, whereby the widow got the disputed plots absolutely and the remaining plots left by Krishna Majhi went to the nephew absolutely. Shortly afterwards, the reversioners of one Purnima Dasi, from whom the late Krishna Majhi purchased one of the plots allotted to the widow by the aforesaid arrangement, in the name of his predeceased wife Sundari Dasi, brought a suit for setting aside the sale of the said plot against the widow Putti Dasi and her brother Mohendra, defendant No. 1 in the present suit (who was alleged to be in possession of the said plot). The said suit was contested up to the Appellate Court and it ended in a compromise by which Putti Dasi and her brother got the said plot on payment of a certain sum of money to the plaintiffs. After the death of Putti Dasi the defendant No. 3 sold his interest in the disputed plots to the plaintiff Jogendra Nath Bhunya.

The plaintiff brought this suit for possession after declaration of his title by purchase against Mohendra and Debendra, defendants Nos. 1 and 2 respectively, alleging them to be in wrongful possession of the disputed plots without any title. The defendants Nos. 1 and 2 contested the suit and their main defence was that the plaintiff's predecessor, the *pro forma* defendant No. 3 Haradhan Maity, having given up his interest in favour of Putti Dasi for a consideration of having himself got the remaining plots, both the defendant No. 3 and the plaintiff whose title was derivative, were estopped from bringing this suit, and that the alleged *kobala* in favour of the plaintiff was fraudulent, collusive and without consideration.

The lower Appellate Court found against the plaintiff on both the points. Hence this appeal.

Babu *Mohendra Nath Roy* (with him Babu *Jyotish Chandra Hazrah*), for the Appellant:—The alleged agreement entered into by Haradhan could not confer any title on the widow. Haradhan's interest at the time of the agreement was an interest of a Hindu reversioner expectant upon the death of a female and as such it could not be transferred. Refers to section 6, clause (*a*) of the Transfer of Property Act, *Nund Kishore Lal* v. *Kanee Ram Tewary* (1) and *Sham Sundar Lal* v. *Achhan Kunwar* (2). Hence the widow got nothing by the arrangement and any transferees from the widow, such as the defendants Nos. 1 and 2 who are alleged to have purchased a portion of the disputed property from Putti Dasi, have consequently purchased nothing. Further the doctrine of estoppel cannot apply to the present case, since it cannot override the clear provisions of law. If the doctrine of estoppel is allowed to prevail, the Court will have in a manner to give effect to that which the law clearly forbids, namely, that the interest of a Hindu reversioner expectant upon the death of the widow is transferable. As to the second plot which formed the subject-matter of compromise, the doctrine of estoppel does not arise; the title of Putti Dasi was independent of the deed of agreement and consequently the doctrine of estoppel which has its basis in the agreement cannot properly arise.

Babu *Mohesh Chandra Banerjee*, for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Midnapur, dated the 20th November 1916, affirming the decision of the Munsif of Tamluk. The plaintiff brought the suit for possession of two plots of land on establishment of his title by purchase. Both the Courts below have dismissed the suit. It appears that one Krishna Majhi had two wives Sundari and Putti Dasi. One of the two plots sued for Krishna Majhi purchased in the name of Sundari from one Purnima Dasi. The other plot Krishna Majhi apparently acquired himself. Sundari predeceased Krishna Majhi. On Krishna Majhi's death, he left him surviving Putti Dasi as his heiress and a sister whose son the defendant No. 3 is the vendor to the plaintiff. On the 4th June 1903, the defendant No. 3 relinquished in favour of Putti Dasi both the plots now sued for for a consideration of the defendant No. 3 receiving a relinquishment from Putti Dasi of all her interest in the other plots. Subsequently, Putti Dasi sold one half of plot No. 2 to her brother, the defendant No. 1. Then the sons of Purnima in the year 1911 brought a suit against Putti Dasi and her brother, the defendant No. 1, to recover plot No. 2. That suit was compromised on the defendant No. 1 paying a sum of money to the son of Purnima Dasi for relinquishing all their claims. In 1913, Putti Dasi died and the defendant No. 1 succeeded to the property. In February 1914, the defendant No. 3 sold to the plaintiff. The learned Judge of the lower Appellate Court has held that it is a case of estoppel and that the defendant No. 3 having taken the benefit of the deed of the 4th June 1903, he or any person claiming through him cannot now set up that the document is not binding on him and did not operate on the plots relinquished in favour of Putti Dasi. It seems to me, speaking generally, that he is quite right. The defendant No. 3, having had the benefit and having retained the benefit of this document of the 4th June 1903, cannot now turn round and say that he is not bound by its terms.

A supplemental point was attempted to be made with regard to plot No. 2, and that was that the title of the defendant No. 1 arose under the *solenama* with the sons of Purnima Dasi and that he did not claim through the deed of the 4th June 1903. Although the compromise might have been by way of confirmation, there is nothing to suggest that the parties intended to give up the rights that they had under and by virtue of the deed of the 4th June 1903. I think the learned Judge of the lower Appellate Court came to a correct conclusion on the facts found

(1) 29 C. 355; 6 C. W. N. 395.
(2) 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755 (P. C.).

in the case. The present appeal, therefore, fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1246 OF 1916.

June 28, 1918.

Present:—Mr Justice Tudball and Mr. Justice Abdur Raoof.

NANDLAL SINGH—PLAINTIFF—APPELLANT

versus

BENI MADHO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contribution, suit for, maintainability of—Trespassers independent, decree against—Costs recovered from one defendant—Other defendant, whether liable to contribute.

Plaintiff and defendant each obtained a half share in certain property under separate deeds of gift. A third person brought a suit for recovery of a certain share in the property, in which both were impleaded as defendants. Plaintiff contested the suit but the defendant did not, and ultimately the suit was decreed against both with costs. The decree-holder recovered the full amount of the costs from the plaintiff, who thereupon brought a suit for contribution against the defendant, claiming half the costs which he had been compelled to pay;

Held, that the plaintiff and the defendant were independent trespassers who derived their titles under separate deeds of gift and who were separately liable for the trespass committed by each, and that, therefore, the defendant was not liable to contribute anything towards the amount which had been recovered from the plaintiff. [p 981, col. 1.]

Second appeal from a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Cawnpore, dated the 9th May 1916.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Messrs. *Shamnath Mushran* and *Kailash Nath Katju*), for the Appellant.

Mr. *Baldeo Ram Dave* (with him Messrs. *Braj Nath Vyas* and *Nawal Kishore*), for the Respondents.

JUDGMENT.—The plaintiff-appellant in this suit was a person who under a deed of gift executed by one Jagat Singh obtained a half share in certain property. The respondent Ram Lal Singh is a person who received a half share in the same property by an entirely separate deed of gift from the same Jagat Singh. Beni Madho Singh and Zalim are certain persons claiming to be the lawful owners of a certain share in that property. They brought a suit to recover their shares and they impleaded both Ram Lal Singh and Nand Lal Singh in the suit. Ram Lal Singh did not defend the suit, but Nand Lal Singh did and in the course of his pleadings he stated that Ram Lal Singh was at the bottom of the suit and that he had instigated the plaintiffs to sue. Part of the claim was decreed and part of the claim was dismissed. The plaintiffs appealed in respect to so much of their claim as was disallowed. Nand Lal Singh appealed in respect to so much of the claim as had been decreed against him. The plaintiffs' appeal was allowed, and Nand Lal Singh's appeal was dismissed. Ram Lal Singh was a respondent to both the appeals. He contested neither. In the execution department, Ram Lal Singh pleaded that no portion of the share decreed to the plaintiffs should be taken from him but that it should all be taken from Nand Lal Singh. Nand Lal Singh opposed him. The Court held that each of them had in his hands half of the share decreed. The appellate decree, which is the decree of this Court in the plaintiff's appeal, shows clearly that this Court held that each defendant was separately liable in respect of the property which was in his hands. The order for costs was a joint one. The plaintiffs in the former suit have recovered the whole of their costs from Nand Lal Singh. He has now brought the present suit for contribution, claiming half from the defendant Ram Lal Singh.

This is clearly not a case of joint tort-feasors. Ram Lal Singh derived his title to the property which was in his hands by an entirely separate deed from Jagat Singh and Nand Lal Singh derived his title, such as it was, by a separate deed of gift. The two defendants were not at one in defending the suit. They were as a matter of fact opposed to each other. Paragraph 15 of the written statement of Nand Lal Singh shows this clearly. Ram Lal Singh in no way contested the suit, whereas Nand Lal Singh did and it is

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quite clear that the extra costs that were incurred in that suit were due to the action of the present plaintiff Nand Lal Singh alone. The case is very much like that of *Fakire* v. *Tasadduq Husain* (1). In this case there was no contract between the present parties. Each was in separate possession of property and there was nothing joint. Each was separately liable for the trespass that he had committed. Each trespass was committed separately, and each defendant's liability for mesne profits was entirely separate. The only thing common between them was that they were arrayed as defendants to the suit. We cannot find any equity in the present case that will enable us to hold that the respondent Ram Lal Singh is in any way liable to the plaintiff for a share of the costs that were recovered from him. The appeal is dismissed with costs to Ram Lal Singh.

It is to be noted that the action of the plaintiff is directed solely against Ram Lal Singh and not against the other respondents. This is clearly admitted before us in open Court.

Appeal dismissed.

(1) 19 A. 462; A. W. N. (1897) 107; 9 Ind. Dec. (N. S.) 297.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 2759 OF 1917.

November 14, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

In re N. KRISHNASWAMI AIYANGAR—ACCUSED—PETITIONER.

Government of India Act, 1915 (5 & 6 *Geo. V, C.* 61), s. 107—'*Superintendence*,' *meaning of*—*Judgments of Courts subordinate to High Court*—*Irrelevant and scandalous matter, expunging of, application for*—*Jurisdiction.*

Per *Abdur Rahim, J.* (*Oldfield, J* dissenting).—The High Court has jurisdiction to expunge irrelevant and scandalous matters in the judgments of Courts subordinate to it under section 107 of the Government of India Act, 1915. Such powers are of extremely wide character but must be exercised in extremely exceptional cases, and with great caution. They are covered by the expression 'superintendence' in the section. [p. 981, col. 2; p. 982, col. 1]

Ramabadra Naidu v. *Subramania Iyer*, 33 Ind. Cas. 608; 3 L. W. 283, considered.

Per *Oldfield, J*.—The High Court has not the power to expunge irrelevant and scandalous matters in the judgments of subordinate Courts under section 107 of the Government of India Act, 1915, especially when the application to expunge them is made by persons who are not parties to the proceedings. [p. 982, col. 2]

Petition under section 107 of the Government of India Act and section 151 of the Civil Procedure Code praying that, in the circumstances stated therein, the High Court will be pleased to direct that first three sentences in paragraph 14, whole of paragraph 15, the words specified in paragraph 23 and the whole of paragraph 27 be deleted from the judgment of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 79 of 1914.

Mr. *K. Srinivasa Iyengar*, for the Petitioner.

JUDGMENT.

ABDUR RAHIM, J.—I have had the advantage of reading the judgment which has been just delivered by my learned brother, and I agree that the petition ought to be dismissed, though not on the ground on which he has proceeded.

I am of opinion that we have jurisdiction to direct the expunging of irrelevant and scandalous matters in the judgment of the Subordinate Court under section 107 of the Government of India Act of 1915. The powers of superintendence vested in the High Court are of extremely wide character, and it seems to me that if we find a case in which a Subordinate Court has gone out of its way to introduce matters in its judgment which are absolutely irrelevant and scandalous in their nature, we can remove those passages from the judgment, so that they may not be circulated and published to the prejudice of persons who are or are not concerned in the suit either as a party or as a witness. It is quite true that, as pointed out, there is no precedent for such action except in a recent case (C. R. P. No. 888 of 1916), to which I was a party. There the question of jurisdiction was not discussed, though it was assumed that we had jurisdiction to delete certain passages from the judgment of the Subordinate Court. On the other

hand, the question was considered in another recent case (C. R. P. Nos. 587, 588 and A. A. O. Nos. 205 and 206 of 1914) [*Ramabadra Naidu* v. *Subramania Iyer* (1)] by Sadasiva Aiyar and Moore, JJ., in which Sadasiva Aiyar, J., expressed his opinion affirming our jurisdiction. I quite realise that it must be in extremely exceptional cases that the High Court will be called upon to interfere in a matter of this sort, and I am entirely of opinion that we ought to act with the greatest caution in making such an order as has been applied for in this case. On the merits, however, the application, in my opinion, must fail, because it could not be said that the remarks which are objected to were altogether irrelevant in the view which the Subordinate Judge took of the case. I do not suggest for a moment that those remarks were justified upon the evidence and in fact. We have expressed our opinion in the judgment in the appeal that they were not justified at all. But, on the other hand, it could not be said that the observations were clearly irrelevant and did not bear on the merits of the case. For these reasons I agree in dismissing the petition.

OLDFIELD, J.—In this petition we are asked to expunge certain portions of the judgment of the Subordinate Judge of Kumbakonam, in Original Suit No. 79 of 1914, which has come before us on appeal. We are asked to do so by a person, who was not a party to that suit and was merely the Vakil of a party, in the exercise of our alleged powers under section 107, 5 & 6 Geo. V, C. 61.

It has not been shown that any Court in England has ever given similar relief or that any other High Court has done so, either under the provisions above specified or the corresponding section 15, 25 & 26 Vic. C. 104. In this High Court such relief has been given only, so far as we have been shown, in one recent case, C. R. P. No. 888 of 1916, but without discussion of the Court's power to give it, whilst in another C. R. P. Nos. 587, 588 and A. A. O. Nos. 205 and 206 of 1914 [*Ramabadra Naidu* v. *Subramania Iyer* (1)], one learned Judge held that it might be given in suitable cases and the other refused to express an opinion; and in the latter case it may be observed that the appellants-petitioners were parties to the proceedings. There is accordingly no course of authority binding on us in petitioner's favour; and the absence of such authority is further material as justifying a doubt whether the exercise of the power in question is essential to the performance of our duty of superintendence under the provision above referred to.

In the absence of authority the matter must be decided on general principles. It seems to me, with great respect, that the exercise of this power is not necessary and would not be advisable and that, therefore, the right to ask for it should not be newly recognised at this date as covered by the general term 'superintendence'. It has not been shown that any function resembling this has ever been treated as covered by it. It is true that in some cases, to which (as I understand my learned brother) he would confine interference, the judgment may contain irrelevant matter, scandalous or blasphemous, by which strangers to the proceedings may be aggrieved and which, as in the instance above referred to, could justly be expunged without investigation of any fact in issue. But such cases will be very rare; and it is not necessary on their account to authorise a course of procedure, which would involve us in the risk of grave inconvenience. For there would be entailed, *firstly*, in many cases the novel recognition of the right to the Court's assistance in favour of persons not parties to or directly interested in any proceeding before it; *secondly*, the investigation of many cases, in which the relevancy and correctness of the observations complained of would not be ascertainable readily or without enquiry into the merits. Such inquiry would frequently, it is to be feared, be asked for on account of personal enmity against the Judge; and its result would not necessarily be in any degree convincing, since it would have been reached without the assistance of any one interested to oppose the petition.

In these circumstances, I would not interpret the Court's duty of superintend-

(1) 33 Ind. Cas. 608; 3 L. W. 283.

ence as covering the grant of the relief asked for by petitioner and I would, therefor, dismiss his petition without expressing an opinion on its merits.

M. C. P.

Petition dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1995 OF 1914.

April 11, 1918.

Present:—Mr. Justice Scott-Smith.

GOPI DAS—DEFENDANT—APPELLANT

versus

LAL DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Suit for removal of old mahant, *appointment of new* mahant *and vesting of trust property in new* mahant, *maintainability of—Parties, necessary—Court-fee payable.*

Where certain persons, who were entitled to elect the *mahant* of a Dera, decided that for certain reasons the defendant, the old *mahant*, was no longer fit for the office of *mahant* and elected another person as the new *mahant* and thereupon a suit was brought under section 92 of the Civil Procedure Code for the removal of the defendant, who was in charge of the trust properties, from the office of *mahant*, the appointment of a new *mahant* and the vesting of the trust properties in the new *mahant*:

Held, (1) that the suit was properly brought under section 92 of the Civil Procedure Code; [p. 934, col. 1.]

(2) that the new *mahant* elect was not a necessary party to the suit; [p. 934, col. 2.]

(3) that it was not necessary to stamp the plaint with a Court-fee stamp calculated *ad valorem* on the value of the trust property, inasmuch as the plaintiffs were seeking nothing for themselves but merely the removal of the defendant from the office of *mahant*, which would involve his ejectment from the immoveable property of which he was in possession as *mahant*. [p. 934, col. 2.]

Miscellaneous second appeal from the order of the Additional Divisional Judge, Lahore, dated the 22nd July 1914.

Mr. *Beechey*, for the Appellant.

Mr. *B. Bevan Petman*, for the Respondent.

JUDGMENT.—The suit, out of which the present appeal arises, was brought by the two plaintiffs with the permission of the Collector under section 92, Civil Procedure Code. The trust property in suit is connected with a religious institution in Kasur, known as Dera Bawa Hari Har, of which defendant Gopi Das was said to have been elected Mahant some eighteen years before suit. The prayers in the plaint were—

(*a*) that the defendant be removed from the Mahantship of the temple of Dera Bawa Hari Har and ejected from the property attached thereto;

(*b*) that Pritam Das or some other Beragi Sadhu be appointed Mahant in accordance with the custom of the Dera, and that it may be directed that the *waqf* property be made over to the new Mahant.

The first Court held that Pritam Das was a necessary plaintiff, as there was an allegation in the plaint that he was elected a Mahant in place of Gopi Das, and secondly that there should be a Court-fee on the plaint calculated *ad valorem* on the value of the property attached to the shrine. It directed the amendment of the plaint by adding Pritam Das as a plaintiff and by making up the Court-fee, and as its order was not complied with, it rejected the plaint. On appeal it was held by the Additional Divisional Judge of Lahore that Pritam Das was not a necessary plaintiff and that the plaint was properly stamped. He accordingly accepted the appeal, set aside the order of the lower Court and remanded the case to the first Court for decision on the merits.

Defendant has filed a second appeal in this Court. Attention is drawn in argument to paragraph 7 of the plaint, in which it is stated that the Beragi Sadhus in their general meeting and with the concurrence of the Mahant of Babali, all assembled at Kasur, had unanimously declared the defendant unfit for Mahantship and had in his place elected Pritam Das to be Mahant. It is argued that according to this statement the defendant has been dismissed from the office of Mahant and Pritam Das has been elected in his stead and that, therefore, there can be no suit for removal of the Mahant or for appointment of a new one within the meaning of section 92, Civil Procedure Code. It is further argued that as defendant is no longer the Mahant or trustee his possession of the trust property is unlawful, that he is in other words a trespasser and that any person suing to dispossess him from the trust property must sue on a fully stamped plaint. Defendant is admittedly acting as Mahant of the shrine

even though Pritam Das may have been elected in his place. In the words of the lower Appellate Court, Gopi Das is still *de facto* Mahant of the shrine even though Pritam Das may be *de jure* Mahant. What I understand the plaintiffs to say in their plaint is this. For certain reasons stated, the persons who were entitled to elect the Mahant have decided that the defendant is no longer fit for the office of Mahant and have elected Pritam Das as the new Mahant. They have not as yet removed Gopi Das from the office of Mahant. For the purpose of his removal they have brought this case and invoked the aid of the Court. I am quite unable to agree with Mr. Beechey, Counsel for the appellant, that the effect of the resolution referred to in paragraph 7 of the plaint was to remove the defendant from the office of Mahant. He is still acting as Mahant and is in charge of the trust property and in order to remove him it was necessary for a suit to be brought. I hold that the suit is one such as is contemplated by section 92, Civil Procedure Code.

In *Ghazoffar Husain Khan* v. *Yawar Husain* (1), the following passage occurs:—

"A suit instituted under section 539 is not a suit in which plaintiffs claim or can claim for themselves possession of the trust property. They merely ask the Court to vest the trust property in trustees duly appointed to manage the trust and to take it out of the hands of trustees who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power under the section to vest the trust property in the new trustees and it seems to me reasonably clear that the Court may direct a trustee who is being removed from the trusteeship to make over the trust property to the new trustee or trustees. .... As regards the Court-fee, in many cases the costs of such a suit as this fall on the trust estate, and it seems to me that as the decree in such a suit works no change in the beneficial ownership of the property, it would be a hardship to impose upon the trust estate the payment of the ordinary Court-fee payable in respect of a hostile suit for recovery of land on title."

In *Yad Ali* v. *Mubarak Ali* (2), the following passage occurs:

"The prayer for consequential relief in the amended plaint, however, it will be observed, did not take the form of a prayer for delivery to the plaintiffs of possession of the mosque and of the immoveable property appertaining thereto, because had it taken that form, the plaintiffs would have had to pay an *ad valorem* Court-fee stamp upon the value of the said property, which in this case was found by the first Court, after a remand by the lower Appellate Court, to be Rs. 5,648-10-0. In fact the defendant took the objection that the Court-fee stamp affixed by the plaintiffs was insufficient, but the first Court decided, and decided we think rightly, upon the authority of the ruling in *Mahant Mangal Das Mahant Narinjan Das* (3), that since the plaintiffs simply sought the removal of the defendant from the office of *mutwalli*, which would involve his ejectment from the immoveable property of which he was in possession in that capacity, and did not seek possession of the property for themselves, full stamp could not be levied upon the value of the said property."

Following these authorities I am of opinion that it was not necessary to stamp the plaint with a Court-fee stamp calculated *ad valorem* on the value of the trust property. The plaintiffs seek nothing for themselves in the present suit. They seek the removal of the defendant from the office of Mahant, which would involve his ejectment from the immoveable property of which he is in possession in that capacity.

I also fully agree with the lower Appellate Court that there is no necessity for Pritam Das to be joined as a plaintiff in the present suit. The suit has been correctly instituted by two of the three persons to whom the Collector gave leave to sue under section 92, Civil Procedure Code, and there is no sufficient reason why they should not alone maintain the suit. Mr. Beechey has contended that defendant claims part of the property in suit as

(1) 28 A. 112 at p. 117; 2 A. L. J. 591; A. W. N. (1905) 208.

(2) 2 Ind. Cas. 107; 53 P. R. 1909; 37 P. W. R. 1908.

(3) 56 P. R. 1895.

his own private property. No plea to this effect has as yet been made by the defendant, so it is not necessary for me to deal with it. It will be dealt with by the Court which tries the suit. Mr Petman who appears for the respondent has brought to my notice that one of the original plaintiffs has died. He cites *Parameswarem Munpu* v. *Narayanan Namboodri* (4) as authority for the proposition that the death of one of the plaintiffs in a suit under section 92, Civil Procedure Code, would not cause the abatement of the suit. As at present advised, I am disposed to agree with this ruling. But the point is not before me directly and if it arises, it should be disposed of by the Court trying the case.

The appeal is dismissed with costs.

Appeal dismissed.

(4) 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 805; (1916) 1 M. W. N. 402; 31 M. L. J. 279.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2154 AND 2703 TO 2713 OF 1916.

July 1, 1918.

Present:—Mr. Justice Walmsley and Mr. Justice Panton.

ANNADA PRASANNA LAHIRI—PLAINTIFF—APPELLANT

versus

BADULLA MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenure-holder, whether can change status to prejudice of tenants—Estoppel by pleadings, whether can be proved by copy of judgment which contains summary of pleadings.

A tenure-holder cannot be allowed to change his status to that of a *raiyat* to the prejudice of tenants on the land at the time of the change and even as regards tenants who enter upon the land after the change, their status would not be prejudicially affected if the change in the status of the tenure-holder is only in respect of an undivided portion of his tenancy and not in respect of the whole of that tenancy. [p. 987, col. 1.]

A plaintiff who wants to show that the defendants are estopped from raising a certain plea by reason of their pleadings in a previous suit between the parties cannot do so by merely producing a copy of the Court's judgment in the previous suit which contains a summary of the pleadings in that suit, but must produce the written statement filed by the defendants in that suit. [p. 987, col. 1.]

Appeals against the decrees of the Additional Subordinate Judge, Rajshahi, dated the 11th July 1916, affirming the decrees of the Munsif, Naogoan, dated the 24th May 1915.

FACTS.—Iswar Chandra Ghose and Bhagwan Chandra Ghose had a tenancy of 184 *bighas* (which according to the plaintiff was an occupancy *jote* and according to the defendants a tenure) under the entire body of landlords from before 1890. In 1890 the Ghoses executed 3 *kabuliyats*, each for less than 100 *bighas*, in respect of these lands, which on measurement were then found to be about 250 *bighas*, in favour of Bindeshwari Debi, the proprietor of a 2/3rd share. Before the execution of these *kabuliyats* the Ghoses had in 1888 mortgaged these lands to one Tarini Kanta Chowdhury, who subsequently purchased them in execution of his own mortgage decree. Later on Tarini Kanta sold his auction-purchased lands to one Siva Sahai in the year 1894. After the mortgage to Tarini Kanta the Ghoses again mortgaged these lands in 1892 to the aforesaid Bindeshwari Debi, the proprietor of a 2/3rd share. At the sale in execution of this second mortgage decree the plaintiff purchased them in 1897. In 1903 the plaintiff brought a redemption suit against Siva Sahai Sukul. All the present defendants were made parties to that suit, which was decreed. Subsequently the plaintiff redeemed. In the year 1911 the plaintiff instituted suits for arrears of rent against the defendants, which were all decreed. The present suits were brought in the year 1913 for ejecting the defendants from their holdings.

Babu *Mohendra Nath Roy*, (with him Babu *Profulla Chandra Chakraverty*), for the Appellants—In the mortgage-deed in favour of Tarini Kanta the Ghoses described their tenancy as a transferable occupancy *jote*. So the status of Siva Sahai who was a transferee from Tarini Kanta was that of an occupancy *raiyat*. The lower Appellate Court has found that the defendants were inducted on the land by Siva Sahai Sukul. They can't now be heard to say that their landlord

was a tenure-holder and not an occupancy *raiyat*. The plaintiff appellant is now in the position of Siva Sahai.

The three *kabuliyats* in favour of Bindeshwari, the 2/3rd landlord, were executed before the defendants came on the land. In these *kabuliyats* also the Ghoses described their holdings as occupancy *jotes*. The acceptance of rent by the remaining 1/3rd landlord at the rates fixed in these *kabuliyats* amounted to a ratification on his part of the sub-division of the holding into three separate occupancy *jotes*. Oral evidence to show that the lands formed a tenure and not occupancy *jotes*, was inadmissible.

It appears from the judgment in the rent suits brought by the appellant against the respondents that the latter resisted the plaintiff's claim for rent in those suits, mainly on the ground that the occupancy *jotes* purchased by the plaintiff were not transferable. This admission on the part of the defendants as regards the character of the tenancy was binding on them. The written statement of the defendants in those suits ought to have been put in. But the summary of the pleadings as given in the judgment is also admissible to show the nature of the defence.

Babu *Krishna Kamal Maitra*, for the Respondents.—The first point was not taken in either of the Courts below. The appellant is not entitled to raise it in this Court for the first time. Further it is not clear from the mortgage deed in favour of Tarini Kanta that what was mortgaged was an occupancy *jote*. The words used to describe the tenancy are *jote jama*.

As regards the second point, the original tenancy of the Ghoses was of more than 100 *bighas*. The presumption is that it was a tenure. A tenure-holder cannot be allowed to change his status to the prejudice of the tenants on the land. *Jagabandhu Saha* v. *Magnamoyi Dassi* (1).

As regards the third point, the judgment in the rent suits is no evidence of the contents of the written statement filed by the defendants in those suits. The written statement ought to have been put in. Further the defence set forth in the written statement was meant to meet the allegations contained in the plaint. It cannot bind the defendants in the present suit.

Babu *Profulla Chandra Chakraverty* replied.

(1) 36 Ind. Cas. 884; 22 C. W. N. 89; 24 C. L. J. 363; 44 C. 555.

JUDGMENT.

WALMSLEY, J.—These appeals are preferred by the plaintiff: he brought the suits from which they arise to eject the defendants from various parcels of land, which they hold under him. His case is that the defendants are under-*raiyats*, and that his own interest is that of a *raiyat*. The Courts below have found that the plaintiff served notices on the defendants, but they have upheld the defence plea that the plaintiff is a tenure-holder and that the defendants are *raiyats*, not under-*raiyats*.

The learned Subordinate Judge has compiled a very careful narrative of the transactions affecting the tenancy since 1888 when the Ghoses, who may be called the plaintiff's predecessors, executed a mortgage in favour of one Tarini Kanta, and it is unnecessary to reproduce the narrative in this judgment.

Three points have been pressed on behalf of the plaintiff, namely, (1) that it was not open to the lower Courts to go into the conduct of the parties for the purpose of determining the origin of the tenancy.

(2) That the *kabuliyats* executed by the Ghoses speak of *raiyati* interests and oral evidence could not be admitted to vary the terms of the contracts.

(3) That if any presumption arises from the area of the holding, it is rebutted by the admissions of the defendants made in certain rent suits of 1911.

Regarding the first argument it is said that the Ghoses, when mortgaging the tenancy to Tarini Kant, described it as a *jote jama* in which they had a transferable occupancy right; Tarini bought the holding in execution of a decree on the mortgage: Siva Sahai bought from Tarini, and the defendants were inducted by Siva Sahai, and, therefore, they cannot deny that the interest of the Ghoses was that of occupancy *raiyats*. It is pointed out, however,

on behalf of the respondents that this argument was not put before either of the lower Courts. I think, therefore, that we should not allow it to be urged in this Court; and I may add that the expressions used in the mortgage are wanting in exactitude.

As for the second contention, the *kabuliyats* executed by the Ghoses in 1890 are described as ordinary *raiyati kabuliyats*. The learned Subordinate Judge, however, finds as a fact that the tenants were inducted on the land by Siva Sahai before the earliest date at which Jnanada Sukul can possibly be regarded as having agreed to the division of the tenancy effected by the *kabuliyats*. It is conceded that a tenure-holder cannot be allowed to change his status to that of a *raiyat* to the prejudice of tenants on the land at the time of the change, and it follows that, to the extent of Jnanada Sukul's share, the change could not be operative as against the tenants. It is suggested that the change could be sanctioned by Bindeshwari and was sanctioned to the extent of her share at the time of the execution of the *kabuliyats*, that is, a few years before the defendants entered on the land. We have not been referred to any authority for this proposition, and it is one which I should be very unwilling to accept in a case like the present where the *kabuliyats* do not refer to specific land, but to an undivided share in land. I think this argument also fails.

With respect to the third contention, the plaintiff took the extraordinary step of producing a copy of the Court's judgment instead of the defendants' written statement. The judgment contains a summary of the pleadings no doubt, but if the plaintiff wanted to show that the defendants are estopped from pleading that the plaintiff is a tenure-holder, he should have produced the written statement. In any event, however, it is clear that the defendants were meeting the particular allegations made by the plaintiff, and when they pleaded that occupancy rights were not transferable, they did not admit that the plaintiff's right was that of a *raiyat* and not that of a tenure-holder.

In my opinion, the arguments urged on behalf of the plaintiff cannot be sustained, and on the very definite finding of fact recorded by the learned Subordinate Judge the appeals must fail. They are dismissed with costs.

PANTON, J.—I agree.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 47 OF 1916.

June 21, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

RAMMAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM GOPAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debt, antecedent—Personal covenant in simple mortgage, whether antecedent debt—Son, liability of, to pay father's debts.

The personal obligation comprised in every simple mortgage may be separated from the mortgage debt, and though the mortgage may in certain circumstances be invalid, the personal obligation to repay the money may amount to an antecedent debt which a Hindu son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral [p. 99, col. 2.]

Appeal against the decree of the Subordinate Judge, Hardoi, dated the 6th April 1916.

The Hon'ble Pandit *Gokaran Nath Misra* and Mr *J. N. Chak*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of possession of the mortgaged property. The mortgage in question was effected by Ram Narain, the father of defendant No. 1 and father-in-law of defendant No. 2 who is the widow of another son of his, in favour of Narain Prasad, the predecessor-in-interest of the plaintiffs, on the 11th October 1905. The amount secured by the mortgage was Rs. 12,500, out of which Rs. 7,000 were credited towards a prior mortgage of the 12th March 1902 held by Narain Prasad, Rs. 1,091-8-3 were credited towards interest due thereon, Rs. 5,000 were left for payment to Banwari Lal in satisfaction of his decree against the mortgagor dated the 30th November 1904, Rs. 2,911 were credited towards a *bahi* debt due to the mortgagee and the balance was paid in cash before the Sub-Registrar. The properties mort-

gaged comprised the entire villages of Sikandarpur and Ratanpur situated in Tahsil Aligarh, district Farrukhabad, and the mortgagee right in a grove standing in Chak Bamiari, district Hardoi. The registration of the mortgage deed was effected in the latter district. The mortgage-deed provided for the payment of the mortgage money—with interest thereon at 6 per cent. per annum compoundable half-yearly—within five years, and one of the conditions in the mortgage-deed was that if the mortgagor failed to pay the said mortgage money within five years, he shall deliver possession of the mortgaged properties to the mortgagee.

On the 21st April 1913 the learned Subordinate Judge decreed the claim of the plaintiffs for possession of the grove but dismissed it in regard to the remaining properties mortgaged, holding that the registration of the mortgage-deed, so far as it affected the latter properties, was invalid. On appeal this Court set aside that decree and remanded the case to the Court below for its decision on the merits after determination of such of the issues as had remained undecided. The only issues on which this Court in common with the Court below expressed its findings, were those relating to the nature of the interest which the mortgagor held in the mortgaged properties, the validity of the registration of the deed of gift and the obtaining of the deed of mortgage by fraud and undue influence. The finding of this Court and of the Court below on the point last mentioned was that no fraud or undue influence was established. On the other matters the findings of this Court disagreed with those of the learned Subordinate Judge and were to the effect that the Farrukhabad property was acquired out of joint family funds possessed by the family of which Bhajan Lal and Kam Narain were members, and in which Banwari Lal and Ram Gopal obtained rights as co parceners upon their birth, that Banwari Lal had relinquished his share under an amicable arrangement by which he was allowed a sum of Rs. 5,000 in lieu of his rights and that the registration of the deed of mortgage was not invalid. The matters which remained for determination, were whether the mortgagor had received the consideration of the mortgage deed in suit, whether defendant No. 1 was benefited by the loan and was bound by it and whether the covenant to put the mortgagee in possession of the mortgaged properties, if the mortgage money was not paid within 5 years, was enforceable against him.

The learned Subordinate Judge came to the conclusion that the consideration paid by the mortgagee did not exceed Rs. 6,232-7-9, out of which Rs. 497-7-9 were shown not to have been taken for the benefit of the minor and the rest represented antecedent debts for which the minor was liable. He refused, however, to give a decree for possession of the mortgaged villages, but decreed the claim for the recovery of Rs. 5,735 with interest thereon at the stipulated rate by the sale of the mortgaged properties.

The findings of the learned Subordinate Judge on these points cannot be sustained. He considered that the sum of Rs. 3,000 principal and Rs. 1,091-8-3 interest credited in the mortgage-deed in suit towards an earlier mortgage of the 12th March 1902 was not really due, because the alleged earlier mortgage was fictitious. The reason suggested for the execution of the fictitious mortgage by Hulas Singh (D. W. No. 8) is that there was a quarrel between Ram Narain and his son, Banwari Lal, and that the former said that he had executed the deed in favour of one of his relations to defeat the claim which the latter might bring for partition. On the 15th August 1904 a suit for partition was brought by Banwari Lal (Exhibit 42). It was compromised on the 30th November 1904 (Exhibit 44), whereby Banwari Lal agreed to accept Rs. 5,000 in lieu of his claim to a share in the family properties. That sum of Rs. 5,000 was paid to Banwari Lal out of the consideration of the mortgage in suit, and if the mortgage of the 12th March 1902 was fictitious, there is no reason why after the claim of Banwari Lal had been amicably settled, the money due on that mortgage should have been acknowledged and credited in the mortgage in suit. Hulas Singh holds a lease of one of the villages in suit from Ram Narain and he is naturally interested in helping his lessor to defeat the claim of the mortgagees. He

alleges that he was present at the time of the registration of the aforesaid mortgage and learnt there from Ram Narain that it was fictitious, having gone there to pay the revenue due by him: but no instalment of revenue is generally payable in March. The statement of Hulas Singh cannot, therefore, be trusted.

Another witness produced by the defendants to prove that the earlier mortgage was fictitious is Jagannath (D. W. No. 2). He is an attesting witness to the said mortgage. He states that Ram Narain executed it to bring pressure on Banwari Lal who was quarrelling with him. He further states that Ram Narain gave him Rs. 2,550 from his own house and that the said money was shown before the Sub-Registrar as having been paid by the mortgagee and was then returned to him. The falsity of the former statement is apparent from the fact that after the claim of Banwari Lal was settled by compromise, the mortgage of the 12th March 1902 was credited in the mortgage-deed in suit and the falsity of the latter is equally apparent, because if the mortgage-deed was fictitious, there was more reason for Ram Narain to have concealed the fact from outsiders than to have published it by giving the money to be shown before the Sub-Registrar to such a person. He is not a resident of the village in which Ram Narain lived. He was at one time a *chaukidar* but was dismissed from service for making a false report (Exhibit 49). He admits that his brother was for sometime in the service of Ram Narain. No reliance can be placed on his statement.

On behalf of the plaintiffs Makhan (P. W. No. 3) has been examined. He states that the mortgage in question was executed in his presence and was attested by him, that Rs. 2,550 were paid before the Sub-Registrar and the receipt of the rest acknowledged by Ram Narain. He is related to one of the plaintiffs but as his statement is corroborated by the mortgage-deed (Exhibit 3) and the endorsement made thereon by the Sub-Registrar, there is no ground for discrediting his testimony.

The learned Subordinate Judge observes that the plaintiff Ramman Lal did not come forward in the witness-box to give evidence and that the non-production of the original mortgage deed is also suspicious. But Mangladin, one of the plaintiffs, has given evidence in the case and has produced account-books, proving that Rs. 450 were advanced on different dates to Ram Narain prior to the execution of the said mortgage for the expenses of some litigation which was then going on in respect of his estate in Farrukhabad (O. P. 224) and that the balance was paid before the Sub Registrar. It is suggested that another mortgage-deed executed by Ram Narain in favour of Ramman Lal on the 12th February 1894 for Rs 5,000 was held by the Subordinate Judge of Farrukhabad, in a suit filed for the recovery of the money due on the same, to have been fictitious (Exhibit A-18). But no inference can be drawn from the nature of the transaction, represented by that mortgage, in regard to the mortgage of the 12th March 1902. Mangladin explains that the original mortgage deed of the 12th March 1902 was returned to Ram Narain when the money due on it was credited in the mortgage-deed in suit. The defendants have not produced that mortgage-deed and the failure of the plaintiffs to produce it cannot in the circumstances be construed as evidence to establish that it was fictitious and was in the custody of the plaintiffs. On the evidence adduced, there can be no doubt that the mortgage of the 12th March 1902 represented a genuine debt due by Ram Narain and as it was an antecedent debt, there was a pious obligation on Ram Gopal, the minor son of Ram Narain, to pay it; and the mortgage effected in lieu of such a debt by Ram Narain is binding on him.

The next item of consideration compromising the mortgage in suit is the sum of Rs 5,000 paid by Banwari Lal on the 10th January 1906 (Exhibit 2) in pursuance of the compromise arrived at in the suit filed by Banwari Lal against Ram Narain. The effect of this compromise was to relieve the family property from the claim brought by Banwari Lal and to enlarge the share of Ram Narain and his son, Ram Gopal. By virtue of that compromise, Banwari Lal gave up all possible interest in the property which

might accrue to him in favour of Ram Narain (Exhibit 44) and as the defendant Ram Gopal was the only other son of Ram Narain, he was obviously benefited by the compromise and the loan taken from the plaintiffs to comply with its terms.

The third item of consideration is a *bahi* debt of Rs. 2,911, which is sufficiently proved by the evidence of Mangladin and the account-books produced. The learned Subordinate Judge found that there was corroborative evidence to prove items worth Rs. 735; but the letters on which he relies, show that there was a general course of dealings between the parties from a long time. On some occasions Ram Narain sent letters asking for specific sums of money. On other occasions, he might have gone to borrow the money or might have obtained it otherwise through some messenger. The mere fact that letters are not forthcoming in regard to the other items, is not necessarily evidence of the fact that no money was taken to Ram Narain. Ganesh Prasad (D. W. No. 5), who is a cousin of Ram Narain used to say to him that he had *bahi khata* accounts with Ramman Lal and that he took loans from him from time to time as necessity arose (O. P. 85). On the 23rd August Ram Narain wrote a letter to Ramman Lal asking for an advance of Rs. 2,500 (Exhibit 26). On the 26th August 1901 he acknowledged the receipt of Rs. 100 (Exhibit 27). Between the 29th June 1902 and the 31st January 1903 he wrote various letters, asking for different sums of money (Exhibits 17, 18, 19 and 28). On the 26th February 1913 and again on the 28th December 1903 he wrote letters acknowledging the receipt of different items (Exhibits 16 and 20). On the 25th January 1904 he asked for a loan of Rs. 100 (Exhibit 21). On the 27th March 1904 he acknowledged the receipt of another sum of Rs. 100 (Exhibit 29). On the 13th October 1904 he acknowledged the receipt of another similar sum (Exhibit 22). On the 3rd June 1905 sometime after the execution of the mortgage-deed in suit, Ram Narain wrote to Ramman Lal, saying that he was unable to pay the interest demanded (Exhibit 30). By the terms of the mortgage the plaintiffs were entitled to claim possession of the mortgaged property, if the mortgage money was not paid within five years, Ram Narain wrote, suggesting that possession might be taken over one or both the villages mortgaged, provision being made for his maintenance, if both were taken (Exhibit 30). On the 1st July 1907 Ganesh Prasad similarly wrote that one or both the villages mortgaged might be taken in possession in lieu of interest (Exhibit 24). On the 23rd July 1907 Ram Narain wrote again, asking Ramman Lal to take possession of one of the villages (Exhibit 23) and sent other letters asking for a further loan of Rs. 50 for the marriage of his daughter (Exhibits 25 and 31). On the 24th of January 1910 Ram Narain applied to the Collector asking that the Court of Wards might take a mortgage of his estate and pay his debts (Exhibit 48) and stating that he owed Rs. 16,000 to Ramman Lal and others. After the death of Ram Narain, Ganesh Prasad again wrote on behalf of his widow to Ramman Lal, asking him to give six months' time for the payment of the money due to him (Exhibit 32). On the 2nd March 1912 he asked Pandit Lajja Ram, a Deputy Collector, to intercede on behalf of the defendants in inducing Ramman Lal to wait for four months for the repayment of the mortgage-money (Exhibit 33). Ganesh Prasad admitted having sent the letters produced by the plaintiffs.

The accounts filed show that Rs. 4,612-13-0 were due by Ram Narain on Phagun, Sudi 4, 1960. Ram Narain struck the balance and signed it with his own hand (Exhibit 12). Thereafter other items were borrowed from time to time as shown by the day-book. The total amount due was thus Rs. 7,002-8-3 inclusive of Rs. 3,000 principal and Rs. 1,091-8-3 interest payable on the earlier mortgage. The whole of this amount was credited in the mortgage-deed in suit.

The account-books filed by the plaintiffs were kept in the regular course of business and there is no sufficient reason for supposing that the debts entered in them were not genuine. Apart from the statement of Ram Narain in the mortgage-deed in suit wherein the existence of the said debts was admitted by him, the evidence produced in corroboration of

the same is sufficient. Ramman Lal (*sic*) was admittedly the manager of the family comprising himself and his minor son, Ram Gopal, and as pointed out by their Lordships of the Privy Council in *Suraj Narain* v. *Ratan Lal* (1), the statements made by him are admissible in evidence against the other members of the family.

A sum of Rs. 497-7-9, representing the balance of the consideration, was paid before the Sub-Registrar. There is evidence to show that that money was taken by Ram Narain for the expenses of the investiture of his son, Ram Gopal, with the sacred thread. According to Shiam Lal, one of the witnesses for the defendants, the ceremony was attended by 500 or 600 persons. Mangla Prasad states that the amount aforesaid was taken by Ram Narain for the expenses of that ceremony. In the mutation proceeding, consequent on the death of Ram Narain, Ganesh Prasad (D. W. No. 5), who was present at that ceremony, admitted that the debts due by Ram Narain were incurred by him to meet the expenses of the maintenance of his family, the marriage of his daughters and the *janeo* of his son.

We have no doubt, therefore, that the entire consideration represented by the mortgage-deed in suit was taken either to pay antecedent debts or to meet a valid family necessity. The learned Counsel for the defendants-respondents contends that an antecedent debt incurred on the security of the family property ought not to be taken into account in determining the family necessity, and reliance is placed in support of that contention on the observations of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2); but what their Lordships seem to lay down is that an antecedent debt secured by a mortgage might be open to the same objection as a subsequent mortgage, effected to pay that debt. They nowhere say that the personal obligation compromised in every simple mortgage cannot be separated from the mortgage debt, and that though the mortgage may in certain circumstances be invalid, the personal obligation to repay the money may not amount to an antecedent debt, which a son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral. There is no allegation in this case that any of the debts comprised in the mortgage in suit was incurred for purposes illegal or immoral.

The plaintiffs ask for a decree for possession in enforcement of the terms comprised in the mortgage; but the learned Subordinate Judge gave them a decree for the money which, according to his finding, the defendants were liable to pay. The plaintiffs had, however, a right to insist on getting possession, to which they had become entitled in consequence of the failure of the mortgagors to pay the mortgage money within 5 years; and as held in *Jawahir Singh* v. *Chandika Bakhsh* (3) and *Muhammad Sher Khan* v. *Swami Dayal* (4), a decree for money ought not to have been forced upon them. The plaintiffs became entitled to possession on the 11th October 1910. The present suit was filed on the 1st March 1912 and by the frivolous pleas and defences raised by the defendants, some of which found favour with the Court below, they have been kept out of possession of the mortgaged property all this time. Ganesh Prasad, a relation of the defendants, said in one of his letters that if the plaintiffs were not amenable to his suggestion, they would suffer trouble as they had suffered before, and whoever may be responsible for the attitude which the defendants took up firstly in questioning the validity of the registration and secondly in questioning the necessity for the mortgage, there can be no justification in denying to the plaintiffs the relief they ask for.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed with costs here and hitherto. The defendants will, in the circumstances, bear their own costs throughout.

Appeal allowed.

(1) 40 Ind. Cas. 988; 20 O. C. 211 at p. 219; 21 C. W. N. 1065; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159; 44 I. A. 201 (P. C.).

(2) 39 Ind. Cas. 280; 39 A. 437 at p. 447; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(3) 2 O. C. 145.

(4) 30 Ind. Cas. 377; 18 O. C. 105; 2 O. L. J. 372.

QYAM-UD-DIN *v.* DELHI FLOUR MILLS COMPANY.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1287 OF 1918.

August 7, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

QYAM-UD-DIN—PLAINTIFF—APPELLANT

versus

THE DELHI FLOUR MILLS COMPANY, LTD., DELHI—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (1), Sch. I, Art. 1, applicability of—Suit for recovery of money due after adjustment of accounts—Court-fee payable.

According to section 7, clause 1), of the Court Fees Act the fee payable in a suit for money must be according to the amount claimed.

Article 1 of Schedule I of the Court Fees Act applies only to those cases which are not otherwise provided for under the Act.

Where plaintiff sued for the recovery of Rs. 1,125-4-0 alleged to be due to him, after deducting a sum of Rs 2,500 said to be due by him to the defendant on account of the price of certain goods) from Rs 3,625-4-0, which he assessed as the amount of damages suffered by him by reason of the defendant's failure to perform certain contracts entered into between the parties:

Held, that the Court-fee paid *ad valorem* on the amount actually claimed was sufficient.

Second appeal from the decree of the District Judge, Delhi, dated the 4th February 1918, affirming the decree of the Subordinate Judge, 2nd class, Delhi, dated the 20th August 1917, dismissing the claim.

Messrs. *Abdur Rashid* and *Muhammad Rafi*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—The sole question for determination in this appeal is whether the plaintiff has correctly valued the relief claimed by him and whether the Court-fee affixed to the plaint and the memorandum of appeal to the lower Appellate Court is adequate. The action brought by the plaintiff was for the recovery of a sum of Rs. 1,125-4-0 and on that amount he has admittedly paid *ad valorem* Court-fee. The plaint, however, shows that the plaintiff arrived at the amount after deducting a sum of Rs 2,500 (said to be due by him to the defendant on account of the price of certain goods) from Rs. 3,625-4-0, which he assessed as the amount of damages suffered by him by reason of the defendant's failure to perform certain contracts entered into between the parties.

The learned District Judge holds that the bone of contention between the parties is the amount of loss said to have been suffered by the plaintiff, and that the credit allowed by him to the defendant should not be taken into consideration for the purpose of determining the Court-fee to be levied upon the plaint. We are unable to concur in this view. Section 7, clause (1), of the Court Fees Act prescribes that the fee payable in a suit for money must be according to the amount claimed. Now, the plaintiff has, as stated above, paid the Court-fee in accordance with this clause, and we are not prepared to hold that Article 1 of Schedule I of the Act, which provides that a plaint or a memorandum of appeal should bear Court-fee on the amount or value of the subject matter in dispute, militates against his contention. It is to be observed that this Article applies only to those cases which are not otherwise provided for under the Act.

There can be no manner of doubt that in determining the sum to be awarded to the plaintiff, the Court has to adjudicate upon the amount of the loss sustained by the plaintiff on account of the breach of contracts; but we do not think that that amount should determine the value for the purpose of Court-fee. Indeed, there are many suits, *e. g.*, those for the rendition of accounts between parties or between principals and agents or suits involving cross-demands, in which the Court has to adjudicate upon various large items in dispute between the parties, though the actual amount claimed by the plaintiff is a comparatively small sum of money. In all these suits it is the amount claimed by, or decreed to, the plaintiff which determines the Court-fee leviable on the plaint, and not the various sums which may be the subject-matter of controversy between the parties and upon which the Court may have to record its findings before arriving at the final conclusion.

For these reasons we are of opinion that the Court-fee is sufficient and that the lower Appellate Court's decree must be discharged We accordingly accept the appeal and setting aside the decree of the District Judge remand the case for re decision. The Court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

Appeal allowed

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 26 OF 1918.

July 2, 1918.

Present:—Mr. Stuart, A. J. C.

Musammat SHAHZADI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Hafiz AHMAD ALI SHAH—AUCTION-PURCHASER AND S. T. WILLIAMS—DECREE-HOLDER—RESPONDENTS.

Execution of decree – Sale—Bid of one person, whether can be used by another—Bidder's consent, effect of.

A person cannot avail himself of the bid made by another at a Court-auction and constitute himself the purchaser by depositing the purchase-money; nor can the consent of the bidder improve his position in this matter.

Appeal against the decree of the District Judge, Lucknow, dated the 16th March 1918, confirming that of the Munsif, Lucknow (South), dated the 5th February 1918.

Mr. *H. K. Ghosh* holding brief of Mr. *Daya Kishen Seth*, for the Appellants.

Mr. *K. Dorabji*, for Respondent No. 1.

JUDGMENT.—The facts of this case are as follows. S. T. Williams held a decree against the seven appellants. In execution of this decree he attached and brought to sale a certain house belonging to the appellants. The house was put up to auction. The last bid was in the name of a certain Bahadur Khan. Bahadur Khan did not, however, deposit the 25 per cent. of the purchase-money as required by Order XXI, rule 84. A certain Ahmad Ali Shah made that deposit. Ahmad Ali Shah did not deposit this on behalf of Bahadur Khan but on behalf of himself. He subsequently deposited the remaining 75 per cent. He asserted that Bahadur Khan had purchased the house on his behalf. Bahadur Khan subsequently ratified this statement. In the meanwhile the appellants paid up the total decretal amount. They omitted, however, to deposit 5 per cent. of the purchase-money as required by Order XXI, rule 89. When Ahmad Ali Shah applied for confirmation of the sale, the learned Munsif confirmed the sale and his order has been upheld by the learned District Judge.

I do not consider that there was any regular purchase. The sale should have been to Bahadur Khan if Bahadur Khan deposited the money. He did not do so. The sale to Ahmad Ali Shah, in my opinion, was an irregular sale which cannot be upheld. Irrespective of the fact that the appellants did not deposit 5 per cent. of the purchase-money, the sale is a bad sale. Therefore, this appeal must succeed. I direct that the sale be set aside and that the amount deposited by Ahmad Ali Shah be returned to him. Costs on parties.

Appeal allowed.

PATNA HIGH COURT.

CUTTACK CIRCUIT

MISCELLANEOUS APPEAL NO. 2 OF 1918.

April 9, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Roe.

ARJUN NAIK—DECREE-HOLDER—APPELLANT

versus

LAKHAN—JUDGMENT DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), O. XXI, r. 11 (3)—Execution of decree, application for—Failure to file copy of decree, effect of—Application, whether in accordance with law—Limitation, saving of.

The question whether an application for execution is in accordance with law or not must be determined with regard to what the law requires to be done at the time when the application is made, and it is not permissible to consider what the law requires to be done after the application has been made. [p. 994, col. 2.]

ARJUN NAIK *v.* LAKHAN.

An application for execution of a decree, which satisfies all the requirements of rule 11 of Order XXI of the Civil Procedure Code, but which is subsequently dismissed on account of the decree-holder's failure to file a copy of the decree within the time specified by the Court, is an application in accordance with law within the meaning of Article 182 of Schedule I of the Limitation Act and operates to save limitation. [p. 994, col. 2.]

Appeal against an order of the District Judge, Cuttack.

Mr. *B. N. Sinha*, for the Appellant.

Mr. *S. N. Roy*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings in execution. Two questions arose, (1) whether the decree had been satisfied, and (2) whether the particular application for execution was barred by limitation. In regard to the first point there is a concurrent finding of the original Court and the Court of first appeal. We are concerned only with the second question. The application for execution was filed on the 11th May 1917. It recited that the suit had been decreed by the Munsif on the 30th April 1911, and that the appeal had been disposed of by the High Court on the 15th of May 1914 The only defects in the application when filed were that the amount of costs were stated under the heading (*g*) of sub rule 2 of rule 11, Order XXI, namely, under the head "the amount with interest (if any) due upon the decree." It would have been more regular to state the amount of costs separately under heading (*h*) of that sub-rule. Another defect in the application as filed was that reference was made to a previous execution petition filed with reference to the original decree made by the Munsif. It is not clear whether this is or is not a defect; all that can be said is that the previous application was not an application for the execution of the decree of the High Court. So far as the actual requirements of rule 11 are concerned, all the requirements of that rule were complied with when the application was presented. It appears, however, that the Court under sub-rule 3 of that rule required the applicant to produce a certified copy of the High Court decree within fifteen days' time and on the failure of the applicant to comply the application was rejected. The learned District Judge in first] appeal has held that on the failure to comply with the order of the Court requiring a copy of the decree the application became an application not in accordance with law and was, therefore, not sufficient to save limitation. Under Article 182 of the First Schedule to the Indian Limitation Act, three years' limitation commences to run from the date of applying in accordance with law to the proper Court for execution or for some steps taken in aid of execution of the decree or order. Where no such application has been made or any such steps taken, the limitation runs from the date of the decree or order. Execution would in the present case be barred unless it is possible to say that the application in execution was made in accordance with law or a step in aid of the execution is taken.

In the case of *Pachiappa Achari* v. *Poojali Seenan* (1) it was held by the Madras High Court, an application for execution is in accordance with law although the applicant does not comply with the order of the Court requiring a copy of the decree. The same view was taken by the Allahabad High Court in *Raghunandan Lal* v. *Badan Singh* (2). I am of opinion that a correct view was taken in these two decisions, namely, that the questions whether the application is in accordance with law or not, must be determined with regard to what the law requires to be done at the time when the application is made, and in order to ascertain whether the application is in accordance with law it is not permissible to consider what the law requires to be done after the application has been made. With the exception of informalities to which I have above referred, which would be excused under the rule long ago established by the Calcutta High Court that mere matters of informalities are disregarded, the application was in accordance with law at the time it was made. We have been referred to sub-rule 2 of rule 17, Order XXI, which provides, where an application has been amended within time under the order of the Court, it is deemed to be an application in accordance with law and presented on the date when it was first presented. We have been asked to hold

(1) 28 M. 557.
(2) 43 Ind. Cas. 914; 16 A. L. J. 87; 40 A. 209.

this as meaning that where a Court requires a copy of the decree to be filed and the copy is not supplied in time, the original application should be deemed to be not in accordance with law. This is not what the sub rule says. The intention of the sub rule is to relax the law in favour of the decree-holder, it is not possible to interpret it in the direction of making the law more strict against the decree-holder. In these circumstances this appeal must be allowed. The order of the District Judge is set aside and that of the Munsif restored. The appellants are entitled to costs, one gold *mohur*.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 18, 1918.

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

Sheikh SHARFUDDIN HOSSAIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SAMANTA RADHA CHARAN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI B. C. of 1859), ss. 3, 5, 6, 33—Sale for arrears of Government revenue—"Illegality" and "irregularity," distinction between—"Official Gazette"—Publication in vernacular Gazette, whether necessary.

Failure to notify in the vernacular Government Gazette the sale of an estate, the Government revenue of which exceeds Rs. 500, is not an illegality which *per se* vitiates the sale as having been made "contrary to the provisions" of Act XI of 1859. [p. 996, col. 2.]

Semble.—It is a sufficient compliance with paragraph 2 of section 6 of the Act if the sale is notified in the official Gazette published at Calcutta. [p. 996, col. 2.]

Appeal against the judgment and decree of the Calcutta High Court (Mr. Justice Richardson and Mr. Justice Newbould), dated the 1st July 1913, reported as 20 Ind. Cas. 423, reversing a judgment and decree of the Subordinate Judge, Cuttack, dated the 30th March 1911.

FACTS.—Plaintiffs were suing a trespasser to recover possession of their Zamindari in the Balasore District of Orissa. Meanwhile there was default in payment of revenue and the Zemindari, the *sadr-jama* (revenue) of which was Rs. 1,586, was put up for sale under Act XI of 1859 and purchased by defendants. Plaintiffs brought the present suit to set aside the sale on the ground that it had not been notified in the Urya Government Gazette (although notified in that published in Calcutta). Before 1895 it was the practice to notify such sales in both Gazettes, but from 1895 to 1911 publication in the vernacular Gazette was discontinued under orders of the Local Government. The Subordinate Judge of Cuttack held that the vernacular Gazette was included in the term "official Gazette" in section 6 of Act XI of 1859, and that in view of the Full Bench ruling of *Lala Mobaruck Lal* v. *Secretary of State* (1) the omission to notify the publication in such vernacular Gazette was an illegality not cured by section 33.

He, therefore, set aside the sale.

On the question of substantial injury he observed: "Although the property was sold at a much lower than its fair price, had it been sold at a private sale, it cannot be said that the price was inadequate when it was made at a revenue sale and when the purchaser knows that he would have to plunge into litigation before getting quiet possession." The Calcutta High Court (Richardson and Newbould, JJ.) reversed this decision: they held that the Full Bench ruling relied on by the lower Court had been practically overruled by the Privy Council decision in *Gobind Lal Roy* v. *Ramjanam Misser* (2), "the effect of which," they observed, "is to annul to a very great extent the distinction between illegalities and irregularities": that publication in the Calcutta Gazette was a sufficient compliance with section 6 of the Act, but that even if it were not section 33 applied to the case and that the sale could not be set aside without proof of substantial injury by reason of the irregularity complained of.

Hence this appeal.

Mr. *A. M. Dunne* (with him Mr. *Ramsay*), for the Appellants.—The case is outside

(1) 11 C. 200; 5 Ind. Dec. (N. S.) 893 (F. B.).
(2) 20 I. A. 165; 21 C. 70; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679 (P. C.).

section 33 of the Act, but even if that section applies, the plaintiffs have suffered substantial injury. As to this there are concurrent findings against us, but the first Court has adopted a wrong test of what is a fair price. Our main ground, however, is that the Subordinate Judge was right in holding that the failure to notify the sale in the Urya Gazette was an illegality which in itself vitiated the sale. The Act should be construed generously in favour of those whose property is sold. "Gazette" in section 6 includes Gazettes: the Legislature did not mean one Gazette only in a language which nine-tenths of the people do not understand. *Lala Mobaruck Lal* v. *Secretary of State* (1) is an express authority in my favour, and *Gobind Lal Roy* v. *Ramjanam Misser* (2), though there are observations of the Board against me, was decided on an entirely different point, *viz.*, that the ground of complaint had not been taken before the Commissioner.

Their Lordships intimated to Mr. *Kenworthy Brown*, who appeared for Respondents, that they did not desire to hear argument but would like a reference to any further authorities. He referred to *Tasudduk Rasul Khan* v. *Ahmad Husain* (3).

[LORD SHAW.—That is a complete negation of the Indian case cited.]

JUDGMENT.

LORD SHAW.—This is an appeal from a judgment and decree of the High Court at Calcutta, dated the 1st July 1913*. That decree reversed a judgment and decree of the Subordinate Court of Cuttack, dated the 30th March 1911.

The suit was one to set aside a sale for arrears of Government revenue. The sale had been conducted under the provisions of the leading Statute, Act XI of the year 1859.

By section 33 of that Statute it is provided that no such sale "shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of." The defect of procedure which is said not to be merely an irregularity but to amount to an illegality is this: that publication of the notification of sale was necessary in the Urya vernacular Government "Gazette," circulating in the district. By order of the Lieutenant Governor, manifestly made for purposes of public convenience, it was provided that a notification of sales should not appear in that publication. On the hypothesis, which is by no means admitted, that non-publication in the "Urya Gazette" was an irregularity, the question for the Board is, whether this was an illegality, so as to make the sale "contrary to the provisions" of the Act.

It is admitted by Mr. Dunne, with his usual candour, in the argument presented to the Board, that the main provisions applicable to the conduct of sales, namely, those of sections 3, 5, and 6 of the Statute, have been, in all points, complied with. These sections provide, not only for notification in the official Gazette, which is, on the proper interpretation of those sections, the official Gazette published in Calcutta, but they also make provisions for a local mode of communication in the particular district, *viz.*, "in the language of that district, in the office of the Collector," otherwise as set forth in section 3.

In these circumstances their Lordships are of opinion that no ground has been made out in the present case for the argument that this sale has been made by procedure contrary to the provisions of this Act.

There remains further the question of irregularity. Their Lordships are of opinion, not only that there has been no contravention of the provision of the Statute, but that, even if their view was that any irregularity had been committed, upon which it is not necessary to enter, there has been no proof offered that any substantial injury arose to the appellants in consequence of the irregularity complained of.

Their Lordships say no more upon the question, except that on the latter point all the Courts below are agreed, that is to say, that it is not established that the appellants bring forward a case of any

(3) 20 I. A. 176; 21 C. 66; 17 Ind. Jur. 534; 6 Sar. P. C. J. 324; Rafique & Jackson's P. C. No. 131; 10 Ind. Dec. (N. S.) 676 (P. C.).

*See 20 Ind. Cas. 423.—*Ed.*

substantial injury attributable to the irregularity which they allege. The essential conditions for setting aside the sale have accordingly not been satisfied.

In those circumstances their Lordships do not doubt that the High Court have come to a correct conclusion, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents.—*Tanken, Ford & Chester.*

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 248 OF 1918.

April 2, 1918.

Present:—Mr. Justice Broadway.

THARYA RAM—JUDGMENT-DEBTOR—APPELLANT

versus

POPAT RAM AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Companies Act (VII of 1913), ss. 186, 199, 200, 201—Civil Procedure Code (Act V of 1908), ss. 39, 42, O. XXI, rr. 4, 5, 6, 7, 16—Order of payment—Assignment of order—Application for execution by assignee—Procedure.

Section 199 of the Companies Act enacts that any order passed by a Court under the Act is enforceable in the same manner in which a decree passed by such Court would be. Therefore, an order of payment made under section 186 of the Companies Act must be regarded as a decree and enforced as such. This means that the provisions of the Civil Procedure Code relating to the execution of decrees are applicable to the execution of such orders. [p. 998, col. 2.]

Where such an order is sought to be enforced through a Court other than the one which passed it, section 201 of the Companies Act removes the necessity for complying with the procedure laid down in section 39 and Order XXI, rules 4 and 5, of the Civil Procedure Code, dispenses with the requirements of rule 6 of the Order, and empowers the other Court to act on a certified copy of the order alone. [p. 999, col. 1.]

An assignee or transferee of the order, however, cannot make an application for the enforcement of the order without having recourse to the procedure laid down by Order XXI, rule 16 of the Civil Procedure Code, which requires that an application by a transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree. [p. 999, col. 2.]

Sections 200 and 201 of the Companies Act are subject to the special provisions of rule 16 of Order XXI of the Civil Procedure Code. [p. 999, col. 2.]

Miscellaneous first appeal from the order of the District Judge, Dera Ghazi Khan, dated the 9th December 1917.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Sangam Lal*, for the Respondents.

JUDGMENT.—The Aya Ram Ginning and Press Company, Limited, of Dera Ghazi Khan, went into liquidation, and on the 20th July 1916, the Liquidation Judge, Lala Damodar Das, passed an order under section 186 against various persons including Lala Tharya Ram of Dera Ghazi Khan, who was ordered to pay a sum of Rs. 1,409-3-11. The Official Liquidator, one Narain Das Sethi, Bar-at-Law, on the 30th day of July 1917, executed a deed of assignment in favour of Lalas Sohan Lal and Popat Ram under which, amongst others, the debt due by Lala Tharya Ram was assigned to the said Sohan Lal and Popat Ram. On the 16th of October 1917, the said assignees applied in the Court of the District Judge at Dera Ghazi Khan for execution of the said order as against Lala Tharya Ram and sought to have the judgment-debtor arrested. On the 30th November 1917, the learned District Judge held that he had no jurisdiction in the matter inasmuch as the decree sought to be executed was not that of his Court. The assignees filed a petition for review of this order on the 3rd December 1917, in which they pointed out that the order passed by the Additional Judge amounted to a decree by virtue of section 199, Indian Companies Act, 1913, and that the assignees were entitled to proceed with the execution of the said decree having complied with the provisions of section 201 of the said Act. This petition of review was accepted by the learned District Judge on the 9th December 1917, and execution of the decree was ordered to proceed. Lala Tharya Ram thereupon preferred this appeal to this Court through Mr. Mukand Lal Puri, and Mr Sangam Lal has been heard on behalf of the respondents.

On behalf of the appellant it was contended that sections 199, 200 and 201 of

the Indian Companies Act, 1913, were not intended to, and did not, override the provisions of Order XXI, rule 16, Civil Procedure Code, and that, therefore, the Court of the District Judge at Dera Ghazi Khan had no jurisdiction in the matter of the execution of the decree passed under section 186 of the Companies Act, 1913.

Under Order XXI, rule 16, Civil Procedure Code, a decree may be executed on the application of the transferee of such decree—

(1) when the decree has been transferred by assignment in writing or by operation of law ;

(2) when the decree has been transferred by assigment and notice of the application has been given to both the transferor and the judgment-debtor ; and

(3) when the application for execution is made to the Court which passed the decree.

It seems clear, therefore, that under the ordinary procedure the transferee of a decree must apply to the Court passing the decree. That is apparent from the terms of rule 16, and if authority is needed, it is to be found in *Tameshar Prasad* v. *Thakur Prasad* (1) as well as *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee* (2). The question remains whether there is anything in the Indian Companies Act, 1913, which ousts the ordinary rules of procedure as laid down by the Civil Procedure Code. Under section 199, Indian Companies Act, 1913, all orders made by a Court under the Act are enforceable in the same manner in which decrees of such Court made in any suit pending therein are enforceable. The order under consideration was passed under section 186 of the said Act and is, therefore, enforceable as a decree. Section 200, Indian Companies Act, 1913, enacts that any order made by a Court in the course of the winding up of a Company shall be enforced in any place in British India other than that in which such Court is situate by the Court that would have had jurisdiction in respect of such Company if the registered office of the Company had been situate at such other place and "in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same." In other words, an order passed by a Court winding up a Company is enforceable by any other Court in British India which would have had jurisdiction to wind up the Company, in the same manner as if such other Court had passed the order itself.

Further section 201, Indian Companies Act, 1913, lays down that when any order passed by one Court is to be enforced by another, a certified copy of the order so made shall be produced to the proper officer of the Court that is required to enforce the same and that the production of such certified copy shall be sufficient evidence of such order having been made, and further that the Court before which such certified copy is produced shall take the requisite steps in the matter for enforcing the order "in the same manner as if it were the order of the Court enforcing the same".

Admittedly the Official Liquidator could have executed this order by complying with the provisions of section 201, and applying to the Court at Dera Ghazi Khan for its enforcement. Mr. Puri, however, contended that this special facility was not intended to apply in the case of a transferee from the Official Liquidator. On the other hand Mr. Sangam Lal contended that section 200, Indian Companies Act, 1913, entitled the transferee to apply to any Court in British India in spite of the provisions of Order XXI, rule 16. Neither side has produced any authorities in support of their contentions and as far as I have been able to assertain, the matter is *res integra*.

Now section 199 of the Indian Companies, Act, 1913, enacts that any order passed by a Court under the said Act is enforceable in the same manner in which a decree passed by such Court would be.

It follows, therefore, that an order of payment made under section 186 of the Act has to be regarded as a decree and enforced as such.

This means that the provisions of the Civil Procedure Code relating to the execution of decrees are applicable.

Ordinarily, therefore, it would be necessary for a Liquidator to make an application

(1) 25 A. 443; A. W. N. (1903) 99.
(2) 27 C. 488; 14 Ind. Dec. (N. S.) 321.

under Order XXI, rules 10 and 11 (2), Civil Procedure Code, and if it was desired to get the order enforced in a part of British India other than that in which the Court making it had jurisdiction, it would be necessary for the said Liquidator to have recourse to section 39 and Order XXI, rules 4, 5 and 6, etc., Civil Procedure Code. Here, however, section 201 of the Act steps in, removes the necessity for complying with the procedure laid down in section 39 and Order XXI, rules 4 and 5, dispenses with the requirements of rule 6 and empowers the other Court to act on a certified copy of the order alone.

Further, section 200 of the Act also varies the provisions of Order XXI, rules 4, 5, 7, etc., to this extent that it enacts that when it is necessary to obtain the assistance of another Court for the enforcement of such an order, such Court shall be the Court specified therein.

Here, however, the Indian Companies Act, 1913, stops and the other provisions of the Civil Procedure Code relating to the execution of decrees remain, and must be regarded as in force.

I think it must be conceded that as in the case of decrees so in the case of orders of payment under section 186 of the Indian Companies Act, 1913, the person to apply for the enforcement of an order or decree is the person in whose favour the order or decree has been made or passed.

An assignee or transferee cannot make such an application unless and until his name has been substituted for that of the person in whose favour the decree or order has been passed or made.

The Indian Companies Act, 1913, makes no provision for this being done in the case of orders passed under section 186 of the Act, and, therefore, recourse must be had to the procedure laid down in Order XXI, rule 16, of the Civil Procedure Code.

So long as the person seeking to enforce such an order is the person in whose favour it was made, it is not difficult to understand the reason why the more cumbersome procedure to be found in the Civil Procedure Code was dispensed with, the object being to provide for the recovery of a Company's debts expeditiously and with as little trouble and expense as possible.

When, however, the person applying for enforcement is a transferee from the Liquidator, the same reasons do not apply, and there appears to be no necessity or justification for a departure from the procedure laid down in rule 16, which provides certain safeguards for the benefit of the judgment-debtor and the decree-holder alike.

The use of the words "in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same", in section 200 and "in the same manner as if it were the order of the Court enforcing the same," in section 201, presents no real difficulty inasmuch as a reference to section 42 of the Civil Procedure Code shows that a "Court executing a decree sent to it shall have the same powers in executing such decree as if it has been passed by itself," and as was held in *Tameshar Prasad* v. *Thakur Prasad* (1) and *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee* (2), section 42 is subject to the special provisions of Order XXI, rule 16, Civil Procedure Code, which require that an application by a transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree.

It seems to me that sections 200 and 201 of the Indian Companies Act, 1913, must also be held to be subject to the special provisions of rule 16 of Order XXI of the Civil Procedure Code and that, therefore, a transferee of an order under section 186 of the Indian Companies Act, 1913, must, in the first instance, apply to the Court which made the order.

I accordingly hold that the District Judge of Dera Ghazi Khan had no jurisdiction to entertain the present application and accept this appeal with costs.

Appeal accepted.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1561 OF 1916.

July 22, 1918.

Present :— Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Srimanth Rajah YARLAGADDA MALLIKHARJUNA PRASADA NAIDU BAHADUR ZAMINDAR GARU —1ST DEFENDANT—APPELLANT

versus

MATLAPALLI VIRAYYA AND OTHERS— PLAINTIFF AND DEFENDANTS NOS. 2 TO 24 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, *O. XXXVIII, r.* 6—*Attachment before judgment—Claim to attached property, order on—Applicability of O. XXI, r.* 63—*Suit, regular, maintainability of.*

Rule 63 of Order XXI, Civil Procedure Code, applies to orders on claims preferred to property attached before judgment. [p. 1002, col. 2.]

Ramanamma v. *Bathula Kamaraju*, 39 Ind. Cas. 863; 41 M. 23; 5 L. W. 704, overruled.

The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of. [p. 1002, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 132 of 1915, preferred against the decree of the Principal District Munsif, Masulipatam, in Original Suit No. 622 of 912.

This second appeal coming on for hearing on the 4th February 1918, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the record in the case and upon hearing the arguments of Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant, and of Mr. *C. Rama Rao* for Mr. *P. Narayanamurthi*, for the 1st Respondent, the 13th respondent having died and no legal representative having been brought on record within the time allowed by law and the other respondents not appearing in person or by Pleader and the case having stood over for consideration till the 15th February 1918, the Court (Bakewell and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

KRISHNAN, J.—The facts necessary for this reference may be briefly stated as follows: The 1st defendant, who is the appellant before us, brought a suit for money against defendants Nos. 2 to 4 and when that suit was pending, he obtained an order under rule 6, Order XXXVIII, of the Code of Civil Procedure for attachment before judgment and attached the plaint properties. The plaintiff intervened and claimed the properties as belonging to him by reason of a prior purchase from the same defendants. The claim was enquired into and an order was passed in March 1910 in plaintiff's favour disallowing the attachment. In 1912, 1st defendant obtained his decree for money against defendants Nos. 2 to 4 and he then proceeded again to attach the same properties. He had taken no steps to contest the order on the claim petition, nor has he done so up to date. Novertheless when plaintiff again filed a claim against the second attachment his claim was dismissed and the attachment was confirmed. For some reason not apparent the Court failed to consider the effect of the first order. Plaintiff has filed this suit under rule 63 of Order XXI of the Code of Civil Procedure for a declaration of his title and for setting aside the order of attachment.

Both the lower Courts have decreed the plaintiff's suit without going into the merits, on the ground that the order on the first claim petition was conclusive between the parties because that order had decided in favour of plaintiff's title and against the first defendant's right to attach. In second appeal it is argued before us that as that order was passed on a claim to property attached *before judgment*, it is of no force now and that it is not an order to which rule 63 applies or which need be set aside.

The appellant's Vakil has relied on the ruling in *Ramanamma* v. *Bathula Kamaraju* (1), which certainly supports him. But on the order side our attention has been drawn to the decision in Second Appeal No. 601 of 1916, [*Muthukumara Chettiar* v. *Alagappa Chettiar* (2)], where my learned brother Mr. Justice Spencer and I were of opinion that rule 63 did apply to cases of attachment before judgment. As

(1) 39 Ind. Cas. 863; 5 L. W. 704; 41 M. 23.
(2) 42 Ind. Cas. 554; 6 L. W. 518.

there is a clear conflict between the two decisions on the point before us and as I still adhere to the view expressed by us in the second appeal, I consider that the question should be referred to the Full Bench.

As our attention was not drawn to the ruling in the 5 Law Weekly [*Ramanamma* v. *Bathula Kamaraju* (1)] when we were hearing the Second Appeal No. 601 of 1916 [*Muthukumara Chethiar* v. *Alagappa Chettiar* (2)], we then stated our reasons for our view only very briefly. It is necessary now to state my reasons more fully, as with all respect to my learned brothers who decided the case in the Law Weekly [*Ramanamma* v. *Bathula Kamaraju* (1)], I am unable to accept their view that rule 63 is inapplicable in cases of attachment before judgment.

The decision on the point turns upon the construction of rule 63 of Order XXI and on the meaning to be attached to the word "investigated" in rule 8, Order XXXVIII. The wording of rule 63 is clearly wide enough to include claims before decrees, for the rule speaks of "claims and objections preferred" without restricting them in any way to claims after decree. The change in the wording of that rule from what it was in the corresponding section 283 of the old Code of 1882, by omission of all reference to sections 280 to 282, seems to indicate that it was intended to widen the scope of the rule and to make it clearer that claims of all kinds were included in it. This is the view taken in *Bisheshar Das* v. *Ambika Pershad* (3), and I agree with it in spite of the dissent from it in the 5 Law Weekly case [*Ramanamma* v. *Bathula Kamaraju* (1)]. As rule 63 is an enabling rule which gives a right of suit to parties defeated in claim proceedings which they will not otherwise have, I am inclined to think that we should not unduly restrict its scope. If the rule is held not to apply, the result seems to me to be that the orignal order becomes final without being subject to the result of a suit; I fail to see on what ground it can be treated as of no force, as argued. It is an order between parties by a competent Court deciding that a certain property can or cannot be attached for realising by sale the amount of the decree that may be passed and as such, it seems to me, it is binding on the parties thereto unless set aside. Considering that the two sets of orders, those before and those after decree, are passed after similar enquiries, no distinction should be made between them as to their effect unless the Legislature has clearly indicated a distinction.

Such a distinction is sought to be made out by reference to the word "investigated" in rule 8 of Order XXXVIII. It is argued that the word refers only to the enquiry on the claim and nothing more, in other words, only rules 58 and 59 of Order XXI apply. Now it will be seen that the heading of the Sub-Division of Order XXI where these rules are is "investigation of claims and objections", and under this heading we have grouped all the rules from 50 to 63. It is a reasonable inference from this that the Legislature treated them all as steps in "investigation" or parts of it. If we adopt a restricted meaning for the word "investigated," rules 60 to 62 will not be included in it, as they deal with orders to be passed after the "investigation" proper is completed: and as a result we will have to hold that the Legislature has not made any provision for orders to be passed in claims under that rule, as there is no other provision with regard to it except rule 8. Such a construction seems to me to be hardly right. If we consider that the order in the present case was passed under rule 60, Order XXI, read with rule 8 of Order XXXVIII, as I think we should, it follows that rule 63 applies to it as being an order under rule 60.

The restricted meaning is adopted in the 5 Law Weekly case [*Ramanamma* v. *Bathula Kamaraju* (1)], as the learned Judges considered that it would be unfair and inexpedient to drive a plaintiff into a fresh litigation which might eventually turn out to be a futile proceeding if he failed to secure a decree. It may be remarked that even in cases of attachments after decree, the suit under rule 63 may turn out to be futile if the first decree is reversed on appeal or second appeal and plaintiff's suit is dismissed, and yet the Legislature has clearly given the right of suit. I can see nothing unfair in making a person sue if he wishes to insist on his right to attach a certain property in execution of his antici-

(3) 29 Ind. Cas. 622; 37 A. 575; 13 A. L. J. 732.

pated decree in spite of the adverse order against him in the claim. If his second suit turns cut to be futile because he fails to secure a decree, the fault is his own in bringing an unfounded suit in the first instance. It seems to me, however, these are not relevant considerations in deciding whether a suit lies under rule 63, nor can the wording of the Article 11 of the Limitation Act be used to decide the question. If that article does not apply, as to which I express no opinion, it will be necessary to find what article does when the question arises.

A similar question as the one before us which arose in an attachment before judgment when the Code (Act VIII of 1859) was in force was considered by Sir Barnes Peacock, C. J., and Mr. Justice Mitter; the learned Judges held on a construction of sections 86 and 246 of that Code, which were the corresponding provisions then in force, that the words "Investigated in the same manner as a claim to property attached in execution of a decree" incorporated all the provisions of section 246 and gave the remedy by suit, which was the only and proper remedy, to contest the order on the claim. This was decided in 1868 and till the decision in *Ramanamma* v. *Bathula Kamaraju* (1), no ruling has been cited to us to the contrary. I feel, therefore, fortified in my view that rule 63 does apply to claims before decrees as well. But on account of the conflict of authority in this Court the question must now be decided by the Full Bench.

I would submit the case for the opinion of the Full Bench on the following question:—

"Does rule 63 of Order XXI, Civil Procedure Code, apply to orders on claims preferred to property attached before judgment."

BAKEWELL, J.—I agree.

The second appeal came on for hearing before the Full Bench on the 15th July 1918.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.—Order XXI, rule 63, Civil Procedure Code, cannot apply to orders passed on claims to property attached before judgment. That order has no legal effect after the judgment was passed. The rule is intended to cover cases of claims preferred after decree. The word 'investigated' in Order XXXVIII, rule 8, refers only to the enquiry on the claim petition and rule 63 of Order XXI only covers cases of investigation under rule 58: *Ramanamma* v. *Bathula Kamaraju* (1).

Mr. *P. Narayanmurthi*, for the Respondent.—Rule 63 of Order XXI is an enabling rule and it should be liberally construed. Orders on claims to attached property passed before decree stand in the same position as orders passed after decree, and the Legislature did not intend to make any distinction between the two kinds of orders. The intention of the Legislature was to give a remedy to the party aggrieved by the order, and that remedy is provided for in rule 63. The order in the present case should be deemed to have been passed under Order XXI, rule 60, read with Order XXXVIII, rule 8, and, therefore, Order XXI, rule 63, clearly applies. Reference was made to *Muthukumara Chettiar* v. *Alagappa Chettiar* (2).

OPINION.—Section 86 of the Code of Civil Procedure of 1859, which was re-enacted without material alteration in section 487 of the Code of 1877 and in Order XXXVIII, rule 8 of the present Code, admittedly had the effect of applying to claims in respect of attachments before judgment all the provisions of section 246 of that Code, including the final provision enabling the party against whom the order was given to bring a suit to establish his right at any time within one year from the date of the order. By the Indian Limitation Act, IX of 1871, the provision as to limitation was taken out of section 246 and dealt with in Article 15 of that Act. In the Code of 1877, sections 278 to 283 were substituted for section 246 of the Code of 1859. In section 283, which corresponded to the last sentence of section 246, the language was altered, but there was nothing in the alteration from which an intention to make any of these provisions inapplicable to attachments before judgment could be inferred, nor is there anything of the sort in the changes made in the Code of 1908. The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of and as has been pointed out to us, this section was applied without

question to a case of attachment before judgment which came before the Privy Council in *Kissorimohun Roy* v. *Hansukh Das* (4).

We must overrule *Ramanamma* v. *Bathula Komaraju* (1) and answer the question in the affirmative.

M.C.P.

Answered in the affirmative.

(4) 17 C. 436; 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. S.) 830.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 122 OF 1917.

May 30, 1918.

Present :—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

HEMANTA KUMAR KAR—DEFENDANT—APPELLANT

versus

BIRENDRA NATH ROY CHOUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 149—"Pleads", meaning of—Suit by third person, whether rendered infructuous by plaintiff in rent suit obtaining decree—Landlord and tenant—Tenant proving registered kabuliyat—*Landlord, whether can show that he never accepted* kabuliyat.

The word "pleads" as used in section 149 of the Bengal Tenancy Act does not mean that the tenant should set up a valid plea or a plea that is open to him in accordance with law. Whether the plea is good, bad or indifferent, if the tenant hands in the amount claimed, the Court will serve notice on the third party and unless the third party brings his suit within three months, the plaintiff in the first suit will be entitled to the money. [p. 1004, col. 2.]

A suit instituted in accordance with clause (3) of section 149 of the Bengal Tenancy Act by the "third person" mentioned in that section is not rendered infructuous by the fact that owing to the Courts' delay, before that suit is tried out, the plaintiff in the original rent suit gets a decree against the defendant. [p. 1004, col. 2.]

Where a *kabuliyat* executed and registered by a tenant is proved by the tenant in a suit, there is nothing in the Registration Act or the Evidence Act which prohibits the landlord from showing that he never assented to or accepted the *kabuliyat*. [p. 1005, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Pabna, in Pabna and Bogra, dated the 20th of September 1916, affirming that of the Munsif, 1st Court at Pabna, dated the 12th of August 1915.

FACTS appear from the judgment.

Babu *Sesadhur Roy* (Junior), for the Respondent, raised a preliminary objection that the second appeal was not competent. Judgment was pronounced under section 149 of the Bengal Tenancy Act. It is an order and not a decree.

Babu *Brojo Lall Chakrabartty* (with him Babu *Gurudas Sinha*), for the Appellant.—When the question of title is raised in the pleadings or arises out of the pleadings, a second appeal lies. Refers to *Tirthabasi Singh* v. *Purna Chandra Nag* (1). If the order be in terms of section 149, Bengal Tenancy Act, then I may not have a right of appeal, but when in this case the plaintiff prays that his right and title to the money deposited in Court be declared, surely I have got a right of appeal.

As to the merits of the appeal the defendant is the appellant, and the appeal arises out of a suit brought under section 149 of the Bengal Tenancy Act. Under the terms of section 149 the deposit of rent is allowed only under particular circumstances and the question is, whether the Court was competent under the circumstances of the case to accept the deposit. So far as the present appellant is concerned, the tenant is bound to pay him rent and there can be no *bona fide* doubt on his part as to whether the present appellant is his landlord and is entitled to recover the rent. Further, the point is *res judicata*, the appellant having in a previous suit obtained a decree for rent against the tenant. In the face of that decision, the tenant cannot plead that the rent is due not to the present appellant but to some other person.

My next point is that the Courts below have erred in deciding a question of title between the parties. In a suit under section 149, the Court is only competent to make an order restraining payment out of the money deposited in Court.

The third point is that the present appellant having obtained a rent decree against the tenant before the decision of the plaintiff's suit under section 149, the plaintiff is not entitled to any relief.

(1) 14 Ind. Cas 230; 16 C. W. N. 558; 15 C. L. J. 501.

Further, it appears that the defendant's father executed a registered *kabuliyat* in favour of the plaintiff's father. That *kabuliyat* has been proved in this case. Evidence has been allowed to be given to prove that that *kabuliyat* was never acted upon and that the plaintiff's father never assented to the terms of that document. The learned Judge was, having regard to the provisions of section 92 of the Evidence Act, wrong in admitting oral evidence in variation of the terms of the registered document.

Babu *Sasadhar Roy* (Junior), for the Respondent, submitted that the decision of the lower Appellate Court was concluded by findings of fact, and that the Courts below were right in holding that the plaintiff was entitled to the money deposited in Court. The wording of section 149 of the Bengal Tenancy Act shows that the order shall not only restrain one party from taking out the money in deposit but shall also allow the other party to withdraw the money, otherwise the provisions of the section would be rendered nugatory. Refers to clause (3) of section 149. The Courts below were quite right in declaring that the plaintiff had a right to the money. Refers to *Rubi-un-nessa* v. *Gooljan Bibee* (2). Further, the suit having been instituted within the time mentioned in section 149, it was maintainable.

Babu *Brojo Lall Chakraburtty*, for the Appellant, replied.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against the decision of the learned Subordinate Judge of Pabna, dated the 20th September 1916, affirming the decision of the Munsif of the same place. It is stated that the suit is brought under the terms of section 149 of the Bengal Tenancy Act. That is not strictly accurate. The suit goes far beyond the terms of a suit authorised by section 149 of the Bengal Tenancy Act.

The facts are these. The defendant sued a person alleged to be his tenant for rent. The tenant pleaded that the present defendant was not his landlord but a third party was and, in compliance with the terms of section 149 of the Bengal Tenancy Act, he paid into Court the amount claimed for rent. Thereupon the Court directed notice to be served on the third party, that is, the present plaintiffs. The objections to the suit are these: It is said, first of all, that, in a former rent suit, the present defendant had recorded judgment against the tenant for rent and that, therefore, it is a case of *res judicata* and it is said that the word 'pleads' as used in section 149 means that the tenant sets up a valid plea or plea that is open to him in accordance with the law. It does not mean anything of the sort. Plea means plea, pure and simple, whether good or bad. Whether it is good, bad or indifferent, if the tenant hands in the amount claimed, the Court serves notice on the third party and, unless the third party brings his suit within three months, the plaintiff in the first suit is entitled to the money. There is nothing in the point that the word 'plea' used in section 149 means a valid plea or plea according to the provisions of the law.

The second point is a point which, if I may say so, is worthy of less respect even than the first. The plaintiffs in the present case brought the suit within the period mentioned in section 149 of the Bengal Tenancy Act. Owing to the state of business prevailing in the Civil Courts in this country, the Court was not immediately able to give its consideration to the plaintiffs' case. In the meantime, the present defendant had managed to go on with his rent suit and to get a decree against the tenant and, therefore, it is said that the Court was incompetent to consider the present suit of the plaintiffs. That is clearly not so. Obviously, the parties are not responsible, at any rate, they cannot be held responsible, for the state of the delay that exists in the Civil Courts in this country.

Another point that is raised is that, in a suit under section 149 of the Bengal Tenancy Act, the question of title cannot be gone into. But the decisions of this Court show that suits have been admitted both founded on the provisions of section 149 of the Bengal Tenancy Act and also on the question of title. That being so, we must follow the established practice.

The last point on the merits is one that has less support than even the point of law that has been raised. The facts are

(2) 17 C. 829; 8 Ind. Dec. (N. S.) 1097.

these: The defendant's father wrote out and registered a *kabuliyat* relating to land belonging to the plaintiffs' father. The finding is that the plaintiffs' father never assented to all the terms of the *kabuliyat*. The learned Vakil for the defendant-appellant says that his client's father having written out the document relating to the plaintiffs' land and having registered it—although the facts prove that the plaintiffs' father never assented to it—under the terms of the Registration Act, the plaintiffs are precluded from giving oral evidence that their father did not assent to any document being executed by the defendant's father relating to the plaintiffs' land. It is quite clear that there is nothing in the Registration Act or the Indian Evidence Act prohibiting the plaintiffs from showing that the defendant's father was not authorised to deal with the land or that it was not accepted by the plaintiffs' father. In that view, the appeal fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 122 OF 1918.

April 2, 1918.

Present:—Mr. Justice Broadway.

JAWAHIR SINGH SUNDAR SINGH
—PETITIONERS

versus

SPINNING AND WEAVING MILLS CO., LTD., SHAHDARA—
DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), *s.* 171—*Suit against Company—Liquidation—Leave to continue suit, when to be granted.*

Under section 171 of the Companies Act leave to continue a suit against a Company in liquidation should be given only where some question arises which cannot satisfactorily be determined in the winding up proceedings.

Application for sanction to be allowed to proceed with the case, pending in the Court of the Senior Subordinate Judge, Amritsar, against the respondent Company.

Mr. *D. N. Mehra*, for the Petitioners.

Mr. *Dalip Singh*, Official Liquidator, for the Respondent.

JUDGMENT.—Messrs Jawahir Singh Sunder Singh of Amritsar instituted a case against the Lahore Spinning and Weaving Mills Company, Limited, for Rs. 7,820. During the pendency of this suit on the 26th January 1918, the said Company was put into liquidation by an order of this Court, and the said Jawahir Singh Sundar Singh have thereupon made this application under section 171 of the Indian Companies Act, 1913, asking for leave to proceed with the suit. Mr. Dalip Singh, the Official Liquidator of the said Company, has raised an objection to the granting of such leave and has urged that the matter is one which can satisfactorily be determined in the winding up. As a general rule in England leave to continue an action is given only where some question arises which cannot satisfactorily be determined in the winding up proceeding, *vide*, *Wilson* v. *Natal Investment Co.* (1), *Life Association of England, In re* (2) and *Pool Firebrick and Blue Clay Co., In re* (3). Mr. Dina Nath on behalf of the applicants has been unable to show me any reason why the same rule should not be applied in this country, nor has he been able to refer to any question which arises in this matter which cannot satisfactorily be determined in the winding up, and I accordingly follow the authorities cited above and refuse the application. In the circumstances, however, I direct that the applicants be admitted to prove for their debt and the costs they have incurred in the suit.

Application refused.

(1) (1867) 36 L. J. Ch. 312; 15 L. T. 658.

(2) (1864) 34 L. J. Ch. 64; 10 Jur. (N. S.) 762; 10 L. T. (N. S.) 833; 12 W. R. 1069; 146 R. R. 570.

(3) (1874) 17 Eq. 268; 43 L. J. Ch. 447; 22 W. R. 247.

MUKTA KESHI DEBI *v.* GIRI BALA DEVI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 329 OF 1917.

June 24, 1918.

Present :—Mr. Justice Walmsley and Mr. Justice Panton.

Srimati MUKTA KESHI DEBI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Srimati GIRI BALA DEVI AND OTHERS —DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 66—Suit under section for more than one year's rent, maintainability of—Remedy provided by section, when can be availed of—Decree granting ejectment on default of payment of four years' rent, validity of.

If a landlord in a suit under section 66 of the Bengal Tenancy Act asks for more than one year's rent, he disentitles himself to the remedy granted by that section. [p. 1007, col. 2.]

A decree under section 66 of the Bengal Tenancy Act directing that the plaintiff landlord should be entitled to recover *khas* possession of the land if four years' rent in arrears claimed and decreed in the suit is not paid, is bad [p. 1007, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 14th of November 1916, affirming that of the Munsif, 2nd Court, Bolpur, dated the 18th of December 1915.

FACTS appear from the judgment.

Babu *Khitish Chander Chakerbarty*, for the Appellant.—The learned Judge in the lower Appellate Court has relied on *Sitanath Midda* v. *Basudeb Midda* (1). That case is not good law. I invite your Lordships attention to *Malkarjun* bin *Shidramappa Pasare* v. *Narhari* bin *Shivappa* (2). There an objection was taken that a certain wrong person was made a party to represent a defendant and on the basis of that, a sale took place. The Court held that even if the Court was wrong, the decree was null and void and the only thing for the wronged party was to apply to the Court for amendment.

Then the case of *Dayamoyi* v. *Ananda Mohan Roy* (3) does not say anything about under-*raiyats*, but the lower Court says that this case is also applicable to the case of under-*raiyats*. Transferee of an under-*raiyati* holding has no right: *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (4) referred to. It has been held there that unless the under-*raiyat* has acquired occupancy right he cannot transfer. In the present case the defendants having acquired no occupancy right their right was non-transferable. Even if *Dayamoyi's case* (3) is applicable, there having been relinquishment and abandonment I am entitled to *khas* possession, and it has been found that during the pendency of the suit there has been abandonment within the meaning of section 87, Bengal Tenancy Act.

Babu *Santosh Kumar Bose*, for the Respondents.—The landlord, after having treated the holding all along as one and not split up, is now estopped from raising the point that the lands were split up. So far as splitting up is concerned, he has no case. So far as *Sitanath Midda* v. *Basudeb Midda* (1) is concerned, that case does not stand alone in my favour. I beg to draw your Lordships' attention to a case reported as *Jogeshuri Chowdhrain* v. *Mahomed Ebrahim* (5). There it was held that such a decree which makes a condition precedent that non-payment of rent for four consecutive years will make the tenant liable to ejectment, is illegal. The decree being illegal and my client's vendor, being not a party to the suit in which the decree was passed, is not bound by the decree; hence the purchaser also is not liable, and this was also held in *Sitanath Midda* v. *Basudeb Midda* (1). Hence the plaintiff cannot bring a suit against me for my ejectment for non-payment of the rent-decree in the suit of the plaintiff under section 66 of the Bengal Tenancy Act.

Babu *Khitish Chander Chakerbarty*, in reply.—My friend's client may not be bound by the decree, but the plaintiff is not bound by the transfer of the tenancy. I have not recognised him. As regards abandonment section 67 is not exhaustive and this has been held in *Dayamoyi's case* (3), and your Lordships have held the same view in *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (6). So far as the cases in *Jogeshuri Chowdhrain* v. *Mahomed Ebrahim* (5) and *Ramyad Sahu* v. *Bindeswari Kumar*

(1) 2 C. L. J. 540.

(2) 5 C. W. N. 10 at pp. 15 and 16; 2 Bom. L. R. 927; 27 I. A. 216; 25 B. 337; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(3) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52 (F. B.).

(4) 20 Ind. Cas. 698; 18 C. L. J. 262 at p. 264; 19 C. W. N. 246.

(5) 14 C. 33; 7 Ind. Dec. (N. S.) 23.

(6) 6 C. L. J. 102.

Upadhay (6) cited by my learned friend are concerned, those were decided on the basis of the case in *Sitanath Midda* v. *Basudeb Midda* (1) and hence those were correctly decided as well.

JUDGMENT.

WALMSLEY, J.—The plaintiffs-appellants brought this suit to recover *khas* possession of a certain plot of land on declaration of their title thereto. Their case was that two brothers Jagabandhu and Nabin held the land under them as under-*raiyats*, each brother having a separate plot which he held apart from the other brother. Both brothers are dead and the defendants Nos. 4, 5 and 7 now represent the deceased Nabin. Sometime in 1913 the plaintiffs brought a suit purporting to be under section 66 of the Bengal Tenancy Act against the representatives of both the brothers and obtained a decree to the effect that if the decretal amount were not paid within fifteen days, the plaintiffs would be entitled to enter into possession of the land. The amount specified was not paid and the plaintiffs obtained symbolical possession. Then the defendant No. 1, the contesting defendant, appeared on the scene. She said that defendant No. 8 had obtained a decree against Nabin and put the decree into execution against Nabin's widow and daughters and in execution sold Nabin's share in the holding and bought it himself and that he had subsequently transferred it to her, *i.e.*, the defendant No. 1. She made a claim under Order XXI, rule 100, Civil Procedure Code, for the purpose of recovering possession, but during the course of the investigation of her claim she made a statement to the effect that she was actually in possession; and the Court accordingly dismissed the claim. Then on 23rd January 1915 the plaintiffs brought the present suit. In answer to the plaintiffs the defendant No. 1 filed a long written statement, amongst other things, challenging the nature of the plaintiffs' interest in the land and their assertions regarding the defendant's interest. When the case came to Court it was agreed that two preliminary issues should be tried, the first of them relating to the decree obtained by the plaintiffs under section 66, and the Munsif proceeded to decide these two issues.

In the suit brought by the plaintiff against the brothers under section 66 they had asked for rent of four years, not for one year only, and an objection was taken on behalf of the defendant No. 1 that by asking for four years' rent they had disentitled themselves to the remedy granted by section 66. The Munsif upheld this contention, relying on the case of *Sitanath Midda* v. *Basudeb Midda* (1). He also found the other issues against the plaintiffs, but that followed as a necessary consequence on his finding on the first issue. The plaintiffs appealed to the District Judge and the learned District Judge upheld the decision of the first Court.

It is now contended before us that the Courts below are wrong in holding that the decree passed in the plaintiffs' suit under section 66 was bad. The authority I have just mentioned is quite clear on the point. It follows an earlier case reported as *Jogeshuri Chowdhrain* v. *Mahomed Ebrahim* (5) and I do not myself entertain any doubt about the correctness of these decisions. It follows that the decree directing that the plaintiffs should be entitled to recover *khas* possession of the land if four years' rent was not paid was bad. Further the defendant No. 1 was not a party to those proceedings, although she was actually at that time in possession of the land. Now the case for the plaintiffs as set out in their plaint is clearly based upon that decree. The whole of the plaint makes it plain that they claimed to be put in possession of the land on the ground that the sum of money mentioned in the decree passed in that suit had not been paid to them by the defendants. It follows, therefore, I think, that on this ground alone the plaintiffs' suit was rightly dismissed. If the plaintiffs bring another suit to evict the defendant No. 1 as a trespasser, the other points which have been mentioned in this appeal will arise. We express no opinion regarding those points or regarding the views set out in the judgment of the learned Judges. For the reasons given I think that the appeal should be dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

ANANDGIR *v.* SRINIVAS.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1544 OF 1916.

June 5, 1918.

Present:—Sir George Knox, KT., Acting Chief Justice, and Justice Sir P. C. Banerji, KT.

ANANDGIR—DEFENDANT—APPELLANT

versus

SRI NIWAS—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 158, 193—Suit to establish right to muafi, *dismissal of—Appeal—Remand order of—Appeal, second, whether lies.*

Plaintiff brought a suit in the Revenue Court for a declaration that he was the proprietor of a disputed *muafi*. The suit was dismissed but on appeal the District Judge declared that the plaintiff was a rent-free grantee of so much of the land in suit as he was occupancy tenant of, and remanded the suit to the lower Court for determination of the revenue payable by the plaintiff:

Held, that by virtue of section 193 (*a*) of the Agra Tenancy Act no second appeal lay against the order of the District Judge.

Second appeal from a decision of the District Judge, Cawnpore, modifying a decree of the Assistant Collector, First Class, Fatehpur.

Mr. *Haribans Sahai*, for Mr. *Nawal Khishore*, for the Appellant.

Mr. *N. C. Vaish*, for the Respondent.

JUDGMENT.—The plaintiff in the Court of first instance is the respondent here. He brought a suit in the Revenue Court in which he prayed that he might be declared proprietor of a disputed *muafi* and that costs, etc., might be granted to him. The Court of first instance dismissed his claim altogether. He then went in appeal to the District Judge of Cawnpore, who ordered that the decree of the lower Court, that is to say, the Court of first instance, dated the 13th of March 1916, be set aside and the appeal be allowed to the extent that the plaintiff was entitled to be declared rent-free grantee of so much of the land in suit as he was then entered in the revenue papers as occupancy tenant of the same. The order, however, did not stop here. It went on as follows:—"That the suit be remanded to the lower Court for determination of the revenue payable by the plaintiff-appellant." The defendant has now come to this Court and asks that the decree of the lower Appellate Court be set aside and the decree of the Assistant Collector be restored or any other order, that may be deemed fit, may be passed. Various pleas were then set out attacking the judgment of the District Judge. Upon the appeal being called on in this Court for hearing, a preliminary objection was at once raised on behalf of the plaintiff-respondent, namely, that no second appeal lies from the order of the District Judge. In support of the contention stand was taken upon section 193 of the Agra Tenancy Act of 1901, and it was contended on the ground set out in clause (*a*) of section 193 that the provisions of the Code of Civil Procedure did not apply to the procedure in suits and other proceedings under the Rent Act. Our attention was called to the case of *Vilayat Husen* v. *Maharaja Mahendra Chandra Nandy* (1) and *Gulzari Lal* v. *Latif Husain* (2). The learned Vakil for the appellant meets this objection by maintaining that he is not appealing from any order but from a decree, and so seeks to bring the case away from clause (*a*) of section 193. He dwelt a great deal upon the hardship that, if it was held otherwise, he would have no remedy. Be that as it may, we are here not to make law but to expound it as it stands, and it appears to us that the only meaning we can put upon clause (*a*) of section 193 of the Rent Act is that no appeal lies from an order of this kind. He contended that the decision of the District Judge of Cawnpore was in reality a preliminary decree. We have considered this, but we are unable to agree with it. The Tenancy Act says nothing from first to last about preliminary or final decrees. The result is that the objection prevails and the appeal is dismissed with costs. There is a cross-objection but we have heard nothing about it from the beginning of the case up to this moment. It stands dismissed.

Appeal dismissed.

(1) 28 A. 88; A. W. N. (1905) 198.
(2) 35 Ind. Cas. 27; 14 A. L. J. 84; 38 A. 181

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Abwab—*Annual payment for upkeep of embankments, nature of—Long-continued payment from time immemorial, whether creates title in favour of recipient.*

An annual sum claimed by the Government from Government *khas mahal* tenants in respect of certain embankments the upkeep of which is necessary for the preservation of the lands of the tenants, is not an *abwab*.

A long-continued payment beyond the memory of man of an annual sum is in itself a title in favour of the recipient of such sum. **C** UDAY NARAIN JANA *v.* SECRETARY OF STATE, 22 C. W. N. 823
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Accounts, *suit for—Death of agent—Legal representatives of agent, liability of—Procedure.*

The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representatives from all liability to the principal. After the death of the agent the proper procedure in the suit would be that the statement of claim put in by the plaintiff should be investigated, preferably by a Commissioner in the presence of the representatives of the deceased agent. The onus would be on the plaintiff to prove each item in the sum which he claims, *i. e.*, to prove that each item was actually realised by the agent and further that it was not paid to his credit. The representatives of the deceased agent would be at liberty to adduce such evidence as they please to show either that the money was not realised by the agent or that after realisation it was paid to the plaintiff. The amount actually due being thus ascertained, the Court would pass a decree against the assets of the deceased agent in the hands of the representatives. **C** SASI SEKHARESWAR ROY *v.* HAJIRANNESSA BIBI
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———, *whether can be adjudicated where no further relief can be granted.*

Apart from any special statutory provision, accounts cannot be adjudicated upon by a Court when no further relief can be granted. Ordinarily a suit for accounts upon a mortgage cannot be maintained by the mortgagor unless he also asks for redemption.

An adjudication which cannot be the basis of any relief is not binding on the parties. **N** MUKAND RAM SUKUL *v.* SHEO NARAIN
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Administration of assets—*Priority—Crown debts—Mortgage, English, debts secured by—Mortgagee, rights of—Fixtures, whether pass to mortgagee—Shares, deposit of, effect of—Civil Procedure Code (Act V of 1908), O. XX, r. 13 (2)—Presidency Towns Insolvency Act (III of 1909), s 49.*

In the distribution of the assets of a deceased person whose estate is under administration by a decree of the Court, under Order XX, rule 13 (2), Code of Civil Procedure, read with section 45 of the Presidency Towns Insolvency Act, all debts due to the Crown must be paid in priority over all other debts, secured or unsecured, except debts secured by a first mortgage in English form.

In an English mortgage the ownership is wholly transferred to the creditor, which is, however, liable to be divested by the repayment of the loan on an appointed day. The mortgagee has the right to enter upon possession of the property immediately upon execution of the deed, unless the possession of the mortgagor is protected by a covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged under rule 18 of the Presidency Towns Insolvency Act. He has no debt proveable in the insolvency until his security has been valued or realised. He stands outside the bankruptcy.

The general rule is that unless a contrary intention is shown, a mortgage of land or buildings passes the right to the fixtures then upon the premises, and fixtures attached by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the contrary, pass to the mortgagee.

The ownership of the property passes to the first mortgagee in an English mortgage but not to the puisne mortgagees.

The rule of law, that where the titles of the Crown and of the subject concur the title of the Crown shall be preferred, except so far as the Legislature has thought fit to interfere with it, appears to be one of universal application.

Shares merely deposited and not actually transferred do not create a right in favour of the depositee superior to the right of the Crown. **C** BANK OF UPPER INDIA *v.* ADMINISTRATOR-GENERAL OF BENGAL, 22 C. W. N. 793; 45 C. 653 **529**

Adverse possession **694**

——*as against trustee—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 124, applicability of.*

Section 10 of the Limitation Act applies only where the person setting up adverse possession claims adversely to the beneficial owner. Where, however, a person has been performing the duties of a *shebait* of an idol and applying the trust funds to the proper purposes of the trust and claims the right to hold that office and to perform those duties, section 10 of the Limitation Act has no application and he can acquire that right as against the original *shebait* by adverse possession.

By Article 124 of the Limitation Act a suit for possession of an hereditary office is barred after 12 years from the time when the defendant takes possession adversely to the plaintiff. Articles 134 and 144 do not apply to such cases. **Pat** NATHE PUJARI *v.* RADHA BINODE NAIK, 4 P. L. W. 283; 3 P. L. J. 327; (1918) PAT. 247 **290**

——*Joint holding—Co-sharer in exclusive possession, effect of.*

Where one member of a joint family alone occupies the joint estate, that by itself affords no evidence of exclusion of other interested members of the family Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to

Adverse possession—concld.

assert an adverse claim against other interested members.

Where possession can be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former.

Plaintiffs and defendants were joint owners of an estate and were recorded in the revenue papers as such. It appeared, however, that the defendants alone had been in possession of the joint estate. In 1890 the revenue records were the subject of challenge, but the defendants took no steps to get them rectified, with the result that the plaintiffs continued to be recorded as owners of their joint share:

Held, that the mere fact that the defendants had all along held possession of the joint estate did not amount to an adverse exclusion of the plaintiffs from their joint share. **P C** HARDIT SINGH *v.* GURMUKH SINGH, 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 28 C. L. J. 437; 20 BOM. L. R. 1061 **626**

———Question of law and fact—Possession sufficient to extinguish title of true owner, nature of **892**

———, *tacking of, when allowable—Mortgagee from trespasser, whether can tack possession of himself and trespasser as against true owner.*

In cases where the tacking of possessions is allowed, it is essential that the adverse possessions which are to be tacked must be of the same or of an identical nature. Thus, a mortgagee from a trespasser cannot, as against the true owner, tack his mortgagee possession to that of his mortgagor, the reason being that the latter is a trespasser on the proprietary right, whilst the mortgagee holds adversely merely to the extent of his mortgagee interest. **O** SAIYED-UN-NISA *v.* MAIKU LAL, 5 O. L. J. 391 **687**

———*Trespasser, position of—Owner, remedies of—Ejectment, suit for, after twelve years, maintainability of.*

Although a landlord has an option to treat a person cultivating his land without his permission as a trespasser and to sue him for possession and damages in the Civil Court or to treat him as a tenant and to sue him for rent for the occupation of the same at a fair and equitable rate, he cannot exercise that choice with any effect after a hostile title has been acquired by the occupant by reason of his adverse possession for more than 12 years. The effect of the existence of adverse possession for such a period is to extinguish the remedy of the real owner and the proceedings, if any, taken by him in the Revenue Court to eject the occupant by notice, as if he were a tenant-at-will, are without jurisdiction. **O** SHEO GOBIND *v.* AMBIKA PRASAD, 5 O. L. J. 455 **930**

Agra Tenancy Act (II of 1901), s. 10 **861**

———**s. 20**—*Mortgage of occupancy holding, validity of—Redemption, suit for, maintainability of.*

Plaintiff purported to make a usufructuary mortgage of an occupancy tenancy, which was illegal having regard to the provisions of section 20 of the Agra Tenancy Act. He then brought a suit to redeem the property:

Held, that the suit was maintainable and that the plaintiff was entitled to get back the property on payment of the mortgage money. **A** RAMZAN *v.* BHUKHAL RAI, 6 A. L. J. 747 **852**

Agra Tenancy Act—concld.

———**ss. 95, 177 (f), 202**—*Jurisdiction of Revenue Courts—Suit under s. 95 for declaration of nature of tenancy—Objection as to jurisdiction of Revenue Court—Appeal, whether lies to District Judge.*

A defendant in a revenue suit cannot be allowed by formally raising an untenable plea of jurisdiction to take the case from the Revenue Court to the Civil Court.

Plaintiff was directed by a Civil Court, under section 202 of the Agra Tenancy Act, to bring a suit in the Revenue Court for determination of the nature of his tenancy. He thereupon brought a suit under section 95 of the Act which was heard by an Assistant Collector. The defendant objected that the Revenue Court had no jurisdiction to hear the suit, but the objection was overruled:

Held, that the suit, being one under section 95 of the Agra Tenancy Act and having been brought in compliance with an order of the Civil Court, could be heard only by a Revenue Court, and that no question of jurisdiction had, therefore, been decided by the Revenue Court, so that an appeal against the decision of the Revenue Court did not lie to the District Judge under section 177, clause (*f*) of the Agra Tenancy Act. **A** DEO NARAIN SINGH *v.* SITLA BAKSH SINGH, 40 A. 177; 16 A. L. J. 540 **891**

———**ss. 153, 193**—*Suit to establish right to* muafi, *dismissal of—Appeal—Remand, order of—Appeal, second, whether lies.*

Plaintiff brought a suit in the Revenue Court for a declaration that he was the proprietor of a disputed *muafi*. The suit was dismissed but on appeal the District Judge declared that the plaintiff was a rent-free grantee of so much of the land in suit as he was occupancy tenant of, and remanded the suit to the lower Court for determination of the revenue payable by the plaintiff:

Held, that by virtue of section 193 (*a*) of the Agra Tenancy Act no second appeal lay against the order of the District Judge. **A** ANANDGIR *v.* SRINIVAS, 16 A. L. J. 711 **1008**

———**s. 177 (f)** **891**

———**s. 193** **1008**

———**s. 202** **891**

Appeal (Civil) **171**

———*Appellate Court refusing to accept report of Commissioner, whether bound to order fresh local enquiry—Commissioner, examination of—Discretion of Court.*

Where an Appellate Court refuses to accept the report of the Commissioner for local inquiry, it is not bound to order a fresh local inquiry. The matter is within the discretion of the Court.

On an application by a party for the examination of the Commissioner for local inquiry the Court is bound to see that there is some real ground for examining the Commissioner and that the application has not been made for the purpose of annoying him or for some frivolous purpose. The Court has a discretion as to whether it should permit or refuse a party to examine the Commissioner. **C** JADAVENDRA NANDAN DAS MAHAPTRA *v.* GAJENDRA NARAIN DAS MAHAPATRA, 25 C. L. J. 203 **650**

———*by some of several defendants—Co-defendant*

Appeal (Civil)—contd.

not made party to appeal—Decree against co-defendant, validity of—Appellate Court, power of, to add parties.

Where some of several defendants appeal from a decree without bringing their co-defendants before the Appellate Court as respondents, the Appellate Court has no jurisdiction to pass any decree against the co-defendants without adding them as parties to the appeal.

An appeal having been preferred by some of the defendants, the Appellate Court set aside the decree of the lower Court as against them and made a new decree against a co-defendant who was not a respondent to the appeal. Thereupon the latter applied for the restoration and re-hearing of the appeal in his presence:

Held, that although no provision of the Civil Procedure Code dealt with such a case, yet the Appellate Court should restore the appeal and re-hear it in the presence of the co-defendant after adding him as a party. **C** DURGA CHARAN v. LAKHI NARAIN **917**

———*Death of respondent Notice not served on representative—Appeal decreed ex parte—Application for re-hearing - Limitation—Death of appellant—Appeal dismissed for default—Application to bring representative on record—Procedure.*

The pre-emptor and the vendee both appealed from a decree in a pre-emption suit. Before the appeals could be heard the vendee died, and his appeal was dismissed for default. The pre-emptor applied to bring the representative of the deceased vendee on the record. The application was granted, but before the notice could be served on the representative the pre-emptor's appeal was decreed *ex parte*. The vendee's representative thereupon made an application (*a*) for setting aside the *ex parte* decree in the pre-emptor's appeal and (*b*) for getting himself substituted on the record as appellant in his father's place:

Held, (1) that no notice having been served on the applicant, limitation for the application for re-hearing the appeal which had been decreed *ex parte* commenced from the date on which the applicant had knowledge of the decree;

(2) that as the deceased vendee could not make default, his representative had the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar. **P** DAULAT RAI v. JAGAT RAM, 96 P. R. 1918 **962**

———*Minor respondent—Appellant, failure of, to furnish security for costs of guardian ad litem—Dismissal of appeal against minor—Transfer of appeal—Decree against minor—Dismissal order, effect of.*

One of the respondents to an appeal in a mortgage suit being a minor, the District Judge appointed the Nazir of his Court to act as the guardian *ad litem* of the minor. The appellant, however, failed to furnish security for the costs of the guardian *ad litem* and the appeal was consequently dismissed as against the minor. Subsequently the appeal was transferred to the Subordinate Judge, who heard a Pleader instructed by a third person on behalf of the minor and decreed the appeal. A few days after, the Subordinate Judge, on being informed of the order passed by the District Judge, vacated his own order against the minor and dismissed the appeal as against him:

Held, that the order of dismissal passed by the District Judge was a perfectly good order and was operative until it was set aside. **C** KAILASH CHANDRA KANDOR v. HARIHAR PATRA **928**

———*Parties, necessary, not brought before Court, effect of.*

An appeal cannot proceed unless all the parties necessary for the determination of the case are brought before the Court. **C** AZIMUDDIN MANDAL v. TARA SANKAR GHOSE, 28 C. L. J. 201 **638**

———, right of, against order in execution that certain properties were fraudulently concealed by judgment-debtor **152**

———, *right of—Execution—Order overruling judgment-debtor's objection to valuation, whether appealable.*

There is no right of appeal against an order of the executing Court overruling the judgment-debtor's objection to the valuation put in by the decree-holder in the sale proclamation and refusing the judgment-debtor's prayer for adjournment of the sale and issue of a fresh proclamation. **C** BEJOY KRISHNA NANDY v. DHARENDRA KRISHNA DEB **512**

———, whether competent against decision on question of value for purposes of Court-fee incidental to decision on question of value for purposes of jurisdiction **7**

———, whether lies against order directing attached occupancy holding to be sold **29**

———, whether lies against order directing costs of suit to be recovered personally from mortgagor **542**

Appeal (second)—*Appellate Court shutting out admissible evidence, effect of—Remand.*

Where certain documents having some bearing on the case were improperly excluded from consideration by the Appellate Court on the ground that they were inadmissible in evidence:

Held, that as it was impossible to say what effect the consideration of those documents, as evidence, might have had upon the judgment of the Appellate Court it could not be said that the Appellate Court had properly considered all the evidence in the case and that, therefore, the decree of the Appellate Court must be set aside and the case remanded for a re-hearing of the appeal on consideration of the whole of the evidence including those documents. **C** BRINDABAN CHANDRA DE v. KRISHNA MOHAN DE **159**

———*Document, statement in, value of—High Court, whether can interfere with finding of lower Appellate Court.*

The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognisance of the Court of first appeal, with which the High Court in second appeal is not entitled to interfere. **C** SATISH CHANDRA MUSTAFI v. ABDUL MAJID MAHAMAD **780**

———*Finding of fact not based on evidence.*

Where the finding of a lower Appellate Court on a question of fact is not based on evidence or proceeds on a wrong principle, it is open to question in second appeal. **P** GANGA RAM v. DEWA SINGH, 38 P. L. R. 1918; 92 P. W. R 1918 **39**

———*Finding of fact, when binding—Evidence not considered, effect of.*

Appeal (second)—concld.

The High Court is competent to determine a point of fact in second appeal if it appears from the judgment of the lower Appellate Court that it failed to consider all the evidence on the record relating to that point. **O** KUNJ BIHARI PRASAD *v.* BASDEO PRASAD, 5 O. L. J. 464 **950**

———*Limitation, question of, whether can be raised for first time.*

A question of limitation can be raised in second appeal even where it has not been set up as a defence in any of the lower Courts. **C** NARASINGHA BANA GOSWAMI *v.* PROLHODMAN TEVARI, 22 C. W. N. 994 **25**

———, whether lies in suit to recover registration fee under section 31 of Orissa Tenancy Act (II B. & O. of 1913) **34**

Arbitration Act (IX of 1899), s. 19—*Stay of suit—Umpire, appointment of, certainty of bias in—Order directing stay for limited period, validity of—Mutual mistake on matter of fact not essential to contract, effect of.*

An arbitration tribunal in which the ultimate decision rests with the nominee of a class to which one of the parties belongs cannot be said to be an impartial tribunal.

When a Court finds that an agreement of reference to arbitration provides for the appointment of an umpire who would most certainly tilt the scales against one party, the Court should retain its jurisdiction to try the suit and refuse any application for stay thereof.

An order for stay under section 19 of the Arbitration Act ought not to be restricted by a time limit.

Where an agreement of reference provided that in case of dispute the matter should be referred to the arbitration of two merchants who were members of the Karachi Indian Merchants Association and in case of disagreement between the arbitrators, to an umpire nominated by the said arbitrators or in case of their inability to do so by the Managing Committee of the Association, and it was proved at the trial that the Rules of the Association were so imperfectly drafted and the Association so loosely constituted that the establishment of a valid tribunal of arbitrators was a matter of considerable difficulty:

Held, per *Pratt, J. C.*—That under such circumstances the Court would hesitate to enforce the arbitration.

Per *Fawcett, A. J. C.*—That both the parties appeared to be under a mistake of fact as to the validity of the constitution of the Association but as the matter was not one essential to the agreement, the agreement of reference was not void under section 20 of the Contract Act and hence could not be avoided on this ground.

The Court should exercise its discretion, in refusing to stay a suit or granting leave to revoke a submission, in a sparing and cautious manner and should not do so, unless the applicant can establish that there is good ground for apprehending that there will be a failure of justice if the reference to arbitration is allowed to proceed. **S** GOVERDHANDAS VISHINDAS RATANCHAND *v.* RAMCHAND MANJIMAL, 12 S. L. R. 41 **783**

Arms Act (XI of 1878), ss. 19 (f), 30—*Search by Police Officer specially empowered to conduct searches, legality of.*

The power of search in respect of an offence punishable under section 19, clause *(f)* of the Arms Act, must, by virtue of section 30 of the Act, be exercised in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf.

Where a Police Officer in charge of a reporting section is specially empowered by the Local Government to conduct searches in respect of offences under section 19, clause *(f)* of the Arms Act, a search conducted by such officer in respect of an offence under that clause without obtaining a warrant from a Magistrate is not illegal. **A** BABU RAM *v.* EMPEROR, 16 A. L. J. 721; 19 CR. L. J. 949 **801**

——— **s. 30** **801**

Benami transaction—*Purchase made by father in name of son—Presumption—Burden of proof—Estoppel—Purchaser from ostensible owner, position of—Notice of title of true owner, effect of.*

Where a purchase of real estate is made by a father in the name of his son, the presumption is in favour of its being a *benami* purchase and the burden of proof lies on the party in whose name the estate is purchased to prove that he is solely entitled to the legal and beneficial interest in such purchased estate.

The mere fact that a man has built a house and put his son's name on a tablet in it does not signify that the house belongs to the son.

Where a vendee from an ostensible owner is aware that he is purchasing a doubtful title and also receives direct notice of the true owner's claim before registration of the deed the true owner is not estopped from setting up his title as against the purchaser. **P** GHULAM DASTGIR *v.* TEJA SINGH, 73 P. R. 1918; 159 P. W. R. 1918 **357**

Bengal Alluvion and Diluvion Regulation (XI of 1825), ss. 4, 5—*Accretion - Re-formation in situ—'Small and shallow river,' meaning of.*

Primarily where a party can show that *char* land is in fact a re-formation *in situ* of land identifiable as his own, he is entitled to that land even though it may have been for a period submerged.

Section 4 of the Bengal Alluvion and Diluvion Regulation of 1825 as a whole was not intended to apply to lands which had been previously in existence and the property of individuals. Section 5 of the Regulation was intended to apply to such lands.

The expression "small and shallow river" in clause (4) of section 4 of the Bengal Alluvion and Diluvion Regulation is used in contradistinction to the expression "large and navigable" used in clause (3) of the same section.

The bed of a large and navigable river would not be settled with a private owner. **Pat** NANDAKISHORE JAGATI *v.* NIDHI BIHARA, 3 P. L. J. 438; (19.8) PAT. 261; 5 P. L. W. 194 **102**

Bengal Excise Act (V B. C. of 1909), ss. 46, 83 (a)—*Offence under s. 46—Complaint by Police Officer below rank of officer-in-charge of Police Station, legality of—Magistrate, jurisdiction of, to take cognizance of offence—Criminal Procedure Code (Act V of 1898), ss. 530 (p), 537.*

Bengal Excise Act—concld.

On the report of a Junior Sub-Inspector of Police below the rank of an officer-in-charge of a Police Station, a Magistrate took cognizance of a case under section 46 of the Bengal Excise Act and convicted the offender:

Held, (1) that the Magistrate's proceedings were void under clause (*p*) of section 530, Criminal Procedure Code, inasmuch as he was debarred by section 83 (*a*) of the Bengal Excise Act from taking cognizance of the case on such a report or complaint;

(2) that the defect in the proceedings was not a mere irregularity to which section 537, Criminal Procedure Code, applied, as that section presupposed a trial by a Court of competent jurisdiction. **C** JALALUDDIN PESHAWARI *v.* EMPEROR, 9 CR. L. J. 951 **813**
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——— s. 83 (a)

Bengal Land Registration Act (VII B. C. of 1876) **710**

Bengal Land Revenue Sales Act (XI B. C. of 1859), ss. 3, 5, 6, 33—*Sale for arrears of Government revenue*—*"Illegality" and "irregularity," distinction between*—*"Official Gazette"*—*Publication in vernacular Gazette, whether necessary.*

Failure to notify in the vernacular Government Gazette the sale of an estate, the Government revenue of which exceeds Rs. 500, is not an illegality which *per se* vitiates the sale as having been made "contrary to the provisions" of Act XI of 1859.

Semble.—It is a sufficient compliance with paragraph 2 of section 6 of the Act if the sale is notified in the official Gazette published at Calcutta **P C** SHARFUDDIN *v.* SAMANTA RADHA CHARAN DAS, 16 A. L. J. 915; 35 M. L. J. 644 **995**
995

——— ss. 5, 6, 33

——— s. 33—*Suit to set aside revenue sale*—*Ground not urged before Commissioner taken in suit*—*Plaintiff, whether can succeed.*

In a suit to set aside a revenue sale the plaintiff cannot urge any ground which he did not take in his appeal to the Commissioner under section 2 of Bengal Act VII of 1868. **C** SUKLAL BANIKYA *v.* BIDHU MINDHU **422**

Bengal Municipal Act (III B. C. of 1884), s. 57—*Person holding office of profit under Municipality, whether qualified to be elected Commissioner*—*Election Rules, r.* 13, *meaning of.*

A person who is disqualified under section 57 of the Bengal Municipal Act is *ipso facto* disqualified for election as a Municipal Commissioner.

A person who held and still holds an office of profit under the Commissioners of a Municipality, such as a teachership in a Municipal School, is not qualified to be elected as a Commissioner.

Rule 13 of the Election Rules means that only those persons should be included in the list of candidates who are qualified to be elected. **C** LAKSHMI KANTA DE *v.* CHAIRMAN OF THE NAIHATI MUNICIPALITY **169**

——— ss. 202, 204, 233—*Encroachment on Municipal street by projection*—*Right to run up projection.*

A person who has, without any objection on the part of a Municipality, encroached over the surface of a Municipal street by a projection, has no right to run up the projection to any height he likes, even though he does not thereby make any further encroachment in breadth over the street. **C** RAKHAL CHANDRA DE *v.* CHAIRMAN OF THE SURI MUNICIPALITY **306**
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Bengal Municipal Act—concld.

——— ss. 204, 233

Bengal Tenancy Act (VIII B. C. of 1885), s. 50—*Landlord and tenant*—*Presumption of fixity of rent*—*Instrument stating rent to be variable, whether rebuts presumption*—*Purchaser of non-transferable holding, recognised, rights of*—*Sub-division or amalgamation of raiyati holding*—*"Hajat", meaning of.*

Although the purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right, yet when he obtains recognition from the landlord, whether by payment or otherwise, then in the absence of special circumstances he is admitted into the original tenancy with all its incidents and becomes the successor-in-interest of his vendor.

"Hajat" is a well-known expression for a sum which though, described as rent but never having been part of the rent, is held *in terrorem* over the *raiyat* and is recorded as held in suspense for the time being.

Per *Richardson, J.*—The language of clause (1) of section 50 of the Bengal Tenancy Act is elliptical and the words which must be supplied after "have held at a rent or rate of rent" are "a tenure or holding or land constituting a tenure or holding."

Both the principal rule enacted in clause (1) and the subsidiary, but in practice extremely important, presumption created by clause (2) of section 50 of the Bengal Tenancy Act assume the continuity and identity of the tenure or holding throughout the whole period from the Permanent Settlement onwards. They are applicable to land which at the time when the question arises may form part only of the *raiyat's* holding. Thus they apply to the several parcels of land of which the holding of a *raiyat* consists when the question arises. Part of the holding may be inherited land. Part may have been acquired by purchase from another *raiyat*. In either case the *raiyat* may tack on his own occupation of the land at an unvaried rent to the occupation at an unvaried rent of his predecessor-in-interest, who as regards lands acquired by purchase from another *raiyat* will include his vendor and his vendor's predecessors.

Section 50 is not affected by the variability of the rent at the inception of a tenancy. If the rent of a tenancy created prior to the Permanent Settlement, under an agreement which provided that the rent should be variable, has not in fact been "changed from the time of the Permanent Settlement", then it "shall not be liable to be increased". If an instrument is executed forty or fifty years later, the mere fact that the rent is expressed to be variable will by itself make no difference, as the provision for variability of rent may be merely a repetition of one of the original incidents of the holding. The true question in such cases would be whether the instrument created a new tenancy or whether it was merely confirmatory of a pre-existing interest or tenancy. **C** ABHOY SANKAR MOZUMDAR *v.* RAJANI MANDAL, 22 C. W. N. 904 **359**

Bengal Tenancy Act—contd.

——— **s. 50 (2)**—*Presumption, rebuttal of, by statement in rent receipts that holding is* sarasari.

The mere statement in some rent receipts that a holding is *sarasari* is not sufficient to rebut the presumption arising under section 50 (2) of the Bengal Tenancy Act from the fact that the rent has been unchanged for more than 50 years. **C** SATIS CHANDRA MUSTAFI *v.* ABDUL MAJID MAHAMAD **780**

——— **s. 66**—*Suit under section for more than one year's rent, maintainability of—Remedy provided by section, when can be availed of—Decree granting ejectment on default of payment of four years' rent, validity of.*

If a landlord in a suit under section 66 of the Bengal Tenancy Act asks for more than one year's rent, he disentitles himself to the remedy granted by that section.

A decree under section 66 of the Bengal Tenancy Act directing that the plaintiff landlord should be entitled to recover *khas* possession of the land if four years' rent in arrears claimed and decreed in the suit is not paid, is bad. **C** MUKTA KESHI DEBI *v.* GIRI BALA DEVI **1006**

——— **s. 85**—*Under-*raiyati *lease, permanent, validity of*—'San ba san,' *meaning of.*

A permanent under-*raiyati* lease registered in contravention of section 85 (2) of the Bengal Tenancy Act is not operative even as against the *raiyat* who granted it.

A registered under-*raiyati* lease, while making provision for the holding passing from generation to generation and for being sold by the under-*raiyat*, described itself as a *san ba san* (year to year) lease and stipulated that if the under-*raiyat* ever reduced the rent by raising any objection he would be liable to ejection without notice:

Held, that the under-*raiyati* lease was a permanent lease and as such contravened the provisions of section 85, Bengal Tenancy Act, and was, therefore, invalid. **C** KARIM BAKSHA *v.* ABDUL JABBAR MIAJI **416**

——— **s. 87**—*Landlord and tenant—Occupancy holding, non-transferable, mortgage of—Abandonment of holding—Landlord, right of, to recover possession.*

Where an occupancy *raiyat* executes an usufructuary mortgage of his non-transferable holding and puts the mortgagee in possession, the landlord is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonement of the holding within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. **C** PRIONATH BOSE *v.* KUSUM KUMARI DASSI **332**

——— **s. 87.**

Wher a holding has in fact been abandoned, the landlord is entitled to re-enter without having recourse to the provisions of section 87 of the Bengal Tenancy Act. **C** WAHID ALI BHUYA *v.* MAHAMAD ANSAR ALI **147**

——— **ss. 88, 161**—*Bengal Tenancy (Validation and Amendment) Act I of* 1903, *s.* 3—*Landlord and tenant—Transfer of holding at fixed rent, validity of—Landlord's fee not paid, effect of.*

A sale of the whole of a *raiyati* holding at fixed rent is not invalid merely because the landlord's fee is not paid. But when the sale is only of a part of such a holding the landlord is not bound to recognize the purchaser, as such a sale constitutes a division of the holding. **C** FAZAR ALI MISTRI *v.* AMIR BUKSH MIAN **334**

——— **s. 88**—*Ejectment of purchasers of occupancy holding on failure to attorn, suit for—Suit alleged to have been filed by agent of plaintiff without authority—Burden of proof.*

Section 88 of the Bengal Tenancy Act does not warrant a decree in the landlord's suit for the ejectment of the purchasers of a holding on their failure to jointly and severally attorn to the landlord within a time to be fixed by the Court.

In a suit for the ejectment of the purchasers of an occupancy holding, the defendants pleaded that the suit was bad as it was instituted by the *naib* of the plaintiff without her knowledge:

Held, that as the plaintiff was a lady, the onus was upon the defendants to prove affirmatively that the plaintiff was ignorant of the suit and that it was not enough for them to point to a few facts which gave cause to suspect that it was the *naib* who instituted the suit and then to call upon the plaintiff to prove that she had authorised the institution of the suit. **C** GIRIBALA DASI *v.* KUDRUTULLA PRAMANIK **575**

——— **s. 103A** **49**

——— **ss. 103B, 161, 167**—Patni, *sale of—Rent-free lands within* patni, *whether incumbrance.*

Within a *patni taluk* created in 1807 which was purchased by the plaintiff in execution of a rent-decree, there were certain lands in the possession of the defendant which were recorded in the settlement records as rent-free lands. The plaintiff sued to recover possession of those lands by ejecting the defendant on the allegation that the defendant's interest was an incumbrance within the meaning of section 161 of the Bengal Tenancy Act:

Held, (1) that the defendant's interest could not be deemed to be an incumbrance unless it was shown that the *zemindar* was in possession of those lands at the time when the *patni* was granted;

(2) that having regard to the provisions of section 103B of the Bengal Tenancy Act and the pleadings of the plaintiff and to the facts that there was no evidence to show that any rent had ever been realised in respect of those lands and that the defendant and his predecessor-in-title had been in possession for a long period without payment of rent, it was incumbent upon the plaintiff to show that the *zemindar* was in possession of the lands in dispute at the date of the creation of the *patni* and that the incumbrance of the defendant came into existence after that date. **C** BIPRODAS PAL CHOWDHURY *v.* KEDAR NATH ROY **765**

——— **s. 104H** **502, 524**

——— **ss. 104H, 111A**—*Specific Relief Act (I of* 1877), *s.* 42, *suits under—Limitation—Limitation Act (IX of* 1908), *Sch. I, Art.* 120.

Section 104H of the Bengal Tenancy Act refers only to suits by persons aggrieved by an entry of a rent settled in Settlement Rent Roll prepared under sections 104F to 104H of the Act, or by an omission to settle such rent.

Where in a suit, which was described in the plaint is one under section 104H and section 111A of the Bengal Tenancy Act and section 42 of the

Specific Relief Act, the reliefs claimed by the plaintiffs were *inter alia* the following:—

(*ka*) That the plaintiffs may be declared as occupancy *raiyats*.

(*kha*) That the land of schedule *cha* below may be declared as included in the right which the plaintiffs may be held to have.

(*ga*) That proper rents may be fixed of the lands in the possession of the plaintiffs and time for payment of the said rent may be fixed.

(*gha*) That the tenants under the plaintiffs may be held to have no rights as settled *raiyats* or occupancy *raiyats*.

(*una*) That the tenants under the plaintiffs may be declared to be *korfa* tenants (under-tenants):

Held, that so far as relief (*ga*) was concerned, the suit was one under section 104H of the Bengal Tenancy Act and was governed by the special law of limitation provided by that section, but that the claim for other reliefs was outside the scope of that section, and to that extent the suit was one under section 42 of the Specific Relief Act, as provided by the proviso to section 111A of the Bengal Tenancy Act, to which the limitation applicable was that provided by Article 120 of Schedule I of the Limitation Act. **C** RAJANI KANTA MOOKERJEE *v.* SECRETARY OF STATE, 45 C 645 **820**

——— **s. 105**—*Application for enhancemeht of rent by two landlords—Appeal dismissed as against one landlord, whether can proceed against other.*

In a case which arose out of an application made under section 105 of the Bengal Tenancy Act by two landlords for settlement of fair rent and for enhancement, after the decision of the lower Appellate Court one of the landlords died leaving two sons, of whom one was a major and the other a minor. The tenant defendants, who preferred an appeal to the High Court having failed to pay the costs of the Deputy Registrar who was appointed guardian of the minor son, the appeal as against him was dismissed at the risk of the appellants:

Held, that the appeal must fail in its entirety as all the parties necessary for the disposal of the case were not before the Court. **C** AZIMUDDIN MANDAL *v.* TARA SANKAR GHOSE, 28 C. L. J 201 **638**

——— **ss. 105, 106, 109**—*Application under s* 105, *subsequently withdrawn, effect of—Suit under s.* 106, *dismissed for non-joinder of parties, whether bars civil suit—Landlord and tenant—Rent, non-payment of, whether bars landlord's right to assess rent.*

An application made under section 105 of the Bengal Tenancy Act for assessment of fair rent but subsequently withdrawn should be treated as if it had never been made, so that it cannot bar a suit in the Civil Court for the same purpose under section 109 of the Bengal Tenancy Act.

Where a suit brought under the provisions of section 106 of the Bengal Tenancy Act, for a declaration that an entry in the Record of Rights that no rent was paid in respect of a tenure was wrong and that in fact a certain sum was payable as rent, is dismissed for non-joinder of parties, section 109 of the Act is no bar to a subsequent suit in a Civil Court for assessment of fair rent upon the tenure.

The mere non-payment of rent, for a certain period does not bar the landlord's right to have the rent assessed and to recover it from his tenant. **C** KAMINI SUNDARI CHOWDHURANI *v.* ABDUL AALIM MOULAVI, 28 C. L J. 254 **420**

——— **s. 106**—*Record of Rights, entry in, correction of—Plaintiff and defendant recorded as joint landlords—Partition—Burden of proof.*

In a proceeding under section 106 of the Bengal Tenancy Act for the correction of an entry in the Record of Rights, in which the names of the plaintiff and his co-sharer defendant No. 7 were entered as joint landlords, it was found that there had been a partition between them long before the Record of Rights and that the plaintiff had been in sole possession since the partition:

Held, that although there was nothing to show what was the precise result of the partition, still in the absence of any evidence on the part of defendant No. 7 to show that the plaintiff's possession was as a co-sharer on his behalf, the plaintiff should be recorded as the sole landlord. **C** BROJENDRA KISHORE ROY *v.* JUGENDRA KISHORE ROY **5**

——— **s. 109** **420**

——— **s. 111A** **820**

——— **s. 149**—*"Pleads", meaning of—Suit by third person, whether rendered infructuous by plaintiff in rent suit obtaining decree.*

The word "pleads" as used in section 149 of the Bengal Tenancy Act does not mean that the tenant should set up a valid plea or a plea that is open to him in accordance with law. Whether the plea is good, bad or indifferent, if the tenant hands in the amount claimed, the Court will serve notice on the third party and unless the third party brings his suit within three months, the plaintiff in the first suit will be entitled to the money.

A suit instituted in accordance with clause (3) of section 149 of the Bengal Tenancy Act by the "third person" mentioned in that section is not rendered infructuous by the fact that owing to the Courts' delay, before that suit is tried out, the plaintiff in the original rent suit gets a decree against the defendant. **C** HEMANTA KUMARKAR *v.* BIRENDRA NATH ROY **1003**

——— **s. 153**—*Rent, suit for—Appeal, second, whether lies.*

In a suit for rent where the amount claimed does not exceed Rs 100, no special appeal lies to the High Court where the only question decided in the suit is whether the relation of landlord and tenant exists between the parties. **C** JAHIRAL HAQUE *v.* SADAR ALI **105**

——— **s. 153 (b)**—*Rent suit, dismissal of, on ground that relationship of landlord and tenant not established—Appeal, whether lies.*

In a suit for rent in which the amount claimed did not exceed Rs. 50, the plaintiff alleged that the defendant held two *jamas* under him, one at Rs. 3-12-0 and the other at Rs. 3-15-0 and he claimed to recover arrears of the *jama* of Rs. 3-15-0. The defendant admitted holding only one *jama* at Rs -12-0 under the plaintiff, but denied holding any *jama* at Rs. 3-15-0. The Munsif, who had final powers under section 153 (*b* of the Bengal Tenancy Act, holding that the *jama* claimed by the plaintiff was identical with that alleged by the defendant, dismissed the suit on the ground that there was no relationship of landlord and tenant between the

Bengal Tenancy Act—contd.

parties in regard to the *jama* of Rs. 3-15-0 alleged by the plaintiff:

Held, that no appeal lay to the District Judge as the decision of the Munsif was not a decision of the question of the amount of rent annually payable, but was a decision as to the existence of the relationship of landlord and tenant between the parties in respect of the *jama* sued for. **C** MUKUNDA LAL ROY *v.* BHABASUNDARI DEBYA 922

——— **s. 161** 765

——— **s. 161**—*Adverse possession against tenant—Title acquired by adverse possession, whether incumbrance.*

A title acquired by adverse possession against a tenant is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. **C** FAZAR ALI MISTRI *v.* AMIR BUKSH MIAN 334

——— **ss. 161, 167**—*Incumbrance—Mortgagee-purchaser of holding, interest of, whether incumbrance.*

The interest of a mortgagee of a part of a holding who has purchased the holding in execution of his mortgage decree is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. Such a mortgagee-purchaser cannot be ejected by the purchaser of the holding in execution of a rent decree until his incumbrance is annulled under the provisions of section 167 of the Bengal Tenancy Act. **C** INDRA NARAIN RAY *v.* NABIN CHANDRA BANERJEE 847

——— **s. 167** 765, 847

——— **s. 167**—*Annulment of incumbrances—Procedure—Rent-decree in respect of divided tenure—Sale in execution of decree, whether sale under Bengal Tenancy Act.*

Where in execution of a decree obtained in a suit for the rent of a tenure which has long before the suit been divided into separate *taluks*, the tenure is sold, the sale is not one under the Bengal Tenancy Act. To have the benefits of a sale for arrears of rent under the Bengal Tenancy Act there should be a separate suit in respect of each of the separate *taluks*.

The destruction of valuable incumbrances is a very severe measure, which the law allows only if a certain procedure is strictly followed, and when a party wishes to enforce that severe measure he must show that he has strictly followed the procedure laid down and there must be good proof of his strict compliance with the procedure. **C** PRAFULLA NATH TAGORE *v.* SHITAL KHAN, 22 C. W. N. 788 97

——— **s. 174**—*Amount to be deposited—Decretal amount with costs—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.*

The amount of money required to be deposited by the judgment-debtor under section 174 of the Bengal Tenancy Act is the amount recoverable under the decree with costs, and not the amount specified in the proclamation, as is the case under rule 89 of Order XXI of the Civil Procedure Code. **Pat** MAKRU RAI *v.* SARJUG PERSHAD MISSER 654

——— **s. 182**—*Homestead, occupation of, for more than twelve years—Occupier, whether becomes* raiyat *—Settled* raiyat.

Before a person can become a settled *raiyat* of a village he must be a *raiyat*. Mere occupation of a homestead in a village for more than twelve years would not make the occupier a settled *raiyat* of the village. **C** KAMAL BAIDYA *v.* GANESH CHANDRA BISWAS 829

——— **ss. 184, 185** 502

Bengal Tenancy (Validation and Amendment) Act (I of 1903), s. 3 334

Bombay District Municipalities Act (III of 1901), s. 96—*Application for permission to build privy—Permission granted—Subsequent order cancelling permission, legality of.*

Plaintiff applied to the defendant Municipality on the 1st December 1913 for permission to build a privy on his own land, and the permission was granted by the Municipality on the 22nd of December. On the 8th of January 1914 the Municipality gave a notice to the plaintiff requiring him not to build the privy until a further order was made. The plaintiff thereupon brought a suit for a declaration that he had a right to construct the privy and also prayed for a perpetual injunction restraining the Municipality from preventing him from constructing the privy:

Held, that the order of the Municipality dated 22nd December 1913, granting permission to the plaintiff to build the privy, was a final order under sub-section (2) of section 96 of the Bombay District Municipalities Act, and that the subsequent order of the Municipality was not justified under any section of the Act and was, therefore, illegal. **B** VITHAL DHONDDEV RAIKAR *v.* ALIBAG MUNICIPALITY, 20 BOM. L. R. 756 145

Bombay Land Revenue Code (Act V of 1879), ss. 3 (20), 217—*"Alienated village," what is—Village in which the entire property in the soil has been granted, whether alienated.*

In the definition of the word "alienated" in section 3 (20) of the Bombay Land Revenue Code the words "transferred in so far as the rights of Government to payment of the rent or land revenue are concerned," prescribe a certain minimum requirement, and where that minimum requirement is satisfied, the definition also is satisfied, notwithstanding that the transfer may cover certain other interests over and above those contained in the minimum requirement.

Where the Government has transferred to the grantee of a village not merely its own rights to receive the land revenue but the entire property in the soil, the village is an "alienated" one within the meaning of section 3 (20) of the Bombay Land Revenue Code and section 217 of the Code is applicable to it. **B** DADOO BHAOO *v.* DINKAR VISHNU APHALE, 20 BOM. L. R. 887 745

——— **ss. 144, 160**—*Attachment of village for non-payment of* jama *—Government, whether can levy assessment from rent-free grantee.*

A village was settled by the Government with the *talukdar* and a *jama* was fixed on the whole of the village. Subsequently, the village was attached under section 144 of the Bombay Land Revenue Code for non-payment of the *jama* and an assessment was levied under section 160 of the Code. The plaintiffs, who held lands rent-free under the *talukdar*, contended that they were not liable to pay the assessment:

Held, that the fact that the plaintiffs held lands rent-free from the *talukdar* did not affect the right

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of Government to assess the lands, inasmuch as the *talukdar* had no power to free any lands from liability to pay assessment to the Government. **B** TULLA SOBHARAM PANDYA *v.* COLLECTOR OF KAIRA, 20 BOM. L. R. 748 **117**

——— **s. 160** **117**

——— **s. 217** **745**

Breach of Contract—*Damages, suit for—Party who has not performed his part of the contract, whether can recover damages.*

A plaintiff, who has himself failed to perform his part of a contract and has given no evidence that he has suffered any damages by the defendant's breach of the contract, cannot succeed in a suit for damages for breach of contract. **C** NARENDRA LAL KHAN *v.* MANMOTHA RANJAN PAL **197**

Buddhist Law, Burmese—Maintenance **866**

——— ——— —*Succession*—Pongyi, *whether can inherit from lay relatives after ordination.*

A *pongyi* or *rahan* divests himself of all worldly possessions at the time of his ordination and thereafter is incapable of inheriting property from his lay relatives. **U B** MAUNG PWE *v.* U. INGUYA, 3 U. B. R. (1918) 91 **681**

——— *Succession—Suit by step-children for share in property of step-father, maintainability of*—Thinthi *property.*

It is only where a step-father dies leaving no natural issue and no widow surviving him that the children of his deceased wife by a former husband are entitled to his property under sections 294 and 295 of the Digest.

According to the ordinary rule for partition between a step-father and step-children, the latter can, immediately on their mother's death, claim a share of the property acquired jointly by their mother and step-father during their marriage, so that such a claim, if not made within 12 years of their mother's death, would be barred under Article 123 of Schedule I of the Limitation Act.

In respect of their mother's *thinthi* property, however, the claim can be made by the step-children even on the subsequent happening of their step-father's death. **L B** SAN PE *v.* MA SHWE ZIN, 9 L. B. R. 176 **139**

Burden of proof—Ancestral property **17**

Burma Excise Act (V of 1917), s. 37—*Unlawful possession of* tari *in district where tree-tax system is not in force—Offence.*

In a district in which the tree-tax system is not in force and in which, consequently, the law does not prohibit or place any restriction upon the manufacture of *tari*, it cannot be unlawfully manufactured, and section 37 of the Burma Excise Act does not, therefore, apply to the possession of *tari* manufactured in such a District. **U B** EMPEROR *v.* NGA PO KYAN, 3 U. B. R. (1918) 86; 19 CR. L. J. 970 **870**

Burma Laws Act (XIII of 1898), s. 13, *applicability of—Buddhist, Chinaman professing Buddhism, whether is—Chinese Customary Law, applicability of—Adoption, validity of.*

It is not necessary for the application of section 13 of the Burma Laws Act that the person whose religion is under consideration should have been born a Buddhist, Muhammadan or Hindu, as the case may be. A Chinaman who professes Buddhism is a Buddhist within the meaning of this section.

Where on the death of a Chinaman who professed Buddhism the plaintiff claimed to succeed him as his adopted son:

Held, that the question of the plaintiff's adoption should be determined in accordance with the Chinese Customary Law. **L B** KYIN WET *v.* MA GYOK, 9 L. B. R. 179 **148**

Calcutta Police Act (IV of 1866), s. 54 (a), *offence under—Findings necessary for conviction.*

The preliminary condition which must be fulfilled before effect can be given to section 54 (*a*) of the Calcutta Police Act is that there must be reason to believe that the property found in the accused's possession is stolen property.

The Court has first to find on sufficient materials that there is reason for such belief, and it is not until it has come to such a finding that it can consider whether the accused has been able to account for possession of the property. **C** SUKHU KALWAR *v.* EMPEROR, 22 C. W. N. 936; 28 C. L. J. 262; 19 CR. L. J. 933 **657**

Canon Law—*Roman Catholic Church, constitution of and law applicable to—Church adopting rules different from those of parent body, effect of.*

The Church of England is an *established* church and is, therefore, subject to the ordinary Courts of Law not only as to matters temporal but even as to matters of doctrine.

The Roman Catholic Church is not an *established* church but a voluntary association, and any member who joins that church will be bound by any rules which it has framed for its internal discipline and for the management of its affairs.

If a branch voluntary association adopts rules which differ materially from those of the parent body, then the members of that association will not be members of the parent body but will be an independent organisation with their own rules.

The Canon Law recognises no distinction between the spiritual and temporal powers of the Papacy, and the Episcopate and a member of any church which is part and parcel of the Universal Catholic Church would be bound by the Canon Law.

If a church, while adopting in the main the doctrines of the Roman Catholic Church, has yet erected certain rules different from the rules of the Catholic Church in matters of discipline and management, those rules must be proved in the same way in which a custom would have to be proved in a Court of Law.

Where an appointment as manager of a Vicar in a Roman Catholic Parish Church by the Bishop was questioned on the ground that he was not appointed by the *junta* composed of the heads of houses in a village as was the custom and that the delegation of any authority by the Bishop was only permissive:

Held, (1) that whether the church be viewed as a branch of the Roman Catholic Church or as a voluntary association the appointment was valid;

(2) that the question whether the custom was for the *junta* to appoint was one of fact on which the finding of the lower Appellate Court could not be interfered with in second appeal. **M** LOVES *v.* GONSALVES, 8 L. W. 208; 35 M. L. J. 407; (1918) M. W. N. 842 **941**

Cantonment Code, s. 231 (2)—*"Absence," meaning of—Failure to appoint agent during absence of nine days from Cantonment—Offence.*

In construing the word "absence" as used in section 231 (2) of the Cantonment Code, the word should receive a larger or more restricted meaning according to what the Court believes to be the intention of the Legislature in framing the particular provision in which the word is used.

An absence of nine days from a Cantonment is such absence as is contemplated by section 231 (2) of the Code and would render the delinquent liable to conviction and punishment under the section. **S** HOTCHAND *v.* EMPEROR, 19 CR. L. J. 974; 12 S. L. R. 40 **874**

Carriage by sea—*Short delivery, damages for—Freight illegally collected, suit for return of—General average contribution, claim for—Jurisdiction—Peril to crew and cargo—Jettison—Principles governing general average.*

A claim for general average contribution can be sustained only when the voyage has been completed and the vessel has reached its place of destination or some other port safely. If there are several general average acts during the same voyage the principle is to make each owner of a sacrificed interest contribute to all the sacrifices in whatever order of time they may have occurred. The time of jettisoning cannot be taken as the time when the value of the goods is to be ascertained because the whole adventure may afterwards be brought to an end by the total loss of the ship and cargo when there can be no contribution at all.

A claim for general average may be laid at the place where the voyage has safely ended.

Plaintiff chartered 1st defendant's vessel to sail from Cutch to Basra; where it was to take 700 bundles of dates and discharge them at Calicut. First defendant was a resident of Cutch where the charter party was entered into. The ship experienced rough weather on her way from Basra to Calicut, in consequence whereof the master 2nd (defendant) had to jettison 165 bundles. The ship, however, reached Calicut in safety. The master refused to deliver to plaintiff any of the goods till the whole freight was paid. Plaintiff paid the freight under protest and sued the owner of the ship and the master in the Calicut Munsif's Court for (1) the return of the excess freight collected, and (2) the price of the bundles short-delivered, or (3) the amount due on a general average contribution. The defendants objected to the jurisdiction of the Court:

Held, (1) that the claim for return of freight was properly laid in the Calicut Court as the freight was collected at Calicut;

(2) that, as Calicut was the place of performance of the contract, the Calicut Court had jurisdiction to entertain the claim for the price of the short-delivered goods;

(3) that as the voyage safely came to an end at Calicut, plaintiff's cause of action for general average arose in Calicut. **M** RAJABHAI NARAIN OF CUTCH *v.* KARIM MAHOMED OF BOMBAY, 35 M. L. J. 189; (1918) M. W. N. 521: 24 M. L. T. 209 **708**

Caste Disabilities Removal Act (XXI of 1850), s. 1 **817**

Cause of action **2**

Caveat emptor, doctrine of, applicability of **37**

C. P. Municipal Act (XVI of 1903), ss. 52, 53—*Municipal Committee, whether owner of all land within limits of Municipal Town—Adverse possession—Question of law and fact—Possession sufficient to extinguish title of true owner, nature of.*

There is no authority for the proposition that all land within the limits of a Municipal town must, in the absence of evidence to the contrary, be taken to belong to the Municipal Committee.

A claim of title by adverse possession raises a mixed question of law and fact and should, therefore, be raised in the Court of the first instance so that the opposite party may plead to the claim and evidence may be adduced thereon.

A person who seeks to establish such a claim has to show that his possession was adequate in continuity, publicity and in extent to extinguish the title of the true owner. **N** PRALHAD SINGH *v.* ABDUL AZIZ KHAN **892**

——— **ss. 67 (1) (2), 139**—*Encroachment, old, prosecution in respect of, legality of—Remedy.*

In the case of an encroachment not made by the accused, sub-section (2) of section 67 of the Act provides full means of redress which can be enforced by the penal provisions of section 139.

The word 'such' in sub-section (2) of section 67 of the Act refers back to the words "structure encroaching on any street" in sub-section (1), and not only to new encroachments as is clear from the proviso in which encroachments of very old standing are referred to. **N** MADAN GOPAL DEOKARAN *v.* SECRETARY, MUNICIPAL COMMITTEE, NAGPUR, 19 CR. L. J. 979 **879**

——— **s. 122.**

What is made criminally punishable under section 122 of the C. P. Municipal Act is the act of making an encroachment. The section cannot reasonably be construed as making punishable an existing encroachment not made by the accused person. **N** MADAN GOPAL DEOKARAN *v.* SECRETARY, MUNICIPAL COMMITTEE, NAGPUR, 19 CR. L. J. 979 **879**

——— **s. 139** **879**

C. P. Tenancy Act (XI of 1898), ss. 35, 36, 46—*Surrender of occupancy holding for consideration—Heir of tenant placed in possession—Failure of consideration—Landlord, whether can recover money paid by him—Provision restraining heir from making claim, validity of.*

Section 36 of the C. P. Tenancy Act is only exhaustive as to what the claimant is liable to pay and does not deal with any remedy the landlord may have against the tenant who surrenders his holding for valuable consideration, and certainly does not say that he has no remedy.

When an occupancy tenant surrenders his holding for consideration under section 35 of the C. P. Tenancy Act and his nearest heir is put in possession of the holding by a Revenue Officer acting under section 36 (1) of the Act, the landlord can recover from the surrendering tenant the consideration he has paid less the amount he has received under sub-section (1) of section 36.

A surrender of an occupancy holding for a consideration is not a transfer in contravention of the provisions of section 46 of the C. P. Tenancy Act.

A deed of surrender of an occupancy holding provided that if any one set up a claim to the fields surrendered, the tenants would be responsible for

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costs incurred by the landlord in defending the fields against such claims. The surrender was set aside at the instance of the heirs of the tenants:

Held, that the heirs were legally entitled to make the claim, and the agreement to prevent them making a claim was of such nature that, if permitted, it would defeat the provisions of the C. P. Tenancy Act and was, therefore, unlawful under section 23 of the Contract Act and that the landlord could not, therefore, recover the costs incurred by him in the revenue proceedings in defending the surrender against the heirs. **N** JAIRAM *v.* GOPIKISHAN, 14 N. L. R. 125 **32**

——— **ss. 35 (4), 94**—*Tenant right, whether can be willed away—Ouster of true tenant by devisee—Suit by tenant to recover possession—Limitation.*

S., a co-sharer of a village, gave a lease of the ordinary tenant right of his *sir* fields to *R.*, another co-sharer, for 149 years. A sum of Rs. 1,490 was paid in advance by way of rent for the period of the lease. *R.* died leaving a Will, by which he bequeathed all his property to his mother *A.*, on whose death *R.*'s widow brought a suit for possession of the holding on the ground that her husband had no right to will away the holding and that notwithstanding the bequest she remained the ordinary tenant of the holding:

Held, (1) that *R.* had no right to will away the tenant right;

(2) that section 94 of the C. P. Tenancy Act was not applicable to the case as the ouster, if any, of the plaintiff from the holding was not at the instance of the landlord;

(3) that there had been no implied surrender under section 35 (4) of the C. P. Tenancy Act, inasmuch as the payment of rent in advance must be taken to have been on behalf of the true tenant. **N** SHAMRAO *v.* SATYA BHAWU BAI **28**

——— **s. 46** **32**

——— **s. 81 (b)**—*Rent suit—Appeal, second, whether lies.*

To bring a case under clause (*b*) of section 81 of the C. P. Tenancy Act it is necessary that there should have been an adjudication as between persons impleaded as parties to the suit and having conflicting interests.

Plaintiff Malguzar sued the defendants for arrears of rent, the amount of which was less than Rs. 100. The defendants pleaded that they were not liable for rent as they had relinquished their share in the holding in favour of their nephew *J.*:

Held, that no second appeal lay, inasmuch as the amount claimed was less than Rs. 100, and the case did not fall under clause (*b*) of section 81 of the C. P. Tenancy Act, *J.* not being a party to the suit and the defendants and *J.* not having conflicting claims with regard to the tenancy. **N** DINDAYAL SHEODUTTA *v.* SUKHA **540**

——— **s. 94** **28**

Chota Nagpur Encumbered Estates Act (VI B. C. of 1876), ss. 3 (c), 12A—*Contract by disqualified proprietor, validity of—Ratification of contract to pay debts incurred during period of disqualification, validity of.*

A disqualified proprietor under the Chota Nagpur Encumbered Estates Act is incompetent to enter into any contract which may involve him or his heirs in pecuniary liability.

No suit can be brought upon a contract entered into by a disqualified proprietor after he emerges out of his disqualification by which he promises to pay any debt incurred by him during his disqualification. **Pat** HANUMAN BAKSH *v.* TIKAIT GANESH NARAYAN SAHA DEO, (1918) PAT. 318 **705**

——— **s. 12A** **705**

Chowkidari chakran lands *situate within* putni—*Resumption*—Putnidar, *title of*—*Rent, liability of* patnidar *to pay.*

Chowkidari chakran lands situate within the ambit of a *putni* belong, on their resumption, to the *putnidar*, and where the *putnidar* has been enjoying the services of the *chowkidar* before the resumption, he is not liable to pay for those lands any rent or cesses in excess of what the *zemindar* has to pay to the *chowkidari* fund, unless by the terms of the *putni* lease the *zemindar* is entitled to a profit in respect of such lands. **C** MONOHAR MUKHERJEE *v.* KALI DAS NANDI **840**

——— *within* putni, *resumption of*—Putnidar *and* zemindar, *rights of.*

Chowkidari chakran lands included within a *putni* belong to the *putnidar* after they are resumed, so that the *zemindar's* settlement of those lands after their resumption with a third person is ineffective as against the *putnidar*. **C** MURARI MAHAN DAS *v.* TOFEL SHA **164**

Christian Marriage Act (XV of 1872), ss. 4, 5 **544**

City of Bombay Municipal Act (III of 1888), ss. 140 (c), 143 (1) (a), (2) (d)—*Universities Act (VIII of 1904), ss. 21 (1) (e), (f), 25 (1), (2) (m)—College hostel, whether liable to be assessed to general tax—Hostel fee, whether rent—Charitable purpose, what is—Portions occupied by Superintendent and Professor.*

The extra sum paid by the resident students of a College in respect of hostel accomodation is not paid as rent within the meaning of sub-clause (*d*) of section 143 (2) of the City of Bombay Municipal Act, but is an additional fee paid by them for the advantages derived by them and more attention paid to them for looking after their social, moral and physical welfare than the non-resident students of the College.

The portions of a College hostel occupied by the resident students of the College are exempt from taxation under section 140 (*c*) of the City of Bombay Municipal Act, as they are exclusively occupied for charitable purposes within the meaning of section 143 (1) (*a*) of the Act.

The portions of a College hostel occupied by the Superintendent or a Professor and the peons are exempt from taxation under section 143 (1) (*a*) of the City of Bombay Municipal Act, if the presence of the occupants on the premises is absolutely necessary for the discharge of their duties of supervision and physical welfare of the students as

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required by section 21 (1) (*c*) of the Universities Act. **B** MONIE *v.* SCOTT, 20 BOM L. R. 839 **642**

——— **s. 143 (1) (a), (2) (d)** **642**

Civil Procedure Code (Act XIV of 1882), s. 2—*Civil Procedure Code (Act V of 1908), s. 48—'Decree,' meaning of—Order dismissing appeal for default, whether decree—Execution of decree—Limitation, meaning of.*

An order dismissing an appeal for default is not a decree within the meaning of the definition of that word contained in the Civil Procedure Code of 1882.

Where an appeal was dismissed for default under the Civil Procedure Code of 1882:

Held, that the only decree which could be executed was the decree of the original Court and that limitation for execution of the decree must be taken to have begun to run from the date of the original decree, and not from the date of the order dismissing the appeal from that decree for default. **O** RAM ADHIN *v* RAM LOT, 5 O. L. J. 252 **125**

——— **s. 526** **548**

Civil Procedure Code (Act V of 1908) s. 11 **192**

——— **s. 11**—Res judicata **954**

——— **s. 11**—Res judicata—*Cross-appeals—Appeal from one decree, whether maintainable—Suit of Small Cause nature deciding question of title—Subsequent suit involving same question, whether* res judicata.

Plaintiff brought a suit claiming possession of a half share in each of two groves Nos. 2 and 123, situate in different villages. His suit was dismissed in respect of grove No. 2 and decreed in respect of grove No. 123. There were appeals both by the defendant and by the plaintiff. The latter's appeal was dismissed and the defendant's was allowed, the case being remanded. The plaintiff appealed to the High Court against the order of remand:

Held, that the failure of the plaintiff to appeal against the order, dismissing his own appeal to the lower Appellate Court, did not debar him from appealing against the order remanding the suit in the defendant's appeal.

Plaintiff brought a suit against the defendants to recover his share of the price of two trees cut down by the defendants, on the ground that he was entitled to a moiety share in the grove. The suit was one of the nature cognizable by a Court of Small Causes, but was instituted in the Court of the Munsif, who tried it as a regular suit and decided that the plaintiff was entitled to a half share in the grove. In a subsequent suit by the plaintiff to recover possession of his half share in the grove:

Held, that under Explanation II to section 11 of the Civil Procedure Code, the question of the plaintiff's title to a half share in the grove was *res judicata*. **A** RAM FAQIR *v.* BINDESHRI SINGH, 16 A. L. J. 782 **837**

——— **s. 11**—Res judicata, *essentials of—Concurrent jurisdiction in pecuniary limits and subject-matter, whether necessary.*

In order to constitute *res judicata* the two Courts must be of "concurrent" jurisdiction as regards the pecuniary limits as well as the subject matter of the suit. **N** MUKAND RAM SUKAL *v.* SHEO NARAIN **21**

——— **s. 11, O. II, r. 2**—Res judicata—*Former suit dismissed on technical point—Subsequent suit, whether barred.*

In order to conclude a plaintiff by a plea of *res judicata* it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. Where a suit is dismissed for misjoinder or multifariousness or because all the necessary parties have not been joined in it or on any other purely technical point, a subsequent suit on the same cause of action is not barred. **N** DEODHAR SHEOSINGH *v.* NIHAL SINGH **909**

——— **s. 11**—Res judicata—*Litigating under same title—Suit for recovery of money on promissory note—Malicious prosecution—Cause of action*

Plaintiff brought a suit against defendant for recovery of money on the basis of a promissory note. The suit was dismissed and the pro-note was found to be not genuine. Defendant then prosecuted plaintiff for forgery but the plaintiff was acquitted. He thereupon brought a suit for damages for malicious prosecution:

Held, that the finding as to the genuineness of the pro-note in the previous suit was not *res judicata* in the suit for malicious prosecution, inasmuch as the plaintiff was not litigating under the same title in both the suits. **Pat** TEJU BHAGAT *v.* DEOKI NANDAN PROSAD **141**

——— **s. 11**—Res judicata, *plea of, whether can be taken in appeal—Question left undecided by Appellate Court but decided by trial Court, whether* res judicata.

The plea of *res judicata* is a question of law and can be raised at any stage of a suit.

An Appellate Court's judgment takes the place of and supersedes the decision of the trial Court, so that the principle of *res judicata* cannot apply where a question is left open and undecided by an Appellate Court, although it was decided by the trial Court. **Pat** GOBIND MISSER *v.* BEHARI GOPE **685**

——— **s. 11**—Res judicata—*Rent suit—Decision as to rate of rent, whether operates as* res judicata.

A judgment in a suit for rent deciding the question of the annual *jama*, even where it does not operate as *res judicata* on the same question in a subsequent suit for rent, is good evidence as to the rate of rent.

Semble.—The tendency of the more recent decisions of the Calcutta High Court is that when the question of the annual *jama* has been raised in a suit for rent and decided, it will be regarded as *res judicata* in later suits for rent of the same holding. **C** HAR KUMAR SEN *v.* RAJ KUMAR HALDAR **173**

——— **s. 11, Sch. II, paras. 20, 21**—*Civil Procedure Code (Act XIV of 1882), s. 526—Scheme for management of private endowment, settlement of, by award—Award, filing of, in Court and decree thereon—Variation of terms by consent of parties, legality of*—Res judicata.

A consent decree cannot be set aside by the consent of the parties.

A decree embodying the terms of an award settling a scheme of management for a private endowment cannot be varied or altered by consent of

parties where the scheme does not provide for such alteration.

Alterations in such a scheme can be secured only by a suit filed for the purpose.

Per *Wallis, C. J.*—Where a decree which settles a scheme for a temple proceeds on the basis that it is a private endowment, the Court should not interfere with such decree by raising an issue in any subsequent proceeding whether the endowment is public. The rights of the public, if any, will not be jeopardised by the decree or any subsequent order made in proceedings between parties to the decree.

Per *Spencer, J.*—As against the parties themselves, the decree will operate as *res judicata* in subsequent proceedings except when one of the issues before the Court raises the question whether the scheme, owing to a change of circumstances or for other good reasons, needs to be altered by the Court. **M** YEGNARAMA DIKSHADAR *v.* GOPALA PATTAR, (1918) M. W. N. 595; 8 L. W. 357 **548**

——— **s. 20** **624**

——— **s. 20**—*'Cause of action,' meaning of.*

The term 'cause of action' as used in secton 20, Civil Procedure Code, means the whole bundle of material facts which it is necessary for a plaintiff to allege and prove in order to entitle him to succeed. **M** RAJABHAI NARAIN OF CUTCH *v.* KARIM MAHOMED OF BOMBAY, 35 M. L. J. 189; (1918) M. W. N. 521; 24 M. L. T. 209 **708**

——— **s. 21** **764**

——— **s. 35 (2), O. XXIII**—*Costs—Remand by Appellate Court—'Costs to abide and follow the result,' meaning of—Withdrawal of suit—Order of trial Court silent as to costs in Appellate Court—Discretion of Court.*

An order of remand by an Appellate Court contained a direction that costs before it should abide and follow the result:

Held, that the meaning of the direction was that such costs should be paid to the party in whose favour the litigation might end, and where the suit is withdrawn, effect should be given to the consequences of such withdrawal mentioned in Order XXIII, Civil Procedure Code. The trial Court has no discretion to refuse such costs.

The word 'event' means nothing but the outcome or result of the proceedings and includes the description applicable to the withdrawal of a suit and its consequences with reference to Order XXIII, Civil Procedure Code. **M** LAKSHIMI VENKAYAMMA RAO *v.* VENKATARAMIAH APPA RAO, 8 L. W. 219; (1918) M. W. N. 561; 24 M. L. T. 212 **862**

——— **ss. 36, 47, O. XXI, rr. 53 (3,) 93**—*Maintenance, decree for, charged on immoveable property—Execution—Sale of property charged—Sale, setting aside of—Order for re-payment of purchase-money, enforceability of.*

Where a property charged with maintenance is brought to sale, but the sale is subsequently set aside, the purchaser is entitled under Order XXI, rule 93, Civil Procedure Code, to an order for refund of the purchase-money with or without interest in the Court's discretion and to execute the order under section 36 as if it were a decree.

In such a case the purchaser can enforce payment of the amount ordered to be refunded to him by attaching the maintenance decree and executing it under Order XXI, rule 53 (3) of the Civil Procedure Code. **M** KUTTIVENTI VENKATARAMANAMURTHI *v.* MACHERLA SUNDARA RAMIAH, 23 M. L. T. 355 **630**

——— **ss. 39, 42** **997**

——— **s. 47** **374, 512, 630, 864, 954**

——— **s. 47, O. XXXIV, rr. 7, 8,** *applicability of, to cases under Malabar Compensation Act—Order for re-valuation of improvements passed after Act V of 1908, whether preliminary decree—Amendment of application for re-valuation and order thereon as proceedings in execution—Jurisdiction of executing Court—Appeal against order, maintainability of.*

Where an appeal was preferred against an order for re-valuation of improvements which was followed by the passing of what was called a final decree and the appeal was dismissed on the ground that no appeal lay:

Held, (1) that the application of the decree-holder, though styled as one for the passing of a final decree, was, in substance, one for the execution of the decree already passed;

(2) that the Court should have ordered the amendment of the application as one in execution and passed its order thereon, in which case the order for re-valuation would fall under section 47, Civil Procedure Code, and be appealable;

(3) that the Appellate Court could make the amendment itself and pass the necessary orders after the amendment. **M** NANU NAIR *v.* KUNDAN ASHTAMURTHI, (1918) M. W. N. 551; 8 L. W. 275 **914**

——— **s. 47, O. XXI, rr. 58, 63**—*Execution—Attachment—Objection by stranger, dismissal of, on ground that he was party to suit—Appeal, whether lies—Suit, regular, maintainability of.*

Where in execution of a decree a person who claims that he was not a party to the suit prefers an objection to the attachment of certain property in the capacity of a stranger to the suit and the objection is dismissed on the ground that he was a party to the suit, no appeal lies against the order dismissing the objection but it is open to the objector to file a regular civil suit to establish his right to the property attached.

In such cases the test is whether the claim as laid by the objector is adverse to the claims of the real judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary remedy of a regular suit merely because his objection is dismissed on the ground that he is held to be a party to the suit. **N** GANDELAL *v.* MANJEE SONAR **904**

——— **s. 47**—*Limitation Act (IX of 1908), Sch. I, Arts. 138, 180—Suit by auction-purchaser to recover property purchased by him after confirmation of sale, maintainability of—Limitation.*

A suit by an auction-purchaser for the recovery of possession of property which he has purchased at an auction sale which has been confirmed, is not a suit which is barred under section 47 of the Code of Civil Procedure. Such a suit is governed by Article

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133 and not by Article 180 of Schedule I of the Limitation Act, and the period of limitation is twelve years after the confirmation of the sale. **Pat** JAGESUR SINGH MAHAPATRA *v.* SRIDHAR SARDAR **844**

——— **s. 48** **125, 143**

——— **s. 60 (c), O. XXI, r. 92**—*Execution—Sale of house—Suit for possession by auction-purchaser—Plea that house could not be sold, admissibility of—Estoppel.*

Plaintiff, who was the purchaser of a house in execution of a decree and had obtained formal delivery of possession, brought a suit for actual possession of the house. The claim was contested on the ground that the house claimed was the house of an agriculturist and was, therefore, not liable to sale in execution of a decree in view of the provisions of section 60 (*c*) of the Code of Civil Procedure:

Held, that the defendant having failed to take the objection in execution of the decree and the sale having become conclusive as between him and the plaintiff, it was not open to him to contend that the sale ought never to have taken place and conveyed no title to the purchaser. **A** LALA RAM *v.* THAKUR PRASAD, 16 A. L. J. 691 **947**

——— **s. 60 (g)**—*Grant, construction of—Sanad granting* 'taluka' *in lieu of pension*—'Taluka', *whether can be attached.*

The operative part of a *sanad* recited that Government had granted a *taluka* with all lands cultivated or uncultivated to one *K.* for his life as revenue-free *jagir* by way of maintenance and that after the death of *K.* the *ilaka* would continue to stand in the name of his children as a permanent *zemindari* assessed to a light amount of *jama*:

Held, (1) that the subject-matter of the grant was land and not a money payment in the nature of a pension and was not, therefere, exempt from attachment under section 60 (*g*) of the Civil Procedure Code;

(2) that the grant was a maintenance grant in the case of *K.* but not in the case of his children. **P C** SAKINA BAI *v.* KANIZ FATIMA BEGUM, (1918) M. W. N. 384; 22 C. W. N. 577. **632**

——— **s. 73, O. XXI, rr. 55, 83**—*'Assets held by Court', meaning of—Property of judgment-debtor, attachment of, at instance of several decree-holders—Payment, into Court, of money raised by private alienation under O. XXI, r. 83—Permission, grant of, in execution proceedings started at instance of one decree-holder—Rateable distribution, right to, of all attaching creditors.*

Where money is paid into Court by any one of the modes mentioned in Order XXI, rule 55, Civil Procedure Code, it is an 'asset held by the Court' within the meaning of section 73 of the Code.

When permission is granted to a judgment-debtor under Order XXI, rule 83, Civil Procedure Code, to raise money by private alienation and the money thus raised is paid into Court, it is paid under a pending execution application.

Where property is attached at the instance of several decree-holders, permission should not be granted under Order XXI, rule 83, to satisfy only one of the decrees.

Money paid into Court by virtue of a permission granted under rule 83 of Order XXI should not be credited to the decree of the person in whose execution application the permission was ordered, but should be rateably distributed among all the attaching decree-holders.

Semble.—The language of section 73, Civil Procedure Code, is wide enough to cover cases where money is in the hands of the Court, however realised. **M** THIRAVIYAM PILLAI *v.* LAKSHMANA PILLAI, 41 M. 616; 35 M. L. J. 150; (1918) M. W. N. 524 **538**

——— **s. 73**—*Rateable distribution—Assets, payment of, and rateable distribution, application for, on same day—Priority, presumption as to—'Same judgment-debtor,' meaning of.*

Where the payment of assets and an application for rateable distribution under section 73, Civil Procedure Code, are made on the same day, no presumption can be made by the Court as to which event was prior in time. The party challenging the action of the Court Officer must show that it was wrongful.

To entitle decree-holders to rateable distribution under section 73, Civil Procedure Code, the decrees should be against the same judgment-debtor, *i. e.*, the individuals must be the same.

Where the fund in Court is the property of the same person who is judgment-debtor under two decrees, he may be regarded as the same debtor in respect of that fund.

If the fund is the joint property of two persons, their respective rights cannot be ascertained without an enquiry which is beyond the scope of section 73.

Where, however, the joint debtors are entitled to the fund in equal shares, and the plaintiff claims only half, the provisions of section 73 can be enforced. **M** MUTHIAH CHETTY *v.* ALAGAPPA CHETTY, (1918) M. W. N. 520; 24 M. L. T. 179 **296**

——— **s. 80** **502, 524**

——— **s. 90, O. XXXVI**—*Special case, whether can be re-opened.*

It is settled practice that where a special case is stated by consent, it can only be re-opened by mutual consent. **B** MONIE *v.* SCOTT, 20 BOM. L. R. 839 **642**

——— **s. 92**—*Scheme for application of surplus income—Compromise of scheme suit, validity of.*

A Court should not sanction a compromise of a suit under section 92, Civil Procedure Code, under which any portion of the trust properties is given to any of the parties.

Under section 92, Civil Procedure Code, the Court can sanction a scheme on a *cy pres* application of a charitable trust. **M** MUTHUKRISHNA NAICKEN *v.* RAMACHANDRA NAICKEN **611**

——— **s. 92, O. I, rr. 3, 10 (2)**—*Suit to eject third person from trust properties, whether can be brought under s. 92—Transferee of trust properties, whether can be made party to suit.*

A claim for the recovery of possession of trust property from a trespasser or from a transferee from a trustee is not within the scope of section 92 of the Civil Procedure Code, and a Court trying a suit under that section is not competent to bring before it under rule 3 or rule 10 (2) of Order I of the Code any person who is in possession of trust property either as a trespasser or as a transferee **C** GHOLAM MOWLAH *v.* ALI HAFIZ, 28 C. L. J. 4 **111**

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——— s. 92—*Suit for removal of old* mahant, *appointment of new* mahant *and vesting of trust property in new* mahant, *maintainability of—Parties, necessary—Court-fee payable.*

Where certain persons, who were entitled to elect the *mahant* of a Dera, decided that for certain reasons the defendant, the old *mahant*, was no longer fit for the office of *mahant* and elected another person as the new *mahant* and thereupon a suit was brought under section 92 of the Civil Procedure Code for the removal of the defendant, who was in charge of the trust properties, from the office of *mahant*, the appointment of a new *mahant* and the vesting of the trust properties in the new *mahant*:

Held, (1) that the suit was properly brought under section 92 of the Civil Procedure Code;

(2) that the new *mahant* elect was not a necessary party to the suit;

(3) that it was not necessary to stamp the plaint with a Court-fee stamp calculated *ad valorem* on the value of the trust property, inasmuch as the plaintiffs were seeking nothing for themselves but merely the removal of the defendant from the office of *mahant*, which would involve his ejectment from the immoveable property of which he was in possession as *mahant*. **P** GOPI DAS *v.* LAL DAS, 97 P. R. 1918 **983**

——— s. 92—*Trust for religious purposes, mismanagement of—District Judge, power of, to interfere, on application of private person—Procedure.*

The Civil Procedure Code does not give a District Judge any power to interfere with the management of a religious trust unless and until a regular suit is filed in his Court, when it is open to him to exercise all the powers which the Code gives him in order to protect the property. He has no power to interfere and to suspend a trustee from his post on the application of a private person who has called attention to the fact that a breach of trust appears to have been committed. The Civil Procedure Code lays down a regular procedure for suits in such cases and until the Court is moved in that way, it has no power of supervision to interfere and to pass orders. **A** DARSHAN DAS *v.* COLLECTOR OF MEERUT, 16 A. L. J. 742 **850**

——— s. 104 (f), *scope of, Sch. II, paras.* 1, 15, 17, 20—*Order refusing to file award on private reference, nature of—Application to file award on private arbitration—Subsequent reference to new arbitrator through Court—Application to file second award—Order setting aside award, whether decree—Appeal—Revision.*

Clause *(f)* of section 104, Civil Procedure Code, refers to cases where a matter has been referred to arbitration without the intervention of the Court.

There is an inherent difference between orders refusing to file an award on a matter referred to arbitration without the intervention of the Court and those referred to under paragraph 1 of the Second Schedule of the Civil Procedure Code. In the former case, if the Court refuses to file an award, its order amounts to a formal adjudication on the matter in controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under paragraph 15 of the Second Schedule, the order is only of an interlocutory nature and is in no way a conclusive adjudication of the matter in dispute.

A dispute between members of a firm was privately referred by them to arbitration. An award being given, an application was made for filing it Objections were raised and an issue as to the misconduct of the arbitrators was framed. Meanwhile the parties agreed to refer the whole matter in dispute to a new arbitrator and made an application to the Court to that effect. The new arbitrator was then appointed and gave his award. Objections were made to this second award and the Court, finding that one of the parties had not signed the application of reference to the arbitrator and that the first award had not been superseded, set aside the second award. An appeal to the District Judge was dismissed as incompetent and a second appeal was filed in the Chief Court:

Held, (1) that inasmuch as the application for the filing of the first award was numbered and registered as a suit between the parties, a suit was pending at the time the second reference was made and the order of the first Court was not, therefore, an order referred to in section 104, Civil Procedure Code;

(2) that the order in question setting aside the award did not amount to a decree and was not appealable as such;

(3) that the order of the lower Appellate Court disposed of a question of law and, even if wrong, was not open to revision as no material irregularity had been committed. **P** BEHARI LAL *v.* KHAN CHAND, 154 P. W. R. 1918 **171**

——— s. 105 (2)—*Appeal—Remand, order of, whether can be questioned by lower Court—Jurisdiction, question of, failure to raise, effect of.*

Section 105 (2) of the Civil Procedure Code precludes a lower Court from treating the remand order of the Appellate Court as a nullity owing to the want of jurisdiction in the latter to pass it.

A party who omits to raise the question of the jurisdiction of the Appellate Court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate Court to which the matter in dispute is remanded. **N** DHARAM CHAND *v.* GORE LAL **886**

——— s. 110, O. XLIV, r. 1, O. XLV—*Privy Council, appeal to—Leave to appeal* in forma pauperis—*Jurisdiction of High Court.*

The High Court has no jurisdiction to grant leave to a party to appeal to the Privy Council *in forma pauperis*. **M** AMBA *v* SRINIVASA KAMPTHI, 35 M. L. J. 258; 24 M. L. T. 207; 8 L. W. 460 **646**

——— ss. 115, 151, 152—*Mortgage decree making mortgaged property liable for mortgage as well as sub-mortgage—Amendment of decree, application for, dismissal of—Revision.*

Plaintiff mortgagee brought a suit on his mortgage and obtained a decree. From the judgment it appeared that the Court intended that the property should be sold for the amount of the plaintiff's mortgage, interest and costs but finding that the plaintiff had made a sub-mortgage, it directed that the sub-mortgagee should get the amount of her mortgage out of the proceeds of the sale before the plaintiff was paid. But the decree as drawn up directed the property to be sold not only for the amount of the plaintiff's mortgage, but also for the

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amount of the sub-mortgage, that is to say, that the defendant was made liable not only for the mortgage which he had created but also for the sub-mortgage which the mortgagee had created. The defendant, therefore, applied for amendment of the decree in order to bring it into accordance with the judgment, but the Court dismissed the application:

Held, that the decree as drawn up was quite incorrect and unjust and that the refusal of the Court to amend the decree amounted to a refusal to exercise jurisdiction vested in the Court, and that the High Court was, therefore, entitled to interfere in revision. **A** PULE BISHUNATH RAI *v.* BRAMHANAND SWAMI, 16 A. L. J. 749 **830**

——— **s. 115**—*Receiver, leave to sue, application for—Procedure—Revision.*

The general principle applying to cases in which application is made to sue a Receiver in respect of properties in charge of the Court is that unless the Court is satisfied that there is no question at all to try or there is no legal foundation to the claim, leave should not as a matter of course be refused.

A petitioner in an application to sue a Receiver is entitled to an enquiry upon the materials furnished by the parties and if he so desires, to ask the Court to take evidence if the Court is not inclined to give leave as a matter of course. If the Court refuses to take evidence and proceeds to dispose of the application summarily, it acts with material irregularity in the exercise of its jurisdiction, and the High Court is, therefore, entitled to interfere in such a case under section 115 of the Civil Procedure Code.

An application for leave to sue a Receiver is a case within the meaning of section 115 of the Civil Procedure Code.

There is no statutory provision which requires a party to take the leave of the Court to sue a Receiver. The rule is based on public policy and the grant of leave is made not in exercise of any power conferred by Statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority. **Pat** BRAJA BHUSAN TRIGUNAIT *v.* SRIS CHANDRA TEWARI, (1918) PAT. 337 **719**

——— **s. 115**—*Revision—Error of law, whether ground for interference—Remedies, other, open to petitioner, effect of.*

The petitioner purchased a holding in execution of a money-decree obtained against the tenant by a third party. The landlord refused to recognise the petitioner as a tenant on the ground that the holding was non-transferable. Thereafter the landlord brought a suit for rent against the old tenant and obtained a decree *ex parte* in execution of which he sought to have the property sold, whereupon the petitioner preferred an objection contending that the landlord's decree was merely a money-decree inasmuch as it was obtained against the old tenant who had no interest in the tenancy. The Court, holding that the objection of the petitioner was preferred under the provisions of Order XXI, rule 58, Civil Procedure Code, overruled it as being barred under section 170 of the Bengal Tenancy Act. The petitioner moved the High Court in revision under section 115, Civil Procedure Code:

Held, that as the petitioner had other remedies by suit or otherwise and that as the error of the executing Court, if any, was at most an error of law, the intervention of the High Court under section 115, Civil Procedure Code, was not called for. **C** RAJANI KANTA PAL *v.* KEDAR NATH BISWAS **190**

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——— **s. 115**—*Revision—Interlocutory order, whether open to revision.*

Section 115, Civil Procedure Code, authorises the Court to call for the record of any case which has been decided, but where there has been no decision and the case is still pending, interlocutory orders passed during the course of the hearing cannot be made the subject of revision, unless those orders have the effect of determining the case, so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal. **O** BRIJ INDRA BAHADUR SINGH *v.* DEPUTY COMMISSIONER, KHERI, 5 O. L. J. 430 **676**

——— **s. 115,** *scope of—Revision—Irregularity.*

If a Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements of Pleaders or witnesses, the method of arriving at such conclusion is illegal and irregular and is a ground for revision, provided the irregularity is material and the petitioner has suffered an injustice thereby. **L B** GORIDUT BAGLA *v.* ROOKMAN **781**

——— **ss. 141, 144, O. II, r. 2.**

An application for restitution under section 144 of the Civil Procedure Code is neither a suit nor an execution proceeding; it is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. Section 141 of the Civil Procedure Code does not apply to an application for restitution, and such an application is not, therefore, subject to the provisions of Order II, rule 2, of the Code. **Pat** KRUPASINDHU ROY *v.* BALBHADRA DAS, 3 P. L. J. 367 **47**

——— **s. 144** **47, 511**

——— **s. 144 O. XXI, r. 43**—*Execution—Attachment of cattle*—Supratdar, *liability of, whether can be enquired into by executing Court.*

The liability of a *supratdar* or depositary of property attached in execution of a decree who has made default, cannot be enquired into by the executing Court but must form the subject of a separate suit. **N** KHETSIDAS RADHAKISAN *v.* HARBA MARATHE **956**

——— **ss. 144, 151, O. XXI, r. 90**—*Order refusing to set aside execution sale, reversal of, in appeal—Auction-purchaser not party to proceedings—Restitution, claim to, maintainability of.*

An order refusing to set aside an execution sale under Order XXI, rule 90, Civil Procedure Code was reversed on appeal. The auction-purchaser was not a party to the proceedings. The judgment-debtor applied for restitution of the property from the auction-purchaser:

Held, (1) that section 144 of the Civil Procedure Code did not apply, inasmuch as no decree had been varied or reversed on appeal but only an order under Order XXI, rule 90, refusing to set aside a sale in execution;

(2) that an order could not be made under section 151 of the Civil Procedure Code on the analogy of section 144, inasmuch as the auction-purchaser was

not a party to the proceedings instituted for setting aside the sale. **M** MEDA CHINNASUBAMMA *v.* PAPIREDDI GARI CHINNAYYA, 41 M 467 **628**

——— **s. 151** **154, 628, 830**

——— **s. 151**—*Revival of suit—Inherent power of Court—Limitation Act (IX of 1908), Sch. I, Art. 181—Revival application—Limitation, commencement of.*

During the pendency of a pre-emption suit the plaintiff lost his title to the property which qualified him for the exercise of the right of pre-emption, by virtue of a decree passed against him in another suit, and he filed an appeal from that decree. The Court trying the pre-emption suit thereupon dismissed it as not maintainable, but remarked in its judgment that if the plaintiff's appeal in the other suit was accepted, he might apply for revival of the pre-emption suit. The plaintiff won his appeal and within three years he applied under section 151, Civil Procedure Code, to the Court, which had decided the pre-emption suit, for its revival The Oourt allowed the application:

Held, (1) that the Court had inherent power under section 151, Civil Procedure Code, to revive the suit;

(2) that the original order passed by the Court in the pre-emption suit was not the proper order to be passed in the circumstances, and that the proper course for the Court would have been to stay the proceedings until the pre-emptor had an opportunity of getting the decision of the Appellate Court on the question of title under which he was claiming pre-emption;

(3) that the application was governed by Article 181, Schedule I of the Limitation Act, and was, therefore, within time. **O** RAMESHWAR DAYAL *v.* GUR SAHAI, 5 O. L. J. 259 **137**

——— **s. 152** **830**

——— **O. I, r. 3** **111**

——— **O. I, r. 3**—*Limitation Act (IX of 1908), s. 22—Suit instituted against dead person—Limitation, extension of, against heirs.*

Order I, rule 3, of the Code of Civil Procedure does not apply to a case where a suit is filed against a deceased person and his heirs are subsequently sought to be brought on the record. For the purposes of section 22 of the Limitation Act such heirs, whether added or substituted, must be treated as newly impleaded and the suit as against them will be deemed to have been instituted when they were so made parties **O** NAU NEHAL SINGH *v.* DEPUTY COMMISSIONER, UNAO, 5 O. L. J. 546 **894**

——— **O. I, r. 10** **725**

——— **O. I, r. 10 (2)** **111**

——— **O. II, r. 2** **909**

——— **O. II, r. 2.**

Where a mortgagee has already sued and obtained a decree for interest at a time when he could also have sued for the principal, his subsequent suit for the recovery of the principal is barred by Order II, rule 2 of the Civil Procedure Code. **P** KISHEN NARAIN *v* PALA MAL, 88 P R 1918 **937**

——— **O. II, r. 2**—*Abandonment of claim—Knowledge of right, constructive, whether bars subsequent suit.*

In order to make Order II, rule 2, of the Civil Procedure Code, applicable to a subsequent suit, it is necessary to show that the plaintiff had at the date of the institution of the previous suit actual and not merely constructive knowledge of the right which he is seeking to enforce in the subsequent suit. **N** BINYA BAI *v.* GANPAT **881**

——— **O. II, r. 2,** *applicability of—Suit against one debtor—Subsequent suit against different debtor, whether barred.*

Order II, rule 2 of the Civil Procedure Code, applies only where the defendant in the subsequent suit was also the defendant in the previous suit. The rule does not apply where the subsequent suit is brought against a different defendant. **N** KASHI BAI *v.* SHEORAM KHUPCHAND **896**

——— **O. II, r, 2**—*Mortgage—Suit for interest—Subsequent suit for principal, maintainability of.*

Where under a mortgage-deed both principal and interest become due, the mortgagee must sue for both together, otherwise he is debarred under Order II, rule 2, of the Civil Procedure Code, from claiming in a subsequent suit what was not claimed in the prior suit.

In a mortgage-deed executed by the defendant in favour of the plaintiff in 1909, interest was fixed nominally at Rs. 6 per mensem and a reference was made to an agreement between the parties to draw up a deed of lease of the mortgaged property. The lease was drawn up on the same day and provided that the mortgagor should pay rent at Rs. 6 per mensem Plaintiff sued for the rent due to him in 1911 and obtained a decree. Subsequently he brought a suit for the recovery of the principal and interest due after 1911:

Held, that the mortgage and lease constituted one transaction and that the subsequent suit was barred by Order II, rule 2 of the Civil Procedure Code. **P** NATHA SINGH *v.* CHUNI LAL, 69 P. R. 1918; 112 P. W. R 1918 **364**

——— **O. II, r. 2**—*Relinquishment of claim, what amounts to.*

Order II, rule 2, Civil Procedure Code, refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim, and a decree has been made in that suit. In such a case a second suit in respect of the portion so omitted is barred But the rule does not apply to the amendment of a plaint by the addition of a claim which has been omitted in the plaint as originally filed.

Where a person knowing of the facts before the institution of a suit omits to make a particular claim by an oversight and the suit is carried to a decision without any amendment, Order II, rule 2, Code of Civil Procedure, prevents him from suing subsequently in respect of the claim so omitted, and it is no answer on his part to say that such omission was due to a mere mistake and was not actuated by any fraudulent or dishonest motive. But these principles do not apply where he makes an application for amendment before decree for the purpose of including the claim which was omitted through oversight. **C** UPENDRA NARAIN ROY *v.* JANAKI NATH ROY, 22 C W N. 611; 45 C. 305 **129**

——— **O. II, r. 2, O. XXXIV, r. 1**—*Suit for redemption of kanom—First suit against karna-*

van *personally—Subsequent suit against* tarwad, *maintainability of.*

Where a mortgagor brings a suit for redemption against some of the co-owners of the equity of redemption and obtains a decree, a subsequent suit on the mortgage against the other co-owners is barred under Order II, rule 2 of the Code of Civil Procedure.

Plaintiff sued the *karnavan* of a *tarwad* in his personal capacity for redemption of a *kanom* and obtained a decree He then had knowledge of the *tarwad's* interest in the *kanom.* Subsequently he brought another suit for redemption against all the members of the *tarwad*:

Held, that the subsequent suit was barred by the provisions of Order II, rule 2, Civil Procedure Code. **M** KIZHEKKE MANJAMBRATH AVULLA *v.* KANNA KURUP, 8 L. W. 152 **595**

——— **O. VI, r. 4**—*Pleadings—Failure to give particulars, effect of.*

The Court should not go into the question of undue influence at all where the defendant denies the execution of the mortgage and no particulars of the alleged undue influence are given as required by Order VI, rule 4, of the Civil Procedure Code. **C** KACHHIRANNASSA CHOWDHURANI *v.* HEM CHARAN KASYA **11**

——— **O. VI, r. 17**—*Amendment of plaint, when to be allowed.*

On an application for amendment of a plaint the trial Court, without deciding anything, made the order for amendment subject to any contentions which the defendants might raise in answer to the claim as amended:

Held, that it would have been better and more regular if the question of the right to amend had been determined before the order was made or, if this would have involved a lengthy enquiry covering the same ground as the evidence in the suit, if the hearing of the application to amend had been adjourned to the hearing of the suit and determined on the evidence then taken.

The Court being desirous of getting at the true facts will allow an amendment subject to three general conditions; (*a*) *Bona fides* on the part of the applicant; (*b*) possibility of amendment without such prejudice to the other party as cannot be compensated by costs; (*c*) where the amendment is not such as to turn a suit of one character into a suit of another character. **C** UPENDRA NARAIN ROY *v.* JANAKI NATH ROY, 22 C. W. N. 611; 45 C. 305 **129**

——— **O. VI, r. 17, O. XXIII, r. 1**—*Amendment of plaint—Withdrawal of suit—Appeal, second—Delay in making application, effect of.*

Plaintiff brought a suit for a declaration that a certain sale-deed executed by his father was a bogus transaction. At a later stage the plaint was amended so as to include a claim for possession of the property sold. Both the trial Court and the Court of first appeal held that consideration had passed for the sale and dismissed the suit. In second appeal it was sought to impeach the sale on the ground that it was not for antecedent debts or for legal necessity and was, therefore, not binding on the plaintiff:

Held, that at such a late stage of the proceedings the plaintiff could not be allowed either to amend his pleadings or to withdraw from the suit with liberty to bring a fresh suit. **N** BALIRAM *v.* GANPAT **906**

——— **O. VIII, r. 5**, *scope of—Minor, suit against—Omission to deny allegation of fact in plaint, effect of.*

The scope of Order VIII, rule 5, is only this that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants, and the rule has nothing to do with the conduct of the suit afterwards. For instance, if at the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact, it cannot be said that rule 5 in any way affects such admission. What the Legislature apparently contemplated by rule 5 was that if, for instance, the guardian of a minor defendant allowed a case to proceed *ex parte*, then the plaintiff must prove those facts alleged in the plaint which were not expressly denied in the written statement filed on behalf of the minor defendant. **M** NAGAPPA *v.* SIDDALINGAPPA, 35 M. L. J. 372 **589**

——— **O. VIII, r. 6** **938**

——— **O. IX, rr. 8, 9**—*Appearance, what amounts to Plaintiff present in Court but not prosecuting case—Dismissal for default—Restoration, application for.*

A party may appear in two ways, either by person or by Pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance within the real meaning of the word.

On a case being called on, the parties appeared in Court but the plaintiff did not prosecute the case. The Court dismissed the suit for the plaintiff's default. The plaintiff then applied for restoration of the suit, but the Court now held that the suit was not dismissed for default and that, therefore, it had no jurisdiction to restore it:

Held, that the order dismissing the suit was an order made under Order IX, rule 8, of the Civil Procedure Code, and that the Court was required to deal with the matter under Order IX, rule 9. **Pat** LALJI SAHU *v.* LACHMI NARAIN SINGH, 3 P. L. J. 355 **27**

——— **O. IX, r. 9** **154**

——— **O. XIII, r. 1**—*Documentary evidence, admissibility of.*

Documentary evidence which has not been produced at the first hearing of a suit in accordance with Order XIII, rule 1 of the Code of Civil Procedure, may be admitted at any subsequent stage at the discretion of the Court. **P C** IMAMBANDI *v.* MUTSADDI, 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 BOM. L. R. 1022 **513**

——— **O. XVII, rr. 2, 3**—*Dismissal for default—Procedure where both rules applicable.*

Where a default takes place within the meaning of both rule 2 and rule 3 of Order XVII of the Civil Procedure Code and there is not enough material on the record to enable the Court to proceed to judgment, the Court should proceed under rule 2. **P** HARGOPAL *v.* HARISH CHANDAR, 66 P. L. R. 1918 **596**

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——— **O. XVII, r. 3**—*Appeal - Default of appellant in paying translation and copying fees—Procedure.*

A Court does not act *ultra vires* in dismissing a suit or appeal where materials essential for the progress of a suit or appeal such as translation of vernacular documents, preparation of Bench copies, etc., are wanting owing to the plaintiff's or appellant's default. **L B** MA ON BWIN *v.* MA SHWE MI **691**

——— **O. XVIII, r. 5**—*Evidence Act (I of 1872), s. 80—Perjury, trial for—Statement read over to witness—Proof - Presumption.*

There is no provision of law that a Judge, who records the evidence of a witness in cases to which Order XVIII, rule 5, of the Civil Procedure Code applies, shall append a note to the effect that the evidence of the witness when completed has been duly read out to him. In every such case it should be presumed under section 80 of the Evidence Act that the statement was duly taken.

Where, therefore, there is no evidence to show that the deposition of a witness in a civil suit was not read over to him by the Judge, it must be presumed under section 80 of the Evidence Act that the Judge complied with the provisions of Order XVIII, rule 5 of the Civil Procedure Code. **P** EMPEROR *v.* JAGAT RAM, 28 P. R. 1918 CR.; 19 CR. L. J. 972 **872**

——— **O. XX, r. 13 (2)** **529**

——— **O. XXI, r. 2 (1)**—*Execution of decree—Payment certified by decree-holder, effect of—Judgment-debtor whether can object—Court, duty of—Limitation, extension of.*

Order XXI, rule 2 (1), of the Civil Procedure Code, does not contemplate an inquiry being made into the truth of the statements made by the decree-holder when he comes to Court to certify a payment and the judgment-debtor has no *locus standi* to question the right of the decree-holder to make an application under that provision of the law.

No particular time is fixed during which the decree-holder is bound to certify payments to the Court.

When a decree-holder comes and informs the Court that certain payments have been made to him in satisfaction of the decree, all that the Court has to do is to make a note of the statement made by the decree-holder and no notice need issue to the judgment-debtor even if the decree-holder asks this to be done.

The certifying of a payment under Order XXI, rule 2 (1), Civil Procedure Code, is not conclusive in any way. On an application for execution of the decree being made, the judgment-debtor is entitled to show either that no such payment was in reality made or that if it was, it did not operate to extend the period of limitation for execution of the decree. **O** HAIDER MIRZA *v.* KAILASH NARAIN DAR, 21 O. C. 161; 5 O. L. J. 182 **177**

——— **O. XXI, rr. 4, 5, 6, 7** **997**

——— **O. XXI, r. 11 (3)** **993**

——— **O. XXI, r. 14,** *applicability of—Decree for sale on mortgage—Execution - Attachment, whether necessary.*

A preliminary attachment is not necessary in cases where an application is made for sale in execution of a decree passed for sale of mortgaged property, and therefore Order XXI, rule 14, Civil Procedure Code, does not apply to such an application. **O** IQBAL NARAIN *v.* JASKARAN, 5 O. L. J. 414 **639**

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——— **O. XXI, r. 16** **997**

——— **O. XXI, r. 43** **956**

——— **O. XXI, r. 53 (3)** **630**

——— **O, XXI, r. 55** **538**

——— **O. XXI, rr. 58, 63'** **904**

——— **O. XXI, r. 63, O. XXXVIII, r. 6**—*Attachment before judgment—Claim to attached property, order on—Applicability of O. XXI, r. 63—Suit, regular, maintainability of.*

Rule 63 of Order XXI, Civil Procedure Code, applies to orders on claims preferred to property attached before judgment.

The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of. **M** MALLIKHARJUNA PRASAD NAIDU *v.* MATLAPALLI VIRAYYA, 8 L. W. 137; 35 M. L. J. 231; 24 M. L. T. 134; 41 M. 849; (1918) M. W. N. 699 **1000**

——— **O. XXI, r. 83** **538**

——— **O. XXI, r. 89** **654**

——— **O. XXI, r. 90** **628**

——— **O. XXI, r. 92** **947**

——— **O. XXI, r. 93** **630**

——— **O. XXI, rr. 97, 98** **308**

——— **O. XXII, r. 3** **962**

——— **O. XXII, rr. 3, 5**—*Death of one of several plaintiffs—Legal representative brought on record—Subsequent dispute—Court, duty of—Procedure.*

One of several plaintiffs having died one G. was brought on the record as her legal representative, it being alleged that he was the adopted son of the deceased. Subsequently the daughters of the deceased applied that G.'s name should be deleted from the record and that they should be substituted as the legal representatives of their mother. The Court held that it could not alter its previous order as rule 3 of Order XXII of the Civil Procedure Code provided that after the record had been amended by adding the representative of the deceased plaintiff as a party the Court shall proceed with the suit:

Held, that a question having arisen as to whether G. was or was not the legal representative of the deceased plaintiff, the Court was bound to determine it under rule 5 of Order XXII of the Civil Procedure Code. **B** VATSALABAI VISHNU SUKHTAKKAR *v.* SAMBHAJI PANDURANG NABAR, 20 BOM. L. R. 902 **757**

——— **O. XXII, r. 5** **757**

——— **O. XXIII** **862**

——— **O. XXIII, r. 1** **905, 906**

——— **O. XXIII, rr. 1, 3**—*Withdrawal of suit after decree, whether permissible—Compromise regarding removal of guardian duly appointed by Court, legality of.*

The procedure of withdrawal from a suit under Order XXIII, rule 1, of the Civil Procedure Code applies only to pending suits, before a decree has been made.

An application for guardianship duly made under the Guardians and Wards Act, and on which an order appointing a guardian has been duly made, cannot

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be withdrawn under Order XXIII, rule 1, Civil Procedure Code, by the applicant during the course of an appeal filed by the opponent, in spite of both the appellant and the respondent being consenting parties to the withdrawal.

Nor can the respondent's withdrawal be recorded as a compromise under Order XXIII, rule 3, Civil Procedure Code, inasmuch as its effect would be to withdraw from the determination of the Court the consideration of the welfare of the minor and to defeat the provisions of sections 40 and 42 of the Guardians and Wards Act. **S** MAHOMED YAKUB *v.* RADHIBAI, 12 S. L. R. 14 **817**

——— **O. XXIII, r. 1**—*Withdrawal of suit on behalf of minor, when permissible—Minor, benefit of —Court, duty of, to protect interests of minor.*

Courts should be very jealous of the interests of minors and should not allow a suit or part of a suit instituted on a minor's behalf to be withdrawn without being satisfied that it is for his benefit.

In a suit for a declaration that the sale of certain land will not affect the plaintiffs' reversionary rights, it appeared that the plaintiffs had in their minority sued along with certain others for the same relief asking in the alternative for pre-emption of the land sold and that, subsequently there had been an amendment of the plaint by which the other plaintiffs alone claimed pre-emption, it being stated that the minor plaintiffs had no money with which to pre-empt. Later on an application was presented by all the plaintiffs for permission to withdraw the prayer for declaration. The Court did not give its permission, nor did it consider whether the withdrawal was for the benefit of the minors. The case proceeded and eventually a decree for pre-emption was passed in favour of the adult plaintiffs, but by mistake the names of all were entered in the decree:

Held, that inasmuch as no reason was given by the next friend for withdrawing the suit on behalf of the minors, nor was the Court asked to allow the plaintiffs to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter of such part, nor was the interest of the minors considered, the minors were entitled to bring a separate suit for the relief which was abandoned in the previous suit. **P** RAJADA *v.* GHULAM, 164 P. W. R. 1918 **508**

——— **O. XXIII, r. 3** **535**

——— **O. XXX, rr. 1, 6**—*Suit against firm—Plaintiff, right of, to know names of persons constituting firm—"Individually," meaning of—Partner, appearance of.*

Under Order XXX, rule 1, of the Civil Procedure Code, a plaintiff suing a firm is entitled to know who the persons are who constitute the firm and the information cannot be withheld. The information is necessary so that the plaintiff may know who will be personally liable in execution for the satisfaction of his decree.

The word "individually" in Order XXX, rule 6 of the Civil Procedure Code, is not synonymous with "in person." No partner can be forced under this rule to appear in person, but in his absence after service of summons, he will be dealt with *ex parte*. If, however, appearance is put in for him, it will be reckoned as his individual appearance. **P** BRIDGES & CO. *v.* SHAMAS DIN & CO., 78 P. R. 1918; 155 P. W. R. 1918 **422**

——— **O. XXX, r. 6** **422**

——— **O. XXXIII, r. 8**—*Leave to sue* in forma pauperis—*Insolvency of plaintiff—Receiver, whether can continue suit.*

Where a plaintiff obtains leave to sue *in forma pauperis* and after the commencement of the suit is adjudicated an insolvent, the Receiver in insolvency is entitled to continue the suit just as the insolvent could have done. **A** MOHAMMAD ZAKI *v.* MUNICIPAL BOARD OF MAINPURI, 16 A. L. J. 440 **577**

——— **O. XXXIV** **179**

——— **O. XXXIV, r. 1** **595**

——— **O. XXXIV, r. 5** **206**

——— **O. XXXIV, r. 6**—*Application for personal decree, whether application in execution—Limitation, commencement of.*

An application under Order XXXIV, rule 6, is an application in the original suit for a new decree and it cannot be regarded as an application in execution. Such an application should be made within three years from the time when the right to make such application accrues and the Article which governs the application is Article 181 of the Limitation Act.

Some mortgaged property was put up to sale in execution of a mortgage decree in 1911 and was purchased by the decree-holder. The proceeds of the sale being insufficient to satisfy the mortgage debt, the mortgagee made an application in 1913 under Order XXXIV, rule 6, for a personal decree. That application proved ineffectual and he made another application for a similar decree in 1915:

Held, that the application, not being an application for execution of the original mortgage decree, was barred by time and that the *interim* application did not save limitation **A** MOHAMMAD ILTIFAT HUSAIN *v.* ALIM-UN-NISSA, 16 A. L. J. 437; 40 A. 551 **562**

——— **O. XXXIV, r. 6,** *order refusing to pass decree under, whether decree—Court-fee on appeal, calculation of.*

An order refusing to make a decree under Order XXXIV, rule 6 of the Civil Procedure Code, is a decree within the meaning of the definition of that term in section 2 of the Code, and an appeal against it must bear *ad valorem* Court-fees, calculated upon the value of the subject-matter of the appeal. **A** MOHAMMAD ILTIFAT HUSAIN *v.* ALIM-UN-NISSA, 16 A. L. J. 438; 40 A. 553 **561**

——— **O. XXXIV, rr. 7, 8** **914**

——— **O. XXXIV, r. 14.**

There is nothing in Order XXXIV, rule 14, Civil Procedure Code, to prevent a maintenance decree-holder from proceeding in execution against the properties charged under the maintenance decree. **M** KUTTIVENTI VENKATARAMANAMURTHI *v.* MACHERLA SUNDARA RAMIAH, 23 M. L. T. 355 **630**

——— **O. XXXIV, r. 14**—*Transfer of Property Act (IV of 1882), s. 99, principle of, whether applicable to Punjab—Mortgage—Interest, suit for —Subsequent suit for principal and interest, maintainability of.*

Section 99 of the Transfer of Property Act having been repealed by Order XXXIV, rule 14, Civil Procedure Code, which has been expressly held to be not applicable to the Punjab, the principle of that

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section can no longer be applicable to this Province. **P** KISHEN NARAIN *v.* PALA MAL, 88 P. R. 1918 **937**

——— **O. XXXVI** **642**

——— **O. XXXVIII, r. 6** **1000**

——— **O. XXXIX**—*Injunction, effect of—Malabar Law—Injunction restraining* karnavan *from contracting loans for managing* tarwad *property—Loans contracted for necessity—Creditor, rights of—*Tarwad, *liability of.*

In a suit by the members of a Tarwad to remove the Karnavan from office, the Court passed an injunction restraining the latter from contracting loans to manage the property. The Karnavan nevertheless borrowed money for the necessary purposes of the Tarwad while the injunction was in force. In a suit by the creditor for repayment of the loan:

Held, that the effect of the injunction was what was laid down in Order XXXIX, Civil Procedure Code, and that both the Karnavan and the Tarwad were liable for the debt. **M** PUZHAKKAL EDOM *v.* MAHDEVA PATTAR, 35 M. L. J. 96 **778**

——— **O. XLI, r. 27**—*Appeal—Additional evidence, when can be taken—Appellate Court, power of.*

It is not open to a Court of Appeal to order additional evidence to be taken except to cure an inherent defect in the evidence already recorded. **Pat** TEJU BHAGAT *v.* DEOKI NANDAN PROSAD **141**

——— **O. XLI, r. 27,** *scope of—Document submitted with memorandum of appeal, whether admissible—Findings based on such document, whether binding in second appeal.*

The provisions of Order XLI, rule 27, Civil Procedure Code, are mandatory and an Appellate Court is not entitled to admit and consider additional documentary evidence in contravention of those provisions.

Where an appellant attached certain documents to his memorandum of appeal and the Appellate Court passed an order that they should remain on the record:

Held, that the Appellate Court had contravened the provisions of Order XLI, rule 27, Civil Procedure Code, in admitting and considering this evidence and that as its findings had been vitiated by the fact that they were based on evidence wrongly admitted, they were liable to be set aside. **P** RATNA *v.* HARNAM SINGH, 150 P. W. R 1918 **12**

——— **O. XLIII, r. 1 (a)**—*Order returning memorandum of appeal for presentation to proper Court, whether appealable—Plaint, whether includes memorandum of appeal.*

A memorandum of appeal is not a plaint.

No appeal lies against an order of an Appellate Court directing a memorandum of appeal to be returned for presentation to the proper Court. **A** NUR-UD-DIN KHAN *v.* PRAN KISHAN CHAKARVARTY, 16 A. L. J. 630 **16**

——— **O. XLIII, r. 1 (w), O. XLVII, r. 7**—*Review, order granting—Appeal, whether lies.*

An order granting a review of judgment, though appealable under the provisions of Order XLIII, rule 1 (*w*), Civil Procedure Code, is subject to the limitations mentioned in Order XLVII, rule 7, of the Code, namely, that there can be an appeal only upon the grounds mentioned in that rule. **C** ABDUL HAMID *v.* AKHINA KHATUN **850**

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——— **O. XLIV, r. 1** **646**

——— **O. XLV** **646**

——— **O. XLVII, r. 7** **850**

——— **Sch. II, para. 1** **171**

——— **paras. 12, 14, 15**—*Arbitration—Absence of some arbitrators at meetings, effect of—Award signed by some only of several arbitrators, legality of—Time for taking objections and for remission of award.*

For a final award by arbitrators to be valid, it is essential that all the arbitrators should have been present at all the meetings including the last, that witnesses should have been examined in the presence of all and that all should have consulted together as to the form that their award should take.

The period of ten days' limitation for applying to set aside an award prescribed under Article 158 of the Limitation Act is not applicable to proceedings under para. 12 or para. 14 of Schedule II of the Civil Procedure Code, and there is no limitation for making an application to remit an award for reconsideration of the arbitrators owing to some illegality being apparent on the face of it.

The fact that when an award is presented, it bears the signature of some only of the arbitrators is an illegality on the face of the award which should lead the Court to remit it for re-consideration of the arbitrators. **M** MAMIDI APPAYYA *v.* VEDAN VENKATASWAMI, (1918) M. W. N. 477; 24 M. L. T. 102; 8 L. W. 171 **597**

——— **paras. 14, 15** **597**

——— **paras. 15, 17** **171**

——— **para. 17**—*Evidence Act (I of 1872), s. 92, prov. (2)—Arbitration—Award by some only of arbitrators, validity of—Agreement, oral, that decision of majority of arbitrators would be binding, whether can be proved—Court, whether can remit award.*

Where a matter was referred to the arbitration of several persons without the intervention of a Court, and the deed of agreement to refer explicitly stated that whatever award was made by the arbitrators would be binding on the parties to the reference, and the award was made only by a majority of the arbitrators:

Held, (1) that it could not be proved under section 92, proviso 2 of the Evidence Act, that there had been a contemporaneous separate oral agreement between the parties to the effect that the decision of a majority of the arbitrators would be binding on the parties;

(2) that the award having been made by some only of the arbitrators was a nullity.

The powers of the Court in a proceeding under paragraph 20, Schedule II, of the Code of Civil Procedure are exhausted as soon as the Court decides either to file the award or refuses to file it. **O** GUR BAKHSH SINGH *v.* CHUTTA SINGH, 5 O. L. J. 471 **960**

——— **para. 20** **171**

——— **paras. 20, 21** **548**

Companies Act (VII of 1913), s. 171—*Appeal arising out of suit in which Company was plaintiff—Leave of Court, whether necessary.*

An appeal or an application for revision arising out of an action brought by a Company does not come within the purview of section 171 of the Com-

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panies Act and can be instituted or proceeded with without the leave of the Court. **P** KISHEN SINGH *v.* INDUSTRIAL BANK OF INDIA, 32 P. L. R. 1918; 62 P. R. 1918 **392**

——— **s. 171**—*Suit against Company—Liquidation—Leave to continue suit, when to be granted.*

Under section 171 of the Companies Act leave to continue a suit against a Company in liquidation should be given only where some question arises which cannot satisfactorily be determined in the winding up proceedings. **P** JAWAHIR SINGH SUNDAR SINGH *v.* SPINNING AND WEAVING CO., LTD., 93 P. R. 1918 **1005**

——— **ss. 186, 199, 200, 201**—*Civil Procedure Code (Act V of 1908), ss. 39, 42, O. XXI, rr. 4, 5, 6, 7, 16—Order of payment—Assignment of order—Application for execution by assignee—Procedure.*

Section 199 of the Companies Act enacts that any order passed by a Court under the Act is enforceable in the same manner in which a decree passed by such Court would be. Therefore, an order of payment made under section 186 of the Companies Act must be regarded as a decree and enforced as such. This means that the provisions of the Civil Procedure Code relating to the execution of decrees are applicable to the execution of such orders.

Where such an order is sought to be enforced through a Court other than the one which passed it, section 201 of the Companies Act removes the necessity for complying with the procedure laid down in section 39 and Order XXI, rules 4 and 5, of the Civil Procedure Code, dispenses with the requirements of rule 6 of the Order, and empowers the other Court to act on a certified copy of the order alone.

An assignee or transferee of the order, however, cannot make an application for the enforcement of the order without having recourse to the procedure laid down by Order XXI, rule 16 of the Civil Procedure Code, which requires that an application by a transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree.

Sections 200 and 201 of the Companies Act are subject to the special provisions of rule 16 of Order XXI of the Civil Procedure Code. **P** THARYA RAM *v.* POPAT RAM, 92 P. R. 1918 **997**

——— **ss. 199, 200, 201** **997**

Confession, *retracted, value of—Ill-treatment by Police, allegation of—Burden of proof.*

An accused person who at his trial retracts his confession recorded by the Magistrate, alleging that it was the outcome of ill-treatment and inducement by the Police, should prove his allegations. **C** EMPEROR *v.* KABILI KATONI, 22 C. W. N. 809; 19 CR. L. J. 959 **811**

Confucianism and Buddhism, *whether mutually exclusive.*

Confucianism and Buddhism are not mutually exclusive religions. The former does not render a man incapable of following the latter religion as well. **L B** KYIN WET *v.* MA GYOK, 9 L. B. R. 179 **148**

Construction of deed **552**

Construction of document **225, 364 541**

——— *Company's Sicca rupees, whether mean rupees in current coin.*

Where in a *kabuliyat* of 1850 by which a *patni taluk* was created, the rent reserved was stated to be "Company's Sicca rupees 96:"

Held, that as the Calcutta Sicca rupee, though coined by the Company, had never become known as the "Company's Sicca rupee" the expression. "Company's Sicca rupees" used in the *kabuliyat* must be regarded as ambiguous; so that the intention of the parties must be re-ascertained, having regard to the surrounding circumstances, such as the conduct of the parties, the date of the document, the stamp duty paid on the document, and a reference to current coin in a portion of the *kabuliyat*.

The history and origin of the term 'Sicca rupee' discussed **C** MAHARAJ BAHADUR SINGH *v.* JADAB CHANDRA GHOSE **109**

——— *Compromise restraining powers of transfer of widow.*

Where a compromise deed entered into between a Hindu widow and her husband's reversioners provided that if the widow made any transfer or created any incumbrance it would be null and void and that there would be no injury to the title of the reversioners:

Held, that the compromise gave the widow the rights of a Hindu widow in her husband's estate. **Pat** RAMA SINGH *v.* HARAKHDHARI SINGH **710**

——— *Instalment bond - Default in payment of instalment—Waiver of right to sue for entire amount—Limitation, commencement of.*

An instalment bond provided that the money was to be re-paid by five annual instalments and that if there was any default in payment of any of the instalments, the creditor would have the power to recover the entire amount in a lump sum. The bond was executed in 1909 and default was made in payment of the first instalment, but the plaintiff waited till the term provided in the bond had expired, when he brought a suit stating that his claim for the first 2 instalments being barred by time, he made a claim only with regard to the remaining three instalments:

Held, that under the terms of the bond the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default, which right he had exercised and that, therefore, his suit with regard to the last three instalments was not barred. **A** MOHAN LAL *v.* TIKA RAM, 16 A L. J. 929 **926**

——— *Mortgage—Stipulation to redeem in any Chittirai month at end of 10 years—Covenant, nature and effect of.*

A mortgage-deed contained a stipulation that the amount due thereunder might be paid "at any cultivation season in the month of Chittirai after the stipulated period of 10 years":

Held, that there was no implied personal covenant to pay at the end of 10 years, which the mortgagee could enforce at once at the expiry of the period. **M** RANGA PILLAI *v.* NARASIMMA AYYANGAR, (1918) M. W. N. 672 **852**

——— *Question of law—Appeal, second—Mortgage with possession—Mortgagor taking mortgaged property on lease—Intention—Right of mortgagee to evict mortgagor*

Defendants executed a deed of mortgage in

Construction of document—contd.

favour of the plaintiff on the 17th March 1913. The mortgage was declared to be with possession and redemption was to take place after two years On the same date a rent deed was executed under which the mortgagors agreed to take the mortgaged house on lease at Rs. 3 per mensem, it being definitely stated that the mortgagee was in possession and that he was entitled to evict the mortgagors at any time by giving them one month's notice. It was, however, agreed that the rent was to be credited to the interest due under the mortgage-deed. Both these documents were registered on the 20th March 1913. On the 4th October 1915, the mortgagee instituted the present suit for the eviction of the mortgagors and recovery of Rs 91-15-0 due as rent. It was contended that the two documents evidenced a single transaction and that, therefore, the suit for eviction was not maintainable:

Held, (1) that the question involved in the suit being one related to the construction to be placed on the two documents concerned, a second appeal was competent;

(2) that the fact that there was no reference to the lease in the mortgage-deed was a strong indication of the separate nature of the two transactions and all that was intended by the lease was that such moneys as were payable thereunder were to be given credit for;

(3) that at the time of the execution of the rent-deed, the parties clearly intended to establish the relation of landlord and tenant between themselves and, therefore, the mortgagees were at liberty to evict the mortgagors at any time **P** MANGIA RAM *v.* GANESH DAS, 161 P. W. R. 1918 **351**

——— *Vendor and purchaser—Sale-deed—Indemnity clause—Vendor agreeing to clear disputes—Continuing covenant—Breach of covenant—Rights of covenantee—Suit for cancellation of sale and damages—Cause of action—Limitation Act (IX of 1908), Sch. I, Art.* 115.

A deed of sale of land contained the following clause: "Should disputes of any kind arise at any time touching the said land on the part of anybody, we will clear them all with our own funds and allow this sale to continue to you uninterruptedly without any kind of loss to you." On attempting to obtain possession, the vendee was resisted by the tenants, who asserted occupancy rights in the land. The vendee thereupon sued the tenants, whose claim was finally upheld by the High Court. In a suit by the vendee against the vendor for cancellation of sale and damages brought more than six years after the date of the sale:

Held, (1) that the provision in the sale-deed was an indemnity clause and should be construed as a continuing covenant;

(2) that the cause of action for the suit arose when it was held that the plaintiff's vendor had no Kudivaram right in the property and the suit was, therefore, within time under Article 115 of the Limitation Act. **M** PARVATANENI VENKATARAMAYYA *v.* LANKA RAM BRAHMAN, 35 M. L. J. 124; 8 L. W. 142; 24 M. L. T. 104 **924**

——— *Will, interpretation of—Intention of testator—Life-estate, transfer of, to remainderman, effect of—Surrender—Acceleration.*

A Hindu testator devised a life-estate in favour

Construction of document—concld.

of his widow, and on her death, a vested remained in favour of his grandson by a predeceased daughter, whom he had brought up as his own son, subject to certain devises for maintenance in favour of the plaintiffs, who were also his grandsons by another daughter:

Held, that the intention of the testator was to provide immediate means for the maintenance of the plaintiffs after his death, and that, therefore, the plaintiffs became entitled to the properties devised to them immediately on the happening of that event.

A transfer of his entire interest effected by the holder of a life-estate in favour of the remainderman operates as a surrender accelerating the devolution of the estate in favour of the latter. **O** RUDRA PRATAP SINGH *v.* UMRAI KUNWAR, 5 O. L. J. 505 **912**

——— *'Year,' meaning of.*

It is not desirable to impute repugnancy to the terms of a document where a consistent intention can be found from the study of the document as a whole.

A year usually means a period of 12 months, but the context of a document may show that a particular year, ending with a specified month or season was intended. **O** PRAG *v.* MOHAN LAL, 5 O. L. J. 263 **161**

Contract *for sale of rice milled by certain firms—Election—Breach of contract.*

Defendant contracted to sell a certain quantity of rice to the plaintiff, and the contract gave the seller the right of delivering the milling of seven specified firms. One of the clauses of the contract absolved the defendant from liability in case of accidents to machinery, etc. It appeared that the plaintiff agreed to accept the milling of the defendant's mill, but before the delivery was completed the mill was burnt down. Plaintiff sued the defendant for damages for non-delivery of the balance:

Held, (1) that the clause giving the option to the defendant to deliver the milling of any of the specified firms was inserted for the benefit of the defendant and that the latter could not be compelled to deliver from all the mills;

(2) that the clause relating to accidents to machinery referred to the mill from which delivery was to be taken or was being taken and that that mill having been burnt down, the defendant was absolved from giving or completing delivery of so much of the rice as remained undelivered under the contract. **L B** ARRACAN COY., LTD. *v.* HAMADANEE & CO., 11 BUR. L. T. 63 **541**

Contract Act (IX of 1872), ss. 19, 19A, 64 **883**

——— **s. 20** **783**

——— **s. 23** **32**

——— **s. 23**—Benami *purchase—Government servant, purchase by, in contravention of Government orders, validity of—Public policy.*

A purchase made *benami* by a Government servant in contravention of Government orders in that respect is void on the ground of public policy, and the real purchaser acquires no title under such a purchase **O** SAJAD MIRZA *v.* NANHI KHANAM **694**

——— **ss. 23, 32, 55, 64, 65**—*Contract to finance litigation and to share in property decreed on success, nature of—Loan—Contingent contract—*

Contract Act—contd.

Construction of document—Champerty—Failure to advance full amount agreed upon, effect of—Breach of contract—Refund of consideration advanced, right of lender to—Stipulation for compromise in particular manner and charge on amount of compromise—Compromise effected differently—Charge, enforceability of—Assignment of future property, validity of—Benefit of contract, participation in, where no privity, effect of.

Where a person agrees to advance moneys to another from time to time up to a certain limit with the object of financing a litigation by the latter, but fails or refuses to pay the full amount, he is, nevertheless, entitled, under section 64 of the Contract Act, to a refund of the amount actually advanced by him.

It depends on the terms of the document whether the subject of it is to be treated as a loan.

Where the agreement is to finance a litigation against a person in possession of certain property and in favour of persons who are themselves unable to find the necessary funds, and the person financing is to get a share of the property in the event of the success of the litigation as if the full amount was paid and no provision is made for the refund of the amount in the event of failure, the transaction cannot be treated as a loan.

Such a contract is champertous, but the promisee is entitled to recover what he has advanced in the event of the litigation ending successfully to the promisor.

A person cannot be charged with liability merely on the ground that he has benefited by a contract entered into by another.

Where a loan is charged on a property, a mere default of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced. There will be a lien *pro tanto*.

Where a loan advanced with the object of financing a litigation is charged on an amount which may be secured by a compromise in the suit to be effected in a particular manner, and the compromise is effected in a different manner, the lien will not attach itself to the substituted property, especially where the parties put an end to the contract before the compromise.

Plaintiff's husband agreed on 25th May 1903 to advance moneys up to a limit of Rs. 1,50,000 to defendants Nos. 2, 3 and 4 with the object of financing a suit by the latter to recover a Zemindari, in consideration whereof the latter agreed to convey to plaintiff a 3/16ths share in the property in the event of their succeeding in the litigation. It was stipulated that the defendants should not compromise the suit with their adversaries without the lender's consent. This agreement was varied in 1908 by another, whereunder the lender was to advance two lakhs of rupees and get a fourth share and no compromise was to be entered into by the defendants without the consent of the lender or of his Vakil. The amount advanced was charged on the amount which might be secured under the compromise. Plaintiff's husband, after advancing about Rs. 70,000, declined to advance any further sum as there were misunderstandings between himself and his debtors. The suit by defendants was compromised, but not

Contract Act—contd.

in the manner specified in the agreement. Plaintiff's husband having died, plaintiff sued to recover the amounts actually advanced and interest thereon and to have it charged on the amount of the compromise:

Held, (1) that plaintiff was entitled to a personal decree for refund;

(2) that the lien created on property to come into existence in future was valid;

(3) but that the lien could not be fastened on the amount of the compromise as plaintiff's husband had, prior thereto, broken the contract and the compromise effected was not in accordance with the agreement. **M** PUSAPATI VENKATAPATHIRAJU GARU *v.* VATSAVAYA VENKATA SUBHADRAYYAMMA **563**

——— **s. 23**—*Public policy—Agreement to refer non-compoundable case to arbitration—Award, whether can be enforced.*

On a complaint of cheating being lodged by the plaintiff against the defendants, the Magistrate referred the case to a gentleman for enquiry with the suggestion that perhaps he would be able to effect a settlement between the parties. The parties then agreed to refer their difference to arbitrators and the Magistrate on being informed of this dismissed the complaint. The arbitrators made an award in favour of the plaintiff and the latter applied to have it filed:

Held, that the award was not enforceable, as the agreement to refer to arbitration was invalid having been made to stifle a prosecution. **C** THANDAMOYEE DASI *v.* GOONAMANI DASI **506**

——— **s. 23**—*Public policy—Contract to engage dancing boy for a certain price, whether opposed to public policy.*

The plaintiff engaged the services of a dancing and singing boy for a certain period. He next contracted with the defendant that for a monthly payment of a certain sum the boy should give exhibitions in accordance with arrangements made by the defendant. The defendant employed the boy for a period of one month and twenty four days but refused to make any payment to the plaintiff:

Held, that the contract between the plaintiff and the defendant was not contrary to public policy and that the defendant was bound to pay to the plaintiff at the contract rate. **C** SAMIR *v.* SYED ALI **138**

——— **ss. 32, 55** **563**
——— **s. 62,** scope of **749**
——— **s. 64** **563, 883**
——— **s. 65** **32, 563**

——— **s. 70**—*Sale—Consideration, part of, left with vendee to pay off creditor of vendor—Payment in excess of amount left with vendee—Excess amount, whether can be recovered from vendor.*

Under a sale-deed executed by the plaintiff in favour of the defendant, a sum of money was left with the defendant for payment to a creditor of the plaintiff who held a mortgage over some other property belonging to the plaintiff. Defendant paid off the mortgage with a sum in excess of that which was left with him ,In a suit by the plaintiff to recover a portion of the consideration for the sale which had been left unpaid:

Held, that the defendant could not be allowed to set off the amount paid by him to the plaintiff's creditor

Contract Act—contd.

in excess of the amount that was left with him, inasmuch as the excess payment was not obligatory upon the defendant. **A** SURAJ BHAN *v* HASHIM BEGAM, 16 A. L. J. 581; 40 A. 555 **903**

——— **s. 108,** applicability of **976**

——— **ss. 113, 116**—*Sale of goods by description—Warranty, implied—Inspection before purchase, effect of—Breach of contract—Damages.*

Section 113 of the Contract Act closely follows sections 14 and 15 of the English Sale of Goods Act.

Where goods are sold by description, there is an implied warranty that they are of merchantable quality, even where they have been inspected before purchase. If, however, the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed.

Per *Spencer, J.*—Section 116 of the Contract Act deals with defects which are detectable only by expert examination. **M** PEER MAHAMAD ROWTHER *v.* DALOORAM JAYANARAYAN, 35 M. L. J. 180; 8 L. W. 192; 24 M. L. T. 227; (1918) M. W. N. 658 **555**

——— **s. 116** **555**

——— **s. 202** **133**

——— **s. 239**—*Partnership—Sailing vessel, co-owners of—Freight and earnings of ship—Accounts, claim for, on basis of partnership, maintainability of.*

Co-owners of a vessel are not, as such, partners, but only tenants-in-common, but if the vessel is put to use to earn freight, the co-owners become partners in the employment. **M** VANAMATTI SATTERAJU *v.* BOLLAPRAGADA PALLAMRAJU, 35 M. L. J. 87; 8 L. W. 583; 41 M. 939 **640**

——— **ss. 249, 251, 261, 263**—*Partnership—Contract by partners—Debt contracted after death of partner by surviving partner for performance of contract—Estate of deceased partner, liability of—Remedy of creditor.*

The estate of a deceased partner is not liable for a debt contracted by the surviving partner to enable him to perform a contract entered into during the former's lifetime. The creditor is entitled to proceed against the surviving partner personally and against the assets of the partnership which the surviving partner has power to pledge in discharge of an obligation created by the partnership.

Per *Wallis, C. J.*—Section 263 of the Contract Act cannot override the express provisions of section 261.

Per *Seshagiri Aiyar, J.*—Unhampered by authority, the plain interpretation of sections 251, 261 and 263 of the Contract Act read together would seem to be that a deceased partner's estate would be liable for obligations necessitated by the process of winding up the partnership business. The implication of section 261 seems to be that the estate should not be answerable for fresh liabilities created solely after the death of the partner. It is difficult to construe section 263 as not dealing with devolution caused by the death of a partner. The expression "partners" in that section must mean those who constituted the partnership before it was dissolved by the death of one of them and *prima facie* in the case of dissolution by death the same liability would attach as before death, provided the obligation was

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incurred for winding up the business. **M** SESHI AMMAL *v.* VAIRAVAN CHETTIAR, 8 L. W. 503; 24 M. L. T. 392; (1918) M. W. N. 806; 35 M. L. J. 669 **958**

——— **ss. 251, 261, 263** **958**

Contribution, *suit for, maintainability of—One of several judgment-debtors satisfying decree—Liability of other judgment-debtors.*

A decree in a suit for maintenance, while providing that certain defendants in the suit should pay off the decretal amount within four months from the date of the decree, went on to order that on their failure to do so the money should be realised by sale of the properties hypothecated. One of the defendants, who had since the decree become possessed of four-fifths of the properties charged, paid off the decretal amount and then sued the other defendants for contribution:

Held, that as it was quite unnecessary for the plaintiff to pay off the decretal debt or any part of it, the claim for contribution could not succeed. **C** KANAILAL KUNDU *v.* NITYA SARAN MUKHERJEE **938**

———, *suit for, maintainability of—Trespassers independent, decree against—Costs recovered from one defendant—Other defendant, whether liable to contribute.*

Plaintiff and defendant each obtained a half share in certain property under separate deeds of gift. A third person brought a suit for recovery of a certain share in the property, in which both were impleaded as defendants. Plaintiff contested the suit but the defendant did not, and ultimately the suit was decreed against both with costs. The decree-holder recovered the full amount of the costs from the plaintiff, who thereupon brought a suit for contribution against the defendant, claiming half the costs which he had been compelled to pay:

Held, that the plaintiff and the defendant were independent trespassers who derived their titles under separate deeds of gift and who were separately liable for the trespass committed by each, and that, therefore, the defendant was not liable to contribute anything towards the amount which had been recovered from the plaintiff. **A** NANDLAL SINGH *v.* BENI MADHO SINGH, 16 A. L. J. 689 **980**

Conveyance—*Consideration money, non-payment of, effect of.*

The non-payment of the consideration money expressed to be paid by a conveyance may be an important item to take into consideration to determine whether the conveyance is or is not a real transaction, but a conveyance notwithstanding the non-payment of the consideration money may be a perfectly good transaction, except where the conveyance is drawn in such a form that the transfer is conditional upon the satisfaction of the consideration money. **C** KUMUD KAMINI DASI *v.* KHUDUMANI DASI **202**

Co-operative Benefit Society—*Manager refusing to receive subscription of contributory—Contributor, whether entitled to refund of past subscriptions.*

Plaintiff was a member of an association each member of which was bound to contribute a certain monthly sum, and the total contributions were then placed at the disposal of each contributor in turn,

He alleged that the defendant who was the organiser of the scheme had improperly refused to receive his contributions, and he claimed to recover the sum of his past contributions on the ground that by the action of the defendant he had lost all prospect of taking the pool:

Held, (1) that if it was found that it was the plaintiff who refused to continue his contribution he must prove that he had a right to a refund, and if so at what time;

(2) that if, on the other hand, the defendant was responsible for the breach, the burden lay on him of proving that no refund was claimable. **P** GHULAM HAIDAR *v.* BHAGAN, 77 P. R. 1918; 157 P. W. R. 1918 **415**

Costs—*Discretion of Court—Appellate Court, interference by.*

An order for costs made by a Court within its discretion ought not to be interfered with by the Appellate Court.

Where the trial Court made the costs of an application for amendment costs in the cause:

Held, that as the amendment was opposed by the opposite party, the trial Court was not wrong in making the order and that it ought not to be interfered with by the Appellate Court. **C** UPENDRA NARAIN ROY *v.* JANKI NATH ROY, 22 C. W. N. 611; 45 C. 305 **129**

——*Successful party, whether can be deprived of costs—Practice—Discretion of Court—Appellate Court, interference by.*

Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs.

Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all. **B** LAXMIBAI *v.* RADHABAI, 20 BOM. L. R. 905; 42 B. 327 **762**

Court, *power of, to sell property of persons not parties to suit.*

A Court cannot sell the right, title and interest of any person who is not a party to the suit. **S** PAMANDAS *v.* HIRANAND, 12 S. L. R. 1 **792**

Court-fee payable on suit for removal of old *mahant*, appointment of new *mahant* and vesting of trust property in new *mahant* **983**

Court Fees Act (VII of 1870), s. 7 (I), Sch I. Art. I, *applicability of—Suit for recovery of money due after adjustment of accounts—Court-fee payable.*

According to section 7, clause (1), of the Court Fees Act the fee payable in a suit for money must be according to the amount claimed.

Article 1 of Schedule I of the Court Fees Act applies only to those cases which are not otherwise provided for under the Act.

Where plaintiff sued for the recovery of Rs. 1,125-4-0 alleged to be due to him, after deducting a sum of Rs. 2,500 (said to be due by him to the defendant on account of the price of certain goods) from Rs. 3,625-4-0, which he assessed as the amount of damages suffered by him by reason of the

defendant's failure to perform certain contracts entered into between the parties:

Held, that the Court-fee paid *ad valorem* on the amount actually claimed was sufficient. **P** QYAM-UDDIN *v.* DELHI FLOUR MILLS COMPANY **992**

——**s. 7 (iv) (c)**—*Mortgage, suit on—Defendant claiming prior charge—Suit decreed—Appeal by defendant—Court-fee payable.*

In a suit on foot of a mortgage one of the defendants claimed that she had a prior charge on the property sought to be sold. The defendant's contention was overruled and the suit was decreed. Defendant appealed praying for a declaration that she had a prior charge over the property and that it could only be sold subject to that charge:

Held, that the defendant's prayer was for a declaration with consequential relief and that she must, therefore, pay *ad valorem* Court-fee on the amount of the charge claimed by her. **A** MOTI BEGAM *v.* HAR PRASAD, 16 A. L. J. 81 **311**

——**s. 7 (v) (b), (d)**—*Suit for recovery of land forming part of entire estate, but neither sub-divided nor separately assessed—Valuation, method of—Court-fee payable.*

The Court-fee payable in respect of a suit for recovery of land forming part of an entire area, but neither sub-divided nor separately assessed to land revenue, must be computed on the market value of the land sued for under section 7 (*v*) (*d*) of the Court Fees Act. **M** GODAVARTHY SUNDARAMMA *v.* GODAVARTHY MANGAMMA, 34 M. L. J. 558; 8 L. W. 88 **543**

——**s. 12**—*Decision on question of value for purposes of Court-fee incidental to decision on question of value for purposes of jurisdiction—Appeal, whether competent.*

Plaintiff sued for possession of certain land which he valued for purposes of Court-fee and jurisdiction at Rs. 764-7-0. On an objection by the defendant that the suit had been undervalued, the Munsif appointed a Local Commissioner who fixed the value at Rs. 943, but the Munsif refused to accept this valuation and having come to the conclusion that the land was worth considerably over Rs. 1,000 returned the plaint for presentation to the proper Court. On appeal the District Judge held that the Munsif had wrongly disregarded the Commissioner's valuation and returned the case to him for disposal. The defendant preferred a second appeal to the Chief Court:

Held, (1) that in arriving at a valuation of the land the Munsif only looked at the question from the point of view of his own jurisdiction and although he decided the value for purposes of Court-fee, this decision was merely incidental to his decision on the question of the value for purposes of jurisdiction and section 12 of the Court Fees Act was not, therefore, applicable to the case;

(2) that under these circumstances the appeal to the District Judge was competent and was rightly decided. **P** SIKANDAR SHAH *v* GHULAM NABI SHAH, 151 P. W. R. 1918 **7**

——**s. 17,** *applicability of—Alternative reliefs arising from more causes of action than one.*

Section 17 of the Court Fees Act applies to alternative reliefs claimed with reference to more causes of action than one. The operation of the section is

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not necessarily confined to cases where cumulative reliefs are claimed. **N** DHARAMCHAND *v.* GORELAL **886**

——— **Sch. I, Art. I** **561, 992**

Covenant, *continuing—Breach of covenant—Rights of covenantee.*

Covenants which provide for a continuous exercise of obligations should be regarded as continuing covenants so long as the subject-matter in respect of which the duty is cast subsists. Therefore, though a cause of action may arise on the date of the covenant or as soon as there is a breach, the injured person is not bound to sue once and for all for present and prospective damages for the breach of the covenant. He is entitled to wait until he has exhausted all possible means of obtaining reparation before he has recourse to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of the intervener and for the expense he has been put to in attempting to vindicate his title against that party. **M** PARVATANENI VENKATARAMAYYA *v.* LANKA RAMBRAHMAN, 35 M. L. J. 124; 8 L. W. 142; 24 M. L. T. 104 **924**

Criminal Procedure Code (Act V of 1898), ss. 4, 195, 476—*"Complaint", what is—Sanction to prosecute—Perjury, trial for, without sanction or complaint, legality of.*

Accused, who held a decree against the complainant, recovered in execution of the decree a sum larger than was due thereunder. The complainant thereupon applied to the Court for sanction to prosecute the accused. No sanction was granted, nor was any action taken under section 476 of the Criminal Procedure Code. The presiding officer of the Court, however, addressed to the Magistrate of the district a letter in which he stated all the facts and concluded by soliciting orders in the case. The Sub-Divisional Officer through whom the letter was submitted, instead of sending it on to the District Magistrate, himself ordered the prosecution of the accused and tried and convicted him under sections 193 and 210 of the Penal Code:

Held, (1) that the letter addressed to the District Magistrate did not amount to a complaint within the meaning of section 476 of the Criminal Procedure Code;

(2) that no sanction having been granted under section 195 of the Criminal Procedure Code and there being no complaint under section 476 of the Code, the trial and conviction of the accused were illegal. **A** SHEO SAMPAT PANDE *v.* EMPEROR, 16 A. L. J. 662; 19 CR. L. J. 963 **815**

——— **ss. 4 (h), 200, 203, 437**—*Petition of objection, whether complaint—Dismissal, irregular—Revisional jurisdiction of Magistrate, whether can be exercised.*

A charged *B* with house-breaking, and *B* lodged an information against *A* for theft of his gun. The Police reported *B*'s case to be false, and *B* filed a petition of objection asking the Magistrate to make an investigation and to summon the accused. *B*, in the meantime, was tried on the charge of house-breaking and acquitted, and the Magistrate passed the following order on his petition of objection: "Judgment of counter-case, record and Police report gone through. Enter false." Against this order *B* made an application to the District Magistrate, who, acting under section 437, Criminal Procedure Code, held that it was premature to call the theft case false, and sent the case back to the Magistrate:

Held, (1) that the petition of objection filed by *B* was a complaint within the meaning of section 4 (*h*) of the Criminal Procedure Code.;

(2) that the order of the Magistrate entering the theft case as false, was in substance an order under section 203 of the Criminal Procedure Code dismissing the complaint;

(3) that where the final order is in fact one under section 203 of the Criminal Procedure Code, the revisional jurisdiction of the District Magistrate can be exercised even though there may have been some irregularity on the part of the officer taking cognizance of the complaint lodged under section 200 of the Criminal Procedure Code. **Pat** SADHU CHARAN RAY *v.* BALEI SWAIN, 3 P. L J. 346; 19 CR. L. J. 874 **70**

——— **s. 71**—*Offence falling under two sections—Procedure—Jurisdiction of British Courts—Abetment out of British India of offence committed in British India.*

Where one act constitutes offences under two different sections of the Penal Code, the proper procedure is to frame charges under both sections in one and the same trial and to award a sentence under either of the sections.

Courts in British India have no jurisdiction to try a person who is not a British subject for abetting out of British India an offence committed by another in British India. **P** RAJ BAHADUR *v.* EMPEROR, 28 P. W. R. 1918 CR.; 23 P. R. 1918 CR.; 19 CR. L. J. 931 **447**

——— **s. 103**—*Search of house—Witnesses present at search, evidence of, value of.*

A Court is not bound to accept as true the evidence of witnesses called in under section 103 of the Criminal Procedure Code to witness a search, if it can be shown to be false. **A** BABU RAM *v.* EMPEROR, 16 A. L. J. 721; 19 CR L. J. 949 **801**

——— **s. 106,** scope of **445**

——— **ss. 107, 112**—*Notice under s. 112, contents of—Jurisdiction of Magistrate to proceed under s. 107.*

Section 112 of the Criminal Procedure Code should be read along with section 107 of the Code.

Where a Magistrate of the first class is informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts and the Magistrate considers the information to have come from a reliable source, he has jurisdiction to make an order under section 112 of the Criminal Procedure Code. In such a case it is not necessary to specify in the order any definite acts which the person intends to commit. **A** JAGUJI RAI *v.* EMPEROR, 16 A. L. J. 567; 19 CR L. J. 876 **72**

——— **ss. 107, 125, 439**—*Order requiring security for good behaviour—District Magistrate, power of, to set aside order—Revision—High Court, interference by.*

An order requiring security for good behaviour under section 107 of the Criminal Procedure Code can be cancelled by the District Magistrate under section 125 of the Code on the ground that there

Criminal Procedure Code—contd.

Criminal Procedure Code—contd.

is no proof of any likelihood of a breach of the peace, and the High Court will refuse to interfere with the order on this ground in revision, unless the District Magistrate has been moved under section 125.

The High Court will on its revisional side interfere only as a Court of last resort under very exceptional circumstances. **N** MARTAND RAO *v.* EMPEROR, 19 CR. L J. 909 **96**

——— **ss. 110, 117, 528, 530**—*Bad livelihood proceedings—Notice, issue of, by Magistrate to person not within jurisdiction, legality of—Proceedings drawn up on reference by District Magistrate, effect of, on want of jurisdiction—Joint trial of two persons, legality of—Misjoinder—Undivided members of Hindu family, liability of, for misconduct of particular members—Evidence, nature of—Rumour and hearsay, admissibility of—'Repute', meaning of—Notice to accused, form and contents of—Landlord keeping tenants of bad character, liability of—Forest offences—Statements in office files, admissibility of.*

The issue of notice under section 110 of the Criminal Procedure Code is not a formal matter and the section limits the power to issue the notice to the Magistrate in whose jurisdiction the accused is.

The issue of a notice under section 110, Criminal Procedure Code, is a judicial act to be exercised after due consideration of the materials placed before the Magistrate, and not merely an executive order to be passed as a matter of course on a complaint by the Police. The issue of a notice by a Magistrate without jurisdiction cannot be justified on the ground that it was drawn up under orders from the District Magistrate.

A defect in the issue of the notice is not a mere irregularity, but the question is one of jurisdiction and falls under section 530 of the Criminal Procedure Code.

It is not legal to try two persons jointly charged under section 110 (*f*) of the Criminal Procedure Code.

The test to be applied in cases where a plea of misjoinder is raised is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint.

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member, and, where they are living separately, there is not even the presumption that one member knew and assented to the misdeeds of the other.

Evidence of general repute does not mean hearsay evidence.

The belief of a class of persons, that a particular individual has done particular acts or has characteristics of a certain kind because there are rumours to that effect in a particular place, is not admissible as evidence of repute where no facts are mentioned to indicate that there were sufficient reasons for the impression.

A notice under section 110, Criminal Procedure Code, must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details to enable the accused to know what fact he is to meet, but it is not necessary to give a list of witnesses.

Criminal Procedure Code—contd.

Where, however, the defect has not been objected to in the trial Court, the High Court ought not to quash the proceedings in revision in the absence of any proof that the accused was prejudiced by the defect.

The facts that a landlord has tenants of bad character under him and lends them money when they are in difficulty or mediates between his tenants who are accused of theft and their victims, are not grounds for requiring security from the landlord under section 110.

Inferences drawn by forest officials as to persons who committed forest offences are not evidence of repute. The Court should test the sources of the information that led the officials to infer that the accused had anything to do with the offences. **M** KRIPASINDU NAIKO *v.* EMPEROR, 19 CR. L. J. 905; 8 L. W. 461; (1918) M. W. N. 751 **277**

——— **s. 110**—*Habitually bringing false cases in Civil Courts—Evidence of general repute, admissibility of.*

Section 110 of the Criminal Procedure Code does not apply to a person who has the reputation of habitually bringing false claims in Civil Courts. Such a person may be punishable under section 209 of the Indian Penal Code, but he does not by so doing commit the offence either, if he succeeds, of extortion or, if he fails, of attempting to commit extortion.

In proceedings against such a person, although evidence of general repute is admissible, it cannot be allowed to override the findings arrived at by the Civil Courts after trial. **N** BAPUJEE *v.* EMPEROR, 19 CR. L. J. 885 **81**

——— **ss. 110, 190 (c)**—*Proceedings under s. 110—Local inspection by Magistrate before instituting proceedings, effect of.*

Although section 190 *(c)* of the Criminal Procedure Code in terms applies only to offences, the principle of that section must apply to cases of a miscellaneous character, *e. g.*, to proceedings under section 110 of the Code.

Where a Magistrate was influenced by his preliminary local investigation in coming to a finding as to the guilt of an accused person under section 110 of the Criminal Procedure Code:

Held, that the conviction was bad inasmuch as the Magistrate should not, under the circumstances, have tried the case himself. **Pat** GODHAN AHIR *v.* EMPEROR, 19 CR. L. J. 899 **95**

——— **ss. 110 (f), 117 (3)**—*Security proceedings—Evidence of general repute, admissibility of.*

The provision in section 117 (3) of the Criminal Procedure Code must be strictly construed and is, therefore, inapplicable where the charge is under clause *(f)* of section 110 of the Code.

Clause *(f)* of section 110 of the Criminal Procedure Code is one of highly special character: evidence of general repute is not sufficient to bring a case within it, but specific acts showing that the accused recklessly disregards the safety of the persons or the property of his neighbours and actually causes danger thereto must be proved. **N** GANPATI *v.* EMPEROR, 19 CR L. J. 871 **67**

——— **s. 112** **72**

——— **s. 117** **277**

——— **s. 117 (3)** **67**

Criminal Procedure Code—contd.

——— ss. 121, 514, Sch. V, Form XI

—Security for good behaviour—Offence committed in Native State—Forfeiture of bond.

A penal bond must be construed literally and strictly.

The subjects of the ruler of an independent Native State are not the subjects of His Majesty the King-Emperor.

A bond executed by a surety in the form prescribed by Schedule V, Form XI, of the Criminal Procedure Code, cannot be forfeited on the principal committing an offence in an independent Native State, inasmuch as the principal does not thereby make default in his undertaking to be of good behaviour towards His Majesty or His Majesty's subjects **P** BAHADUR SINGH *v.* EMPEROR, 26 P. R. 1918 CR.; 19 CR. L. J. 924; 35 P. W. R. 1918 CR. **440**

——— s. 125

——— ss. 133, 139 (1), 141

—Inquiry in proceedings under s. 133—Bona fide *claim of right set up—Procedure.*

On a complaint being made to a Magistrate that public rights in a channel had been interfered with, the Magistrate took proceedings under section 133, Criminal Procedure Code, and coming to the conclusion that the channel in question was in fact a public channel passed orders under sections 139 (1) and 140 (1), Criminal Procedure Code:

Held, that it was not incumbent upon the Magistrate to inquire whether the party complained against had a *bona fide* claim of right to the channel and to refer the parties to the Civil Court if he found that the claim of right set up was *bona fide*, although in normal cases that course would be a wise and proper course to adopt. **C** FAKIR MULLICK *v.* EMPEROR, 28 C. L. J. 211; 19 CR. L. J. 947 **671**

——— s. 139 (1) **671**

——— ss. 140, 145, 146, 147

—Joint user by both parties, finding as to, legality of—Laying warps in street—Right, nature of—Custom—Order, appropriate—Possession, finding as to, necessary at date of preliminary order.

Sections 145 and 146 of the Criminal Procedure Code authorize no recognition of joint possession, and no order can be passed forbidding one of the parties to interfere with the joint enjoyment by both.

Under section 145, the Court must record a finding as to which party was in possession at the date of its preliminary order.

Petitioners claimed the sole right to lay their warps in a certain street in a village and respondents claimed a joint right with the petitioners. The Court, holding that joint user of both parties was established, forbade petitioners from interfering with the joint enjoyment of the street by the respondents:

Held, (1) that it was not competent to the Court to find joint possession under sections 145 and 146, Criminal Procedure Code;

(2) that the right to lay warps was not a right to the possession of land but a right to the use of it and the Court should have dealt with the matter under section 147, Criminal Procedure Code;

(3) that the Court could find that by custom each party was entitled to use a particular part of the street, provided the right alleged by either side was sustainable under the proviso to the section. **M** SANKARA KYLASA MUDALIAR *v.* KUTHALINGA MUDALIAR, 19 CR. L. J. 977 **877** **671**

——— s. 141

——— s. 144

—Jurisdiction of Magistrate to pass order—Imminent danger—Order, whether can be set aside after expiry of 2 months.

The jurisdiction of a Magistrate to pass an order under section 144, Criminal Procedure Code, depends on the urgency of the case. A mere statement by the Magistrate that he considers the case to be urgent is not sufficient to give him jurisdiction, if the facts set out by him show that in reality there is no urgent necessity for action.

In a proceeding to set aside an order of a Magistrate under section 144, Criminal Procedure Code, the High Court would not be justified in considering whether the opinion expressed by the Magistrate on the civil rights of the parties is right or wrong: what it has to consider is, whether the Magistrate's order was made with jurisdiction or not.

Where a Magistrate by an order under section 144, Criminal Procedure Code, directed the petitioner to remove an obstruction to a culvert through which drainage of the Railway menial quarters used to flow into his tank and the only fact set out in the Magistrate's judgment indicating any imminent danger was that a rainfall of one inch in an hour would flood the menial quarters and compel their evacuation:

Held, (1) that this was an imminent danger of quite a different kind to that contemplated by section 144, Criminal Procedure Code: it was a danger to the inhabitants of a particular quarter who might be inconvenienced but was not a source of danger to public health;

(2) that the order under section 144, Criminal Procedure Code, should be set aside even though more than 2 months had expired since its passing inasmuch as a prosecution of the petitioner under section 188, Indian Penal Code, for disobedience to the order had been instituted. **C** CHANDRA NATH MUKERJEE *v.* EMPEROR, 19 CR. L. J. 951; 28 C. L. J. 483; 23 C. W. N. 145 **803**

——— ss. 144, 145, *scope of—Proceedings under s.* 145, *when should be instituted.*

The provisions of section 145 of the Criminal Procedure Code were enacted with the specific intention of definitely settling a quarrel after a fair hearing of each side, and proceedings under section 144 of the Code should not be substituted for proceedings under section 145 in order to evade the provisions of law which require an inquiry into the question of possession with reference to the evidence adduced by the parties.

The use of section 144 of the Criminal Procedure Code is a suitable method of avoiding a breach of the peace only if it is clear, upon a reading of the Police reports, that the claim of the party creating the disturbance is not a claim made in good faith. Where, however, the facts on the record clearly indicate that a proceeding under section 145 is necessary, the Magistrate has no jurisdiction to take action under section 144. **Pat** KANIZ AMINA *v.* EMPEROR, 3 P. L. J. 243; 4 P. L. W. 354; 19 CR. L. J. 869 **65**

Criminal Procedure Code—contd.

——— **s. 144**—*Trustee of temple required to abstain from interfering with conduct of* adyapakam *service—Order, whether definite.*

Where a trustee of a Vaishnavite temple was directed under section 144 to abstain from "in any way interfering with the conduct of the *adyapakam* service:"

Held, that the order was definite and sufficiently defined the acts from which the trustee was required to abstain, and that it rendered the acts 'certain' within the meaning of the section **M** SRINIVASA THATHACHARIAR, *In re*, 19 CR. L. J. 933 **657**

——— **s. 144(4)**—*District Magistrate, power of, to alter order made by Magistrate subordinate to him, extent of.*

Clause (4) of section 144 of the Criminal Procedure Code contemplates only a change in the nature of the order made, and not a change in the party against whom it is made. A District Magistrate has, therefore, no power under this clause to set aside an order made by a Magistrate against one party and to substitute therefor a similar order against the other party. **Pat** GANPAT SINGH *v.* EMPEROR, 3 P. L. J. 287; 4 P. L. W. 357; 19 CR. L. J. 880 **76**

——— **ss. 145, 146, 147** **877**

——— **ss. 165, 173**—*Search for stolen property, when can be allowed—Investigation by Police after submission of report, legality of.*

Section 165 of the Criminal Procedure Code does not authorize a general search for stolen property. A search for specific stolen property is, however, allowed by the section.

The number of investigations into a crime that can be made by the Police is not limited by law and the Police, after submitting a report of an investigation, have power to make further investigation on receipt of further information. **M** DIVAKAR SINGH *v.* RAMAMURTHI NAIDU, 35 M. L J. 127; 19 CR. L. J. 901 **273**

——— **s. 173** **273**

——— **s. 181 (2)**—*Criminal breach of trust by servant—Jurisdiction of trying Magistrate—Revision—Interference by High Court.*

The accused, a Tahsildar, realised a large sum of money from the tenants of his master at a place M., and being bound to render accounts at a place B. presented there a false account with false entries in his papers, shewing that a much lesser sum than what he had realised was due from him:

Held, that it was doubtful whether the Court at B. would have jurisdiction to try the offence of criminal breach of trust against the accused.

Section 531, Criminal Procedure Code, is imperative and the Court is required to see in every case, in which it is asked to set aside a conviction on the ground that the trying Magistrate had no jurisdiction to try the case, whether there has in fact been a failure of justice. **C** BIMAL CHANDRA BANERJEE *v.* TEZ CHANDRA BANERJEE, 19 CR. L. J. 896 **92**

——— **s. 190 (c)** **95**

——— **s. 195** **815**

——— **s. 195**—*Sanction to prosecute—City Magistrate, whether permanent Court—Jurisdiction.*

The Court of the City Magistrate is not a permanent Court with a perpetual succession of Judges; so that where a City Magistrate has been transferred, his successor has no power to sanction a prosecution in respect of an offence committed before his predecessor. In such a case the Sessions Judge alone is competent to grant the necessary sanction under section 195 of the Criminal Procedure Code. **P** JIA LAL *v.* PHOGO MAL, 22 P. R. 1918 CR.; 19 CR. L. J. 914; 34 P. W. R. 1918 CR. **286**

——— **s. 195 (7) (a)**—*Sanction to prosecute, refusal of, by Munsif—Munsif's Court, whether subordinate to District Judge for purposes of s. 195—Appeal to District Judge, whether competent—Procedure—Punjab Courts Act (III of 1914), s. 39 (4).*

Section 195 (7) (*a*) of the Criminal Procedure Code lays down that where appeals lie to more Courts than one, the Appellate Court of inferior jurisdiction is the Court to which the lower Court is deemed to be subordinate for the purposes of the section.

Where, therefore, on a Munsif's refusal to sanction a prosecution, an appeal was preferred to the District Judge:

Held, that as under section 39 (4) of the Punjab Courts Act and Chief Court Notification No. 4424G, dated 20th July 1914, certain appeals from the Munsif's decrees lay to the Subordinate Judge, the District Judge had no jurisdiction to hear the appeal which ought to have been preferred to the Subordinate Judge. **P** LABHU RAM *v.* NAND RAM, 29 P. R. 1918 CR; 19 CR. L. J. 975; 40 P. W. R. 1918 CR. **875**

——— **s. 199** **77**

——— **ss. 200, 203** **70**

——— **ss. 234, 235**—*Misjoinder of charges—Criminal misappropriation—Retrial.*

Where to three charges of criminal misappropriation, alleged to have been committed by the accused within a year, was added another charge of an offence under section 210 of the Penal Code not committed within the same year:

Held, that there was a misjoinder of charges, as the last offence charged did not form one transaction with the other three offences. **C** EMPEROR *v.* RAJENDRA ROY, 27 C. L. J. 311; 22 C. W. N. 596; 19 CR. L. J. 868 **64**

——— **s. 298**—*Trial by Jury—Judge's charge—Duty of Judge—Misdirection and non-direction—Document admitted without objection—Execution, proof of, whether necessary—Failure to draw attention of Jury to presumption arising under Statute—High Court, power of, to weigh evidence after exclusion of inadmissible matter.*

Where a document, which is not *per se* inadmissible, is admitted by the Court in a criminal trial without formal proof of execution, and the accused having sufficient opportunity at the trial to call for formal proof omits to take any objection, he cannot afterwards, in appeal, impeach the verdict of the Jury on the ground that the document had been admitted without formal proof.

A *parcha* slip granted in the course of survey proceedings is not a public document and is not in any way recognised by law. It is, therefore, inadmissible in evidence to prove title or possession. In a criminal trial, however, the Judge is competent to draw the attention of the Jury to the fact that the *parcha* slip was granted to a particular person as a fact relevant to the question of possession.

Criminal Procedure Code—contd.

The omission to draw the attention of the Jury to the provisions of section 103-B of the Bengal Tenancy Act and the presumption arising therefrom does not constitute a serious error on the part of the Judge, where the point has been thoroughly discussed by Counsel and the Jury are under no misconception regarding it.

Where there is no evidence of a particular matter, it would be an error on the part of the Judge to lay down the law to the Jury on that matter, which is not a matter legally and properly before the Jury.

The ability of the Counsel engaged in the defence does not relieve the Judge of his task, which the law imposes upon him, of fully and fairly charging the Jury. At the same time it is reasonable that the Judge should take into account the elaboration and the skill of Counsel.

Per *Thornhill, J.*—If in a criminal trial evidence has been admitted which should have been rejected, it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict. **Pat** RAM BHAGWAN *v.* EMPEROR, 19 CR. L. J. 886 **82**

——— **ss. 337, 339**—*Pardon, forfeiture of*—*Approver, trial of*—*Withdrawal of pardon, whether necessary*—*Approver, whether bound to disclose previous offence.*

As a preliminary to the trial of an approver under section 339 of the Criminal Procedure Code it is unnecessary that there should be a formal withdrawal of the pardon.

It is not sufficient for an approver to help to secure the conviction of some of his accomplices, if he has screened the others.

An approver in order to satisfy the conditions of his pardon is called upon to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence or offences which are being enquired into, and not relative to offences which are at the time not being enquired into. **P** SURAJ BHAN *v.* EMPEROR, 24 P. R. 1918 CR.; 19 CR. L. J. 926; 36 P. W. R. 1918 CR. **442**

——— **s. 339** **442**

——— **s. 399,** *applicability of, to Punjab.*

Section 399 of the Criminal Procedure Code has no application in the Punjab where the Reformatory Schools Act of 1897 is in force. **P** EMPEROR *v.* NUR MUHAMMAD, 17 P. R. 1918 CR.; 25 P. W. R. 1918 CR.; 19 CR. L. J. 917; 91 P. L. R. 1918 **433**

——— **s. 422**—*Appeal by accused*—*Notice to complainant, whether necessary*—*Omission to give notice*—*Revision.*

Where an appeal by an accused is not dismissed summarily, section 422 of the Criminal Procedure Code does not require that notice of the appeal should be given to the complainant. It is, however, the practice to give notice to the complainant as well as to the District Magistrate in a case instituted upon a complaint, but failure to give notice to the complainant does not furnish a ground for interference in revision. **N** MANGALCHAND *v.* MOHAN 14 N. L. R. 131; 19 CR. L. J. 927 **443**

——— **s. 436**—*Offence, minor, cognizance of, by Court*—*Graver offence disclosed, charge for, not pressed by prosecution*—*Commitment to Sessions on graver charge, legality of.*

Where a Magistrate takes cognizance of a minor offence against an accused, and a graver offence triable by the Sessions Court is disclosed in evidence but the prosecution does not press for the framing of a charge in respect of such offence, a commitment to the Sessions Court in respect of the graver offence is illegal. **M** *In re* MARAPPA GOUNDAN, (1918) M. W. N. 486; 24 M. L. T. 82; 19 CR. L. J. 945; 35 M. L. J. 667; 41 M. 982 **669**

——— **s. 437.**

Section 437 of the Criminal Procedure Code contemplates that where a complaint has in fact been dismissed under section 203 of the Criminal Procedure Code, the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal.

It is absurd to hold that a Magistrate is competent to revise the dismissal of a complaint legally dismissed but that he is not so competent to revise in the case of a complaint illegally dismissed. **Pat** SADHU CHARAN ROY *v.* BABI SWAIN, 3 P. L. J. 346: 19 CR. L. J. 874 **70**

——— **s. 439** **96**

——— **s. 439**—*Government of India Act*, 1915 (5 & 6 *Geo. V, C.* 61), *s.* 107—*Revision*—*High Court, power of, to direct Sessions Judge to re-hear appeal.*

Both under the Criminal Procedure Code and under section 107 of the Government of India Act, the High Court has power to direct a Sessions Judge to re-hear an appeal after obtaining additional evidence. **Pat** MAHOMED ZAMIRUDDIN *v.* EMPEROR, 19 CR. L. J. 902; 3 P. L. J. 632 **274**

——— **s. 439**—*Revision*—*Conviction under wrong section*—*High Court, power of interference of.*

It is for the Courts below to find the facts and if they convict under a wrong section in a case in which no charge is framed, it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings. **Pat** SOCKHI CHAND *v.* EMPEROR, 3 P. L. J. 354; 19 CR. L. J. 884 **80**

——— **s. 476** **815**

——— **s. 488 (4)**—*Maintenance*—*Buddhist Law, Burmese*—*Husband marrying second wife*—*First wife refusing to live with husband*—*Sufficient cause.*

Ordinarily the fact that a Burmese Buddhist husband takes a second wife might be a good reason for the first wife declining to live with him, unless he provides her with a separate house. Where, however, a husband marries a second wife owing to the refusal of his first wife to live with him, but is willing to take back the first wife, the latter is not entitled to maintenance under section 488 (4) of the Criminal Procedure Code. **L B** PO NYEIN *v.* MA SHWE KIN, 11 BUR. L. T. 105; 19 CR. L. J. 966 **866**

——— **s. 514** **440**

——— **ss. 528, 530** **277**

——— **ss. 530 (p), 537** **813**

——— **s. 554 (2) (c)**—*Criminal Rules of Practice, Madras High Court, r.* 188—*Madras Board of Revenue Standing Order No.* 173—*Application*

Criminal Procedure Code—concld.

to Tahsildar Magistrate for copy of judgment—Search fee, levy of, legality of.

No search fee can be levied along with an application for a copy of a judgment of a Tahsildar Magistrate. Order No. 173 of the Standing Orders of the Board of Revenue does not apply to such an application which is governed by Rule 188 of the Criminal Rules of Practice framed by the High Court under section 554, sub-section 2, clause c) of the Criminal Procedure Code. **M** AMBALAM IBRAHI *v.* EMPEROR, 35 M. L. J. 401; 8 L. W. 558; 19 CR. L J. 973 **873**

——— **s. 562** - *Penal Code (Act XLV of 1860), s. 420—'Cheating,' whether covers offence under s. 420, Penal Code.*

The word "cheating" in section 562, Criminal Procedure Code, cannot be given an extended meaning so as to cover an offence under section 420, Indian Penal Code. **M** SUNDARAM AYYAR *v.* EMPEROR, 41 M. 533; 19 CR L. J. 934 **658**

——— **Sch. V, Form XI** **440**

Criminal Rules of Practice, Madras High Court, r. 188 **873**

Criminal trial—*Complainant's story disbelieved in essential details—Conviction based on part of story, propriety of.*

Where a party comes into Court with a story which cannot be believed as to its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused. **Pat** PHATALI SINGH *v.* EMPEROR, 5 P. L. W. 157; (1918) PAT. 288; 19 CR. L. J. 877 **73**

——— *Procedure—Court, duty of, to pass orders on petitions.*

When petitions are made to the Court, it is improper merely to direct them to be filed with the record. **Pat** MAHOMED ZAMIRUDDIN *v.* EMPEROR, 19 CR. L. J. 902; 3 P. L. J. 632 **274**

Custom **877**

——— *Alienation—Ancestral property—Burden of proof—Presumption—Adoption—Reversion of property, principle of, applicability of.*

The burden of proving that a particular property is ancestral lies on the person who claims it as such, and the burden is not discharged by showing that it is not unlikely that the common ancestor acquired the property.

Where in 1851 three brothers were in joint possession of certain land:

Held, that it was not unreasonable to presume that they got the land from their father, but that it could not be presumed further that the latter got it from *his* father.

The principle of reversion to the heirs of a donor or appointor is limited to property over which he had not an unrestricted power of disposal, so that the reversionary heirs of an appointor cannot succeed to the land of the appointed heir on the latter's death without descendants, where the land is not ancestral *qua* themselves. **P** RAM KAUR *v.* ACHHRU, 35 P. L. R. 1918; 91 P. W. R. 1918 **17**

——— *Alienation—Necessity, proof of.*

In deciding the question of legal necessity for an alienation the Court should take into consideration the circumstances of the alienor. **P** GANGA RAM *v.* DEWA SINGH, 38 P. L. R. 1918; 92 P. W. R. 1918 **39**

Custom—concld.

——— *Alienation by sonless proprietor of ancestral property in favour of daughter in presence of collaterals, validity of—Mair Rajputs of Tahsil Chakwal, Jhelum District.*

A sonless Mair Rajput of the Chakwal Tahsil of the Jhelum District is by custom competent to devise the whole of his ancestral estate in favour of his daughters in the presence of his brothers and nephews.

Although the initial presumption throughout the Punjab is against the power of alienation in respect of ancestral land in village communities and the *onus probandi* at the outset rests on the person asserting such a power, yet in cases of the Muhammadan tribes of the Jhelum District the presumption against the validity of a gift by a sonless proprietor to a daughter or daughter's son is not of great weight and may be easily shifted. **P** HAYAT *v.* GULLAN, 87 P. R. 1918 **931**

——— *allowing trees to overhang, whether reasonable.*

A custom that a person over whose land trees belonging to another overhang is not entitled to complain is neither definite nor reasonable. **B** VISHNU JAGANNATH JOSHI *v.* VASUDEO RAGHUNATH OKA, 20 BOM. L. R. 826 **629**

———, family, proof of—Evidence **402**

——— Hindu Law—Mantenance of junior members of Mitakshara family out of impartible Zemindari **354**

———, *proof of—Question of law or fact.*

Questions of custom, though they may in the end become questions of law, are at the outset necessarily questions of fact. **M** LOUIS *v.* GONSALVES, 8 L. W. 208; 35 M. L. J. 407; (1918) M. W. N. 842 **941**

———, *proof of*—Wajib-ul-arz, *entries in, value of.*

The value of a *wajib-ul-arz* as evidence of a custom depends upon the circumstances under which the entry with regard to the custom came to be recorded in it. **O** RAGHUBAR SINGH *v.* GAJRAJ SINGH, 5 O. L. J. 508 **920**

Cypres, doctrine of, applicability of, to Indian conditions **611**

Decree *conditional on payment of money within certain period, whether can be altered—Jurisdiction of Court—Discretion, exercise of—High Court, power of interference of.*

Once certain terms are embodied in a decree the Court itself which passed the decree, even if it so desires, has no jurisdiction to alter it save on an application for review of judgment.

Where, therefore, a Court made a decree in plaintiff's favour conditional upon his paying an extra Court-fee within a certain time and directed that the suit would stand dismissed in the case of non-compliance with the condition:

Held, that the Court had no jurisdiction to interfere with the decree by extending the time for payment of the extra Court-fee. **A** SAJJADI BEGAM *v.* DILAWAR HUSAIN, 16 A. L. J. 625; 40 A. 579 **4**

———, *whether can be set aside in subsequent suit.*

It is not open to a litigant, except on the ground of fraud, to maintain a suit to rescind or nullify a decree passed in a former suit to which he was a party and which was tried out by a competent Court. **C** DURGA CHARAN *v.* LAKHI NARAIN **917**

Defamation—*Damages, suit for, maintainability of, in respect of charge which has formed subject of complaint.*

Where one man charges another with an offence and without unreasonable delay makes that charge the subject of a complaint to the Police or to the Court, he is protected from an action for defamation of character in respect of allegations contained in the charge. If the complaint is dismissed, the accused has two remedies, one by obtaining sanction for the prosecution of the complainant for bringing a false charge, and the other, if he has suffered loss or injury, by a suit for damages for false and malicious prosecution. **U B** MAUNG MYO *v.* MAUNG KWET E, 3 U. B. R. (1918) 88 **674**

——— *Fair comment, plea of—Solicitor, conduct of, whether matter of public interest—Journalist, duty of.*

The conduct of a Solicitor of the High Court, as disclosed in proceedings in the High Court, is a topic of public interest and importance.

While a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement, where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the Court must decide what impression would be produced on the mind of an unprejudiced reader, who, knowing nothing of the matter beforehand, read the article straight through.

Comment to be fair must be comment on facts truly stated, though later they may turn out not to be true at all.

It is no part of the law of fair comment that the comment must be the writer's own: he is as much entitled to publish derivative as original comment if it be fair, and he chooses to adopt the former and make it his own.

Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that the inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences.

It is doubtful whether the standard to be applied in determining, whether comment is fair or not, varies according to the station of the plaintiff, and the degree of personality in the libel. All that is essential in this connection is, whether the subject-matter of the libel is of public importance. If it is, it can make no difference whether the person complaining of it is an author, a statesman, or an attorney; once that point is settled against the plaintiff the resultant comment has to be justified upon exactly the same loose general principles, and sentimental considerations ought to have no play. **B** SURAJMAL *v.* HORNIMAN, 20 BOM. L. R. 185 **449**

Divorce Act (IV of 1869), s. 4—*Christian Marriage Act (XV of 1872), ss. 4, 5—Jurisdiction of Court in matrimonial matters—Fraud, whether ground for annulling marriage—Consent—"Rules, rites, ceremonies and customs" of church, meaning of—"Solemnised", meaning of.*

Section 4 of the Divorce Act, which provides that the jurisdiction exercised by the High Court in all causes, suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, does not preclude the Court from considering the provisions of sections 4 and 5 of the Christian Marriage Act and declaring a particular marriage void as not having been solemnised in accordance therewith.

The word "solemnised" in section 5 of the Christian Marriage Act means "celebrated" and refers to the ceremony only.

Section 5 of the Christian Marriage Act deals only with the ceremony and the person who may perform it, and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it, save that he should have received episcopal ordination.

There is no degree of deception which can avail to set aside a contract of marriage knowingly made, unless the party imposed upon has been deceived as to the person and thus has given no consent at all.

When fraud is spoken of as avoiding a marriage, it means such fraud as procures the appearance without the reality of consent; it does not include such fraud as induces a consent, nor fraud which is practised on a third party in order to procure a license. **L B** CONSTERDINE *v.* SMAINE, 11 BUR. L. T. 69 **544**

——— **ss. 7, 11**—*Petition for dissolution of marriage—Co-respondent not made party—Procedure.*

A petitioner cannot be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion.

Where a petitioner for dissolution of marriage is unable to discover the name of the co-respondent, he should apply to be excused from making him a party to the petition, on motion to the Judge supported by an affidavit before the hearing of the petition.

Where there is no co-respondent to a petition for dissolution of marriage, the Master ought not to issue citation to the respondent unless the Judge has granted leave to the petitioner to proceed without a co-respondent. **C** COX *v.* COX, 45 C. 525 **510**

——— **s. 11** **510**

Easements Act (V of 1882), s. 18—*Customary easement—Right to retain trees overhanging another's land.*

Quære.—Whether the right to retain trees overhanging another's land is a customary easement within the meaning of section 18 of the Easements Act? **B** VISHNU JAGANNATH JOSHI *v.* VASUDEO RAGHUNATH OKA, 20 BOM. L. R. 826 **629**

Ejectment, *suit for, by tenant-in-common—Claim for fractional possession—Co-tenant impleaded as defendant, right of, to obtain decree for his share on plaintiff succeeding—Offer to pay Court-fee in written statement.*

Where a tenant-in-common sues in ejectment for his share alone of the property, the co-tenants who are impleaded as defendants and who did not ask to be made co-plaintiffs cannot, on the plaintiff obtaining a decree, be given a decree for their shares on payment of the requisite Court-fee.

The procedure applicable to partition suits where one co-owner seeks a joint declaration by which all co-owners can benefit, cannot be resorted to in the above class of cases. **M** ADHIKARI VISHNUMARTHIAYYA *v.* AUTHAIYA, 35 M. L. J. 153 **533**

Equity—*Void agreement, whether can be enforced.*
The principles of equity cannot be invoked for the purpose of enforcing a void agreement. **O** HAR NATH KUAR *v.* INDRA BAHADUR SINGH, 5 O. L. J. 277 **214**

Escheat—*Resident in village dying without heirs*—Zemindar, *rights of*—Wajib-ul-arz, *entry in, value of*—*Grant, construction of*—*Burden of proof.*
A *sahukar*, who was the owner and occupier of a house situate within the limits of Mouza *S* and also within the limits of the town of *G*, died without leaving heirs and the Secretary of State took possession of the house and its site as the ultimate heir to the property of a deceased person. The plaintiff claimed the site as the Zemindar under the Settlement of 1850, by which the Government had conferred upon him revenue-free proprietary rights over the soil of Mouza *S*, and asserted that the deceased was owner only of the materials of the house with a right of residence therein but had no right to transfer the site or the right of residence. The *wajib-ul-arz* of the Mouza provided that residents of the Mouza had no proprietary rights in anything except the materials of the houses, that they could not sell the site or the right of residence in the sites and that in the event of the death of an occupier of such a house, without legal heirs, the proprietor of the Mouza would be entitled to possession of the house along with the site. The defendant contended that the house in suit, being situated within the limits of a town, was not subject to the ordinary law governing the relations between occupiers of houses and the ground landlord in the inhabited sites of agricultural villages:
Held, (1) that unless the defendant could show that the effect of the Settlement of 1850 was not to grant to the proprietor in the *mahal* in the village any substantial rights of ownership in respect of what was described in the papers of that Settlement as the *abadi* appertaining to the *mahal*, the defendant could not successfully maintain that the residents possessed anything more than a limited interest in the houses occupied by them or in their sites;
(2) that upon the evidence, as between the parties to the suit, it must be held that the plaintiff had successfully discharged the burden of proof which lay upon him and that the deceased did not possess an absolute interest alienable at his will and pleasure in respect of the property in suit but merely a limited interest which could not be the subject of escheat to the Crown. **A** BHARATPUR STATE *v.* SECRETARY OF STATE, 16 A. L. J. 653 **823**

Estoppel 29, 207, 367, 790, 831, 947
——— *by pleadings, whether can be proved by copy of judgment which contains summary of pleadings.*
A plaintiff who wants to show that the defendants are estopped from raising a certain plea by reason of their pleadings in a previous suit between the parties cannot do so by merely producing a copy of the Court's judgment in the previous suit which contains a summary of the pleadings in that suit, but must produce the written statement filed by the defendants in that suit. **C** ANNADA PRASANNA LAHIRI *v.* BADULLA MANDAL **985**

——— *Privy to person to whom representation made, position of*—*Arrangement contrary to representation between parties to representation, effect of.*
The benefit of an estoppel can be claimed either by the person to whom the representation is made or by his privy: and, the privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privity of estate commenced, the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation. **O** BADRI BISHAL *v.* BAIJ NATH, 5 O. L. J. 458 **934**

——— ——— *Reversioner, relinquishment by, of portion of estate in favour of widow, effect of.*
Where an expectant reversioner relinquished his title to a portion of the inheritance in favour of the widow by a deed of agreement in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance:
Held, that neither the reversioner nor any person claiming through him could set up that the deed of agreement was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow. **C** JOGENDRA NATH BHUNYA *v.* MOHENDRA GHOSE **978**

Evidence, *admissibility of*—*Parganah Registers, Kanongo Registers, General and Mouzawari Registers under Bengal Land Registration Act (VII of 1876)*—*Thak map, probative value of*—*Omission of entries of Lakheraj, effect of*—*Bengal Tenancy Act (VIII B. C. of 1885), s. 103 A*—*Presumption, rebuttal of*—*Long possession without payment of rent, presumption arising from.*
Where in the Record of Rights an entry was made in respect of a land that no rent was actually paid for it but that the occupant was not entitled to hold without payment of rent:
Held, that proof of long possession free from payment of rent was sufficient to rebut the presumption arising under section 103A of the Bengal Tenancy Act that the land was liable to be assessed to rent.
Held, also, that the mere fact that the land in question, which did not exceed 50 *bighas* in area, was not shown as Lakheraj in the Parganah Register, prepared under sections 2 and 3 of Bengal Regulation VIII of 1800, or in the Kanongo Register or account kept under the provisions of Bengal Regulation I of 1819, read with section 7 of Bengal Regulation V of 1816, or in the General and Mouzawari Register kept under the Bengal Land Registration Act or in the Thak maps and statements of 1859, was not sufficient to prove that the land was the *mal* land of the Zemindari and as such liable to be assessed to rent. **C** BIPRADAS PAL *v.* MONORAMA DEBI, 22 C. W. N. 396; 45 C. 574 **49**

———, *consideration of*—*Trial Judge, view of, value of.*
Where the evidence, taken as a whole, is of such a character and so full of doubtful statements that it can only be weighed adequately by the Judge who has seen the witnesses, the conclusions arrived at by him should not be lightly interfered with. **P C** KUNDAN LAL *v.* BEGAMUN-NISA, 22 C. W. N. 937; 8 L. W. 233 **337**

Evidence Act (I of 1872), s. 3—*Bengal Land Registration Act (VII B. C. of 1876)*—*'Court,' meaning of*—*Deputy Collector holding enquiry under Land Registration Act, whether Court*—*Judicial enquiry.*

Evidence Act—contd.

A Deputy Collector holding an enquiry under the Bengal Land Registration Act for the purpose of registering the names of rival claimants, is a Court within the meaning of section 3 of the Evidence Act, and the enquiry held by him is a judicial enquiry. **Pat** RAMA SINGH *v.* HARAKHDHARI SINGH **710**

——— **s. 6** **611**

——— **ss. 25, 27, 28**—*Statement made to Police leading to discovery of fact deposed, admissibility of—Defence, right of, to insist upon production and proof of record—Confession, admissibility of—Part of confession disbelieved, effect of—Criminal trial—Defence, whether bound to give explanation.*

Accused went to a Police Station and made the report "I have killed my wife and her corpse is lying in my house," in consequence of which the Police, proceeding to his house, discovered the corpse of his wife in an inner room of the house:

Held, that under section 27 of the Evidence Act the officer who had taken down the statement of the accused was entitled to depose that the accused came to him at the time and place stated and said: "I have killed my wife and her corpse is lying in my house," and that in consequence of that statement the woman's corpse was discovered as indicated by the accused; but that when this had been deposed by the prosecution, the defence were entitled to require the production of the record made at the Police Station and to insist upon proof of the whole of that record.

Per *Walsh, J.*—Where there is no evidence of offence except a confession, the confession must be taken as a whole. The Court cannot select, from the only evidence which it is proceeding to act upon, in order to find the crime established as a fact at all, portions which it rejects as untrue and treat the balance which remains as truthful evidence.

In a criminal trial it is not desirable to call upon the defence to frame a theory either at the beginning or at any other stage of the hearing, particularly in a case of difficulty in which the theory of the prosecution itself is not clear. **A** SURENDRA NATH MUKERJI *v.* EMPEROR, 16 A. L. J. 478; 19 CR. L. J. 935 **659**

——— **ss. 27, 28** **659**

——— **s. 32 (3), (7)** **611**

——— **s. 35**—*Official document, admissibility of—Register of* minhaidari *villages.*

A register of Minhaidari villages is an official document and is admissible in evidence under section 35 of the Evidence Act. If, however, it can be shown that a particular part of the register is in excess of the official duty by reason of which it came into existence, that part would be inadmissible. **P C** RAJ KISHORE DEO *v.* BANI MAHTO, 22 C. W. N. 439; (1918) M. W. N. 305; 28 C. L. J. 1; 23 M. L. T. 382; 20 BOM. L. R. 712 **1**

——— **s. 41** **308**

——— **s. 70**—*Execution, admitted—Attestation, whether to be proved—Mortgage executed by two persons—Admission of execution by one, effect of.*

Where there are two executants of a mortgage-deed, attestation may be according to law in respect of one of them and not in respect of the other.

Where execution is admitted and due attestation not denied, the question of attestation does not arise or if it does arise, the maxim *omnia præsumuntur rite esse acta* comes in, unless there is evidence that attestation is not according to law. **N** DHANNA LAL *v.* SHAMBHU **9**

——— **s. 80** **872**

——— **s. 92,** *applicability of—Sale or mortgage—Sale-deed—Oral evidence to show that transaction was mortgage, admissibility of—Pre-emption—Pre-emptor, position of.*

A deed of sale, containing a stipulation that the sale was an out and out one and that there was no agreement to reconvey the property was duly executed and registered. The next day the vendee executed an agreement which was duly registered to reconvey the property sold by the deed of sale to the vendor, provided the latter repaid the purchase-money together with the price of improvements within two years. One *F.* instituted a suit for pre-emption of the property:

Held, (1) that the sale-deed being an out and out sale in express terms, as soon as that sale was completed the right of pre-emption accrued and *F.* was, therefore, entitled to a decree;

(2) that oral evidence to show that at the time of the execution of the sale-deed the agreement to reconvey was in contemplation was inadmissible under section 92 of the Evidence Act.

Obiter dictum—Had the litigation lain solely between the vendor and the vendee, it might have been held that the two transactions taken together amounted merely to a conditional sale or to an English mortgage. **P** MUHAMMAD MIR *v.* FAIZUL HASSAN, 74 P. R. 1918; 163 P. W. R. 1918 **418**

——— **s. 92**—*Oral undertaking by creditor to waive right to enforce bond, admissibility of.*

Where a registered bond payable by instalments provided that on default in payment of two consecutive instalments the creditor would be entitled to sue for the whole amount due under the bond:

Held, that a subsequent oral undertaking on the part of the creditors at the request of the debtors to waive their right to enforce the payment of the whole amount on two successive defaults was a variation of the contract and was, therefore, not admissible in evidence under section 92 of the Evidence Act. **C** HARA KUMAR SAHA *v.* RAM CHANDRA PAL **943**

——— **s. 92.**

Section 92 of the Indian Evidence Act is confined to proceedings between the parties to the deed or their representatives-in-interest and has no application to claims by or against third persons. **O** BISHUNATH SINGH *v.* BALDEO SINGH, 21 O. C. 165 **194**

——— **s. 92, prov. (2)** **960**

——— **s. 114**—*Presumption—Bond in possession of obligor—Discharge—Burden of proof.*

When in a suit on a bond the plea of discharge is set up and the document creating the obligation is produced by the defendant, the onus of rebutting the presumption of discharge lies in the first instance on the plaintiff, but this burden is one which will under the circumstances easily shift as the evidence is developed. **P C** KUNDAN LAL *v.* BEGAM-UN-NISA, 22 C. W. N. 937; 8 L. W. 233 **337**

Evidence Act—concld.

——— **s. 115,** *applicability of—Oral evidence to show nature of transaction contained in deed, admissibility of—Pre-emption, suit for—Estoppel, doctrine of, applicability of.*

Parties to a transaction which is not really an out and out sale are not estopped in a suit for pre-emption brought by a third party from adducing oral evidence to show the real nature of the transaction, even when the document evidencing the transfer stands in the form of a sale-deed.

Section 115 of the Evidence Act contemplates some act or conduct affecting the party pleading it and having the effect of inducing him to change his position for the worse.

Unless a transaction is really one which gives rise in law to a right of pre-emption, no such right can be obtained by means of an estoppel.

There is no estoppel where all that is proved is that the transaction in dispute was in form a sale and that the plaintiff treated it as a sale for the purpose of bringing a suit for pre-emption which he would not otherwise have been entitled to bring **O** BISHUNATH SINGH *v.* BALDEO SINGH, 21 O. C. 65 **194**

——— **s. 115**—*Estoppel, requisites of—Suit in Revenue Court to establish occupancy rights—Subsequent suit in Civil Court for possession as owner, maintainability of.*

A piece of land, which was originally *shamilat*, fell on partition to the share of the defendant, who caused a notice of ejectment to be served on the plaintiff who was in possession of the land. The plaintiff brought a suit in the Revenue Court to contest the notice of ejectment, on the ground that he was a tenant with rights of occupancy in the land. The Revenue Court held that he was not an occupany tenant, and he was consequently ejected. He then brought a suit for possession as owner of the land in the Civil Court:

Held, that inasmuch as the defendant was not caused to shift his position in consequence of anything represented to him by the plaintiff, the requisites necessary to constitute estoppel as defined in section 115 of the Evidence Act did not exist and the plaintiff was not, therefore, estopped from establishing that he was the owner of the land in dispute.

In order to bring a case within section 115 of the Evidence Act there must have been, (1) a representation which amounts to an intention of causing or permitting to believe in another; (2) belief on the part of that other; and (3) an action arising out of that belief. **P** HAR LAL *v.* BASANT SINGH, 75 P. W. R. 1918; 75 P. L. R. 1918 **98**

——— **ss. 123, 124**—*Court of Justice, whether can call for confidential State papers.*

In view of the provisions of sections 123 and 124 of the Evidence Act, no Court of Justice is entitled to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature. **O** LAL TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER, FYZABAD, 5 O. L. J. 294 **225**

Execution—*Application dismissed for default—Restoration—Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9, applicability of—Jurisdiction*—Res judicata.

Execution—contd.

Order IX of the Civil Procedure Code does not apply to execution proceedings.

An application for execution dismissed for default cannot be restored either under Order IX or under section 151 of the Code of Civil Procedure.

There is nothing in the Civil Procedure Code which ousts the jurisdiction of an executing Court to go into the merits of the judgment-debtor's objection even though the executing creditor is absent.

Where, rightly or wrongly, a Court with jurisdiction has disposed of the judgment-debtor's objections on the merits and has decided that the decree-holder is not competent by reason of a defect of parties to proceed with the execution, the decision is binding on the decree-holder till it is set aside. **Pat** RITU KUER *v.* ALAKHDEO NARAIN SINGHA, (1918) PAT. 265; 5 P. L. W. 208 **154**

——— *Attachment by consent, effect of—Estoppel—Judgment-debtor, whether can object to sale—Order directing occupancy holding to be sold—Appeal, whether lies.*

The primary object of an attachment is that pending the sale the right of the judgment-debtor in the property shall be kept intact for the benefit of any possible purchaser.

Consent to attachment means only that the owner of the property attached accepts the limitation put upon his right to alienate the property pending the attachment.

Plaintiff obtained an *ex parte* money decree against the defendant. The latter applied for a re-hearing of the case and pending the re-hearing consented to the attachment of an occupancy holding belonging to him. The case was again decreed against the defendant and the plaintiff applied to have the decree executed by sale of the attached holding. The defendant objected that the holding was not transferable and that he had no saleable interest therein. The Munsif held that the holding could not be sold but that the right, title and interest of the judgment-debtor could be sold On appeal the District Judge held that the defendant having consented to the attachment was estopped from objecting to the sale:

Held, (1) that the Munsif's order was appealable:

(2) that it was idle for the Munsif to put up to sale the right, title and interest of the judgment-debtor when the whole question before him was whether the judgment-debtor had any right, title or interest in the holding at all;

(3) that the defendant was not estopped from objecting to the sale by the fact that he had consented to the attachment. **Pat** BOCHAI MAHTON *v.* ISRI JAJI, 5 P. L. W. 185 **29**

——— *Judgment-debtor declared insolvent—Order in execution that certain properties were fraudulently concealed by judgment-debtor—Appeal, right of.*

A judgment-debtor who has been adjudicated an insolvent, cannot maintain an appeal against a decision in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the Official Receiver. **C** BANOMALI DUTTA *v.* LALIT MOHAN GHOSAL **152**

Execution—concld.

——— *Sale, postponement of, on judgment-debtor undertaking to waive objections—Objections, whether can be raised after sale—Estoppel.*

A judgment-debtor who gets an execution sale of his properties postponed by giving an undertaking that he would not raise any objection on the ground of illegality or irregularity, cannot, after the sale has taken place on the postponed date, ask to set it aside on the ground of any illegality or irregularity of which he was cognisant at the time he gave his undertaking. **C** LAKSHMI PRASANNA MOJUMDAR *v.* RAJINDRA PODDAR **831**

Execution of decree—*Application for attachment of moveables—Subsequent application for attachment of immoveables, whether in continuation of previous application—Limitation.*

On the 26th of August 1916 a decree-holder made an application for execution of a decree for arrears of rent, which he had obtained on the 10th of December 1913, praying for the attachment and sale of the judgment-debtor's moveable properties. Processes were issued accordingly, but as the result of proceedings taken by the judgment-debtor, the attachment of moveables was found to be impracticable. Thereupon on the 22nd February 1917 the decree-holder prayed that he should be permitted to proceed against the judgment-debtor's immoveable properties. Permission was granted and on the 24th February 1917 the decree-holder filed a list of the immoveable properties against which he desired that proceedings should be taken:

Held, that the applications of the 22nd and 24th February 1917 should be regarded and treated as in continuation of the application made on the 26th August 1916 and that, therefore, there was no bar of limitation to the execution sought by the decree-holder.

Where on an application for execution of a decree made in accordance with law, execution cannot be successfully taken against the property specified in the application by reason of causes for which the decree-holder is in no way responsible, he should not be confined to the properties first specified, but it is open to him to ask the Court to proceed against other properties specified in his further supplementary list. **C** MOHINI MOHAN SIRKAR *v.* NAVADWIP CHANDRA BISWAS **911**

——— *Duty of executing Court.*

A Court executing a decree is bound to give effect to it as it stands. **A** NUR-UD-DIN KHAN *v.* PRANKISHAN CHAKARVARTY, 16 A. L. J. 630 **16**

——— *—Mortgage-decree—Sale—Compromise—Sale, whether can be set aside by consent—Court, power of.*

Certain property was sold in execution of a mortgage decree and was purchased by one of the decree-holders. The judgment-debtor applied to set aside the sale on the ground that a compromise had been arrived at between the parties prior to the sale. The decree-holders, through their Pleader, consented to the sale being set aside:

Held, that there being no opposition on the part either of the purchaser or of the decree-holders, the Court had power to set aside the sale. **A** MUHAMMAD ABDUL RASHID ALI KHAN *v.* BUDH SEN, 16 A. L. J. 750 **885**

Execution of decree—concld.

——— *Sale—Bid of one person, whether can be used by another—Bidder's consent, effect of.*

A person cannot avail himself of the bid made by another at a Court-auction and constitute himself the purchaser by depositing the purchase-money; nor can the consent of the bidder improve his position in this matter. **O** SHAHZADI *v.* AHMAD ALI SHAH, 21 O. C. 212 **993**

Fraud—*Decree obtained by false evidence, whether can be set aside.*

The mere fact that a decree has been obtained by false evidence is not a sufficient ground for setting it aside. **C** KASISWAR GOSWAMI *v.* AMIRUDDIN, 23 C. W. N. 133 **14**

——— Ex parte *decree set aside on ground of fraud—Revival of suit—Procedure—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Adjustment of suit.*

The defendants instituted a suit to set aside an *ex parte* decree on the ground of fraud. The specific fraud alleged was to the effect that the plaintiff had agreed on a receipt of Rs. 44 from the defendants to withdraw from the suit but that he had not intimated this arrangement to the Court and had, on the other hand, taken advantage of the absence of the defendants to secure against them an *ex parte* decree. This allegation was fully established and the *ex parte* decree was set aside on the ground of fraud:

Held, that the setting aside of the *ex parte* decree revived the original suit and that the parties were restored to the position they occupied on the day the *ex parte* decree was made, so that the agreement between the parties under which the plaintiff had to withdraw from the suit on receipt of Rs. 44 should be carried into effect by a decree of the Court under Order XXIII, rule 3, Civil Procedure Code, as an adjustment of the suit. **C** NISTARINI DASI *v.* MOHENDRA NATH KAR, 28 C. L. J. 158 **535**

Godaveri Agency Rules, rr. 10, 16—*Decree of Government Agent, execution of, by Agency Munsif—Order by Agency Munsif in execution proceedings, nature of—Appeal to Government, maintainability of.*

The employment of an Agency Munsif by the Government Agent to execute a decree of the latter's Court under rule 10 of the Godaveri Agency Rules does not make the Agency Munsif the incumbent of the judicial office of the Government Agent himself. The Government Agent continues to preside in his own Court and the Agency Munsif is only an employee under the Government Agent in the matter of the execution of that particular decree. He occupies the same position as a Commissioner or an Amin or a Ministerial officer employed by an ordinary Court to assist it in particular judicial proceedings.

An order, therefore, passed by the Agency Munsif in the course of execution of a decree of the Government Agent, is not a decree, and no appeal lies against it to the Government under rule 16 of the Agency Rules.

The proceedings of a Subordinate Officer of a Court of Justice do not become the proceedings of the Court itself unless the Statute Law makes them so in respect of particular matters or unless those proceedings are submitted to the Presiding Officer of the Court and adopted or approved of by him. **M** MANAYAM MAHALAKSHAMAMMA GARU *v.* MUCHIKA APPALARAJU, 34 M. L. J. 473 **713**

——— r. 16] **713**

Government of India Act, 1915 (5 and 6 Geo. V, C. 61), s. 107 274

——— **s. 107**—*Addition of parties—Application to add defendant rejected—Appeal, whether lies—Revision—High Court, power of superintendence of.*

Where an application under Order I, rule 10 of the Civil Procedure Code asking that a certain person be added as a party defendant to the suit and praying for permission to amend the plaint accordingly is rejected, no appeal lies against the order rejecting the application. Where, however, it appears that the Court has exercised wrong discretion in rejecting the application, the High Court can interfere in revision under section 107 of the Government of India Act. **Pat** ABDUL HAQUE *v.* MUHAMMAD YAHYA KHAN 725

——— **s. 107**—*High Court, power of interference of.*

A High Court is entitled in the exercise of its powers of superintendence under section 107 of the Government of India Act to correct and supervise subordinate Courts whenever they appear to have wrongly exercised their inherent powers. **Pat** BRAJA BHUSAN TRIGUNAIT *v.* SRIS CHANDRA TEWARI, (1918) PAT. 337 719

——— **s. 107**—*'Superintendence,' meaning of—Judgments of Courts subordinate to High Court—Irrelevant and scandalous matter, expunging of, application for—Jurisdiction.*

Per *Abdur Rahim, J.* (*Oldfield, J* dissenting).—The High Court has jurisdiction to expunge irrelevant and scandalous matters in the judgments of Courts subordinate to it under section 107 of the Government of India Act, 1915. Such powers are of extremely wide character but must be exercised in extremely exceptional cases, and with great caution. They are covered by the expression 'superintendence' in the section.

Per *Oldfield, J.*—The High Court has not the power to expunge irrelevant and scandalous matters in the judgments of subordinate Courts under section 107 of the Government of India Act, 1915, especially when the application to expunge them is made by persons who are not parties to the proceedings. **M** KRISHNASWAMI AIYANGAR, *In re*, 35 M. L. J. 368 981

Grant, construction of 632, 823

———, *construction of—Water rights—Grant of land bounded by non-navigable river - Ownership of bed of river—Presumption—Burden of proof.*

Where a grant is made of land which is bounded on one side by a non-navigable river, the onus of showing that the grant did not cover the bed of the river *ad medium filum aquæ* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly. **M** VASIREDDI VENKATA LAKSHMI NARASAMMA *v.* SECRETARY OF STATE, 35 M. L. J. 159; (1918) M. W. N. 662; 41 M. 840 606

Grants, *kinds of—Resumption—Burden of proof.*

For the purposes of resumption all ancient grants fall into two main categories: grants of lands burdened with service, and grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume the lands. Grants under the second category are always resumable, unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability In every case it is always a question of fact to determine, whether the grant in suit falls within the first or the second category and the burden of proof must necessarily be upon the grantor seeking to resume to show that either the grant was of a kind falling under the second category, or if a grant of the kind falling under the first category, that it was specially conditioned. **B** CHANDRAPPA BASWANTRAO DESAI *v.* BHIMA DASSAPPA MANIKERI, 20 BOM L. R. 779 330

Guardians and Wards Act (VIII of 1890), ss. 17, 19 (b).

Section 19 (*b*) of the Guardians and Wards Act recognizes the natural right of the father, but as the section is controlled by section 17 of the Act the paramount consideration in appointing a guardian is the welfare of the minor. **S** MAHOMED YAKUB *v.* RADHIBAI, 12 S. L. R. 14 817

——— **s. 19 (b)** 817

——— **ss. 29, 30**—*Sale by guardian without permission of Court, validity of Sale for benefit of minor—Suit to set aside sale, maintainability of.*

A natural guardian, who has also been appointed guardian under the Guardians and Wards Act, cannot claim to be free from the limitations imposed by section 29 of the Act.

Section 30 of the Guardians and Wards Act gives a minor the right to avoid a sale of his property made by his guardian without the sanction of the Court; so that even if the whole of the sale price was spent in benefiting the minor, he is still entitled to get back his property **P** SHIB LAL *v.* SHAM DAS, 61 P. R. 1918; 162 P. W. R. 1918 353

Gujarat Talukdars' Act (VI Bom. of 1888), s. 29 E *Limitation Act (IX of 1908), Sch I, Art. 182 (5)—Decree against* talukdar—*Execution, application for, unaccompanied by certificate of managing officer, whether "in accordance with law" —Time between date of decree and submission of decretal claim, exclusion of.*

The plaintiff obtained an instalment decree on the 16th September 1910 against the defendants who were *talukdars.* The first instalment became payable on the 1st April 1911, and in consequence of the default in payment, the whole amount became payable on that day. The plaintiff presented an application for execution on the 1st April 1914, but it was rejected on the 15th June 1914 as the certificate of the managing officer required by section 29 E of the Gujarat Talukdars' Act was not produced. Subsequently the plaintiff applied to the managing officer for a certificate in August 1914 and obtained a certificate on the 29th August 1914. He then made the present application for execution on the 28th February 1916 accompanied with the certificate of the managing officer:

Held, that the plaintiff was entitled under section 22E, sub-section (3) of the Gujarat Talukdars' Act to exclude the period from the 16th September 1910, the date of the decree, to August 1914, the date of the submission of the claim under the decree, from the period allowed for the execution of the decree,

Gujarat Talukdars' Act—concld.

and that, therefore, the application of the 28th February 1916 was within time.

Per *Shah, J.*—The application of the 1st April 1914 was in accordance with law within the meaning of Article 182 (5) of Schedule I of the Limitation Act and operated to save limitation, although no certificate of the managing officer was produced as required by section 29 E 1) of the Gujarat Talukdars' Act.

The words "in accordance with law" in Article 182 (5) of Schedule I of the Limitation Act refer to the form and procedure relating to the application, unless there is a clear and definite prohibition outside the Act which would render an application not in accordance with law within the meaning of the Limitation Act.

Section 29E of the Gujarat Talukdars' Act does not lay down any prohibition against execution, but only provides a method of securing the result that execution shall not be proceeded with until the certificate that the decree-claim has been duly submitted, is produced or until the prescribed period has expired after the decree-holder has made a proper effort to obtain the certificate. Therefore in spite of the provisions of section 29E it is permissible to a decree-holder to apply in accordance with law for execution in order to save limitation under Article 182 of the Limitation Act without obtaining the certificate under section 29E, though it is not permissible to proceed with the actual execution in the absence of the certificate.

Per *Marten, J.*—An application for execution of a decree against a *talukdar* which is not accompanied by the certificate required by section 29E (1) of the Gujarat Talukdars' Act, is neither "in accordance with law" nor made to the "proper Court" within the meaning of clause (5) of Article 182 of Schedule I of the Limitation Act and does not, therefore, operate to extend the limitation under that clause. **B** HARGOVIND FULCHAND *v.* NAJA SURA, 20 BOM. L. R. 872 **726**

Hindu Law—*Archaka, succession to office and emoluments of—Widow, whether excluded from inheritance.*

Held, per *Curiam* (*Sadasiva Aiyar, J.*, dissenting).—A Hindu widow is not disqualified by reason of her sex from inheriting the service and emoluments of an Archaka office held by her husband

Per *Wallis, C. J.*—The succession to temple offices is governed by user, which is taken to represent the intentions of the founder, and in Southern India the user in the case of temple Archakas is that the office is hereditary and descends in the ordinary course of succession to women, who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy.

Per *Sadasiva Aiyar, J.*—There is no distinction in principle between the incompetency of a claimant to the office of Archaka by reason of sex and the incompetency due to any other cause. So long as a Hindu widow is held incompetent by reason of her sex from performing the duties of a priestly office, she is also incompetent to inherit the service and emoluments of the office. **M** ANNAYA TANTRI *v.* AMMAKA HENGSU, 35 M. L. J. 196; 8 L. W. 301; 24 M. L. T. 163; (1918) M. W. N. 569; 41 M. 886 **341**

Hindu Law—contd.

———*Custom—Maintenance, suit for, by widow—Widow bound to reside in appointed residence—Absence due to just and reasonable cause, whether disentitles widow.*

In defence to a suit for maintenance by a Hindu widow, it was alleged that by a special family custom the widow was bound to reside in a residence appointed by the head of the family and that by reason of her absence from such residence she had forfeited her right to maintenance:

Held, that the custom, even if it were assumed to be established, did not apply to a case of absence from the appointed residence due to just and reasonable causes. **P C** BRAJA SUNDAR DEB *v.* SWARNA MANJERI DEI, 22 C. W. N. 433; (1918) M. W. N. 313 **36**

———*Religious endowment—Trustee, whether can transfer office or trust property.*

A trustee of a public religious endowment cannot alienate his office and duties or the possession of the trust property at his own will either by sale or gift, so as to create a valid title in the transferee. He cannot even create a life-interest in favour of the donee in respect of the *shebaiti* right. He has no beneficial interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust. **Pat** NATHE PUJARI *v.* RADHA BINODE NAIK, 4 P. L. W. 283; 3 P. L. J. 327; (1918) PAT. 247 **290**

———**Adoption**—*Authority to adopt given to widow, when can be exercised.*

There is no limit of time during which a Hindu widow may act upon the authority given to her to adopt a son to her deceased husband.

Where a Hindu son, whether natural or adopted, having inherited the property of his deceased father, dies leaving a son, or widow, or any other person as his heir other than the widow of his father, any power to adopt held by his father's widow comes to an end. But this rule does not apply where the son dies leaving no heir other than his father's widow. **N** NARAYAN RAMRAO *v.* DEBIDAS NARSINGH **41**

———*by widow—Agreement between adoptive mother and natural parents of adopted child, whether binding on minor—Minor, benefit of.*

A minor can only act through a guardian, and contracts entered into by a guardian on behalf of the minor are binding on the minor, provided they have been properly entered into and are for his benefit.

Where a Hindu widow adopts a minor son to her deceased husband and an agreement is entered into between her and the parents of the adopted child acting on the latter's behalf, whereby a life-interest in the estate of her deceased husband is reserved to the widow, the agreement is binding on the minor, provided at the time it was entered into it was a fair and reasonable agreement which to any reasonable man would have appeared for the benefit of the minor. **Pat** KESHOBATI KUMARI *v.* SATYA NARAYAN SINGH, 5 P. L. W. 167; (1918) PAT. 294 **55**

———*by widow—Widow allowed to remain in possession of estate—Adopted son, position of—Transfer of interest, validity of—Transfer of Property Act (IV of 1882), s. 6 (a).*

Where on an adoption being made by a Hindu widow it is agreed between the widow and the

natural father of the adopted son, acting on the latter's behalf, that the widow should remain in possession of her husband's estate till her death, a vested right in the estate is created in favour of the adopted son and merely his right of enjoyment and possession is postponed till after the death of the widow. A transfer of such vested right by the adopted son during the widow's lifetime is unaffected by section 6 (*a*) of the Transfer of Property Act. **A** BALWANT SINGH *v.* JOTI PRASAD, 16 A. L. J 765 **599**

———**Alienation** *by widow—Necessity, nature of—Lender, duty of, to make enquiry—Interest, high rate of, whether can be recovered—Reasonable rate.*

Where a loan is advanced to a Hindu widow for legal necessity, the lender is not bound to ascertain how the necessity for the loan was brought about. Even if it is found that the necessity arose owing to the mismanagement of the estate by the widow the lender is entitled to recover the loan, unless it is shown that he acted *mala fide*.

Where the necessity for the loan is apparent, the lender is not required to make any particular enquiry about it.

A creditor who advances money to a Hindu widow for legal necessity at a high rate of interest is not entitled to recover interest at that rate, unless he explains why that rate was fixed. In such cases the creditor should be allowed a reasonable rate of interest. **O** DWARKA PRASAD *v.* PRITHIPAL SINGH, 5 O. L. J. 271 **106**

——— *by widow—Suit for possession by reversioner against alienee from widow—Right of co-reversioner defendant to obtain decree for his share.*

Plaintiff sued for recovery of his share of property from 1st defendant, who was an alienee from a Hindu widow. The plaintiff was a reversioner next after the widow, as also was the 2nd defendant. The 2nd defendant offered to pay Court-fee for his share, in the event of the plaintiff succeeding in the suit. The plaintiff obtained a decree for possession of his share, and defendants Nos. 3 to 5, legal representatives of 2nd defendant, claimed a decree for their share:

Held, that no decree could be passed in favour of defendants Nos. 3 to 5 for their shares. **M** ADHIKARI VISHNUMURTHIAYYA *v.* AUTHAIYA, 35 M. L. J. 153 **533**

———**Guardian**—*Father, rights of, as natural guardian, whether affected by conversion to other religion—Caste Disabilities Removal Act (XXI of 1850), s. 1.*

That portion of the Hindu Law which disqualifies a father, on account of the loss of caste involved in his conversion to any other religion, from becoming the guardian of his children after his conversion having been abrogated by Act XXI of 1850, the mere fact of conversion of a Hindu father to Islam is not, *per se*, sufficient to deprive him of his natural rights of guardianship over his children. **S** MAHOMED YAKUB *v.* RADHIBAI, 12 S. L. R. 14 **817**

———**Joint family**—*Agreement to separate, effect of.*

Once the members of a joint Hindu family have agreed and declared their intention to hold the joint family property in definite shares, the family is no longer a joint family. It may be that no actual division of the property takes place, but the result of such

agreement and declaration is that from the time it is made the parties thenceforth hold the property not as joint tenants but as tenants-in-common. **O** CHAUBAR SINGH *v.* BAKHTAWAR SINGH, 5 O. L. J 486 **897**

———**Joint family** — *Alienation—Necessity, absence of—Decree against father—Decree held not bindingon sons' sons, effect of—Consideration, whether charge on share—Pious obligation*—Res judicata.

Where a sale by a Hindu father is held to be not binding on the share of the sons, the purchaser is not entitled to any charge on the latter's share for any portion of the consideration for the sale.

In such a case the purchaser cannot treat the consideration which he seeks to get refunded as a debt of the father which it is the pious duty of the sons to repay.

A decree against the father will not operate as *res judicata* in a suit by the sons to set aside the sale in respect of their shares in the property. **M** KILARU KOTAYYA *v.* POLAVARAPU DURGAYYA, 35 M. L. J. 451 **192**

———— *Debt, antecedent — Personal covenant in simple mortgage, whether antecedent debt —Son, liability of, to pay father's debts.*

The personal obligation comprised in every simple mortgage may be separated from the mortgage debt, and though the mortgage may in certain circumstances be invalid, the personal obligation to repay the money may amount to an antecedent debt which a Hindu son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral **O** RAMMAN LAL *v.* RAM GOPAL, 21 O. C. 200; 5 O L. J. 629 **987**

———*Debt incurred by father—Sons, pious obligation of, nature of—Sons, position of, during father's lifetime—Decree against co-parcener for separate debt —Co-parcener's interest in joint property, whether liable to attachment and sale - Creditor of co-parcener, position of.*

So long as the father in a Hindu family is alive; the pious obligation to discharge his debts which is imposed by the Hindu Law upon his sons cannot be enforced.

Under a decree against any individual co-parcener for his separate debt, a creditor may during the life of the debtor seize and sell his undivided interest in the family property. **O** MANNA LAL *v.* BHAGWANDIN, 5 O L. J. 447 **679**

———*Decree against father—Sale of ancestral property—Sons, whether can object.*

A Hindu son is bound by a sale of his share in joint ancestral property held in execution of a decree obtained against his father, even where it is not shown that the debt was incurred by the father for legal necessity. The only exception is where the debt was an immoral one.

In a suit for accounts the defendant obtained an *ex parte* decree against the plaintiffs' father who was his agent and in execution of that decree brought to sale the joint property of the plaintiffs and their father and purchased it himself:

Held, that the sale was binding on the plaintiffs, inasmuch as the liability of their father was an ordinary civil liability and there was nothing to show that it was immoral. **Pat** GADADHAR RAMANUJ DAS *v.* GHANA SHYAM DAS, 3 P. L. J. 533 **212**

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———**Joint family**—*Decree against undivided father, execution of, against sons' shares—Liability of sons in absence of proof of immorality or illegality—Antecedent debt—Attachment of property—Intention of decree-holder, when material—Proof of immorality, nature of.*

An execution creditor is entitled to sell the whole of the estate of a joint Hindu family consisting of a father and his sons and governed by the Mitakshara Law in execution of a decree obtained against the father alone, unless it is shown that the debt for which the decree was obtained was incurred for illegal or immoral purposes.

Where joint family property including the shares of two undivided sons was attached and sold in execution of a decree obtained against the father on a pro-note executed by him, and the sons preferred a claim for the release of their shares which was dismissed and subsequently brought a suit for a declaration that their share of the property could not be attached and sold in execution of the decree:

Held, that in the absence of proof that the debt in respect of which the decree was obtained was (*i*) incurred for illegal or immoral purposes or (*ii*) borrowed by the father solely to enable him to sell the whole property including the sons' shares, the decree-holder was entitled in execution to proceed against the whole of the property including the hares of the sons.

Per *Krishnan, J.*—It is only when it is doubtful what was attached and sold in Court-auction, as, for example, when the property attached and sold was "the right, title and interest of the judgment-debtor," that the intention of the attaching creditor becomes important.

If the father's debt in execution of which the shares of the sons are also attached was contracted merely for the purpose of enabling the father to sell the whole property including his sons' shares and if the father suffered a decree to be passed in furtherance of that purpose, the decree-holder cannot be permitted to sell the shares of the sons.

Evidence to show that the father led an immoral life will not be sufficient to exclude the father's right to sell the joint property. There must be evidence to show that the particular debt in question was contracted for an immoral purpose. **M** SUBBA RAO *v.* SWAMIA PILLAI, 7 L. W. 407 **834**

———*Maintenance of junior members—Basis of right—Impartible* zemindari, *whether subject of co-parcenary—Custom—Maintenance out of impartible* zemindari.

The right to maintenance of the junior members of a Mitakshara joint family, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.

Two other categories of persons have by special texts a right to maintenance under the Mitakshara Law, *viz.*, (1) Those who are debarred from inheriting by personal disqualifications *e.g.*, the idiot, the blind from birth, the insane, etc. (2) Certain near relations, *viz.*, the widow, the parent and the infant child. But these categories are exhaustive.

In impartible properties there is no co-parcenary, hence in such properties no one can claim maintenance on the ground that but for the

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custom of impartibility he could sue for partition.

Custom may and does affirm a right to maintenance out of an impartible Raj in certain members of the family. In the case of sons this custom is so well recognised that proof of it in individual cases is unnecessary. But there is no invariable or certain custom that any one below the first generation from the late Raja can claim maintenance as of right: any special custom to that effect must be pleaded and proved.

The grandson of the late Rajah of Pittapur, an impartible Raj, sued the devisee of the Raj for maintenance on the ground that by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party:

Held, that there was no legal basis for any such claim. **P C** GANGADHARA RAMA RAO *v.* RAJAH OF PITTAPUR, 5 P. L. W. 267; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 41 M. 778; 28 C. L. J. 423; 29 Bom. L. R. 1056 **354**

———**Mitakshara**—*Partition—Step-mother, right, of to share in estate.*

Under the Mitakshara Law in a partition between sons, the step-mother is entitled to a share equal to that of a son. **Pat** SUBA RAUT *v.* MANLA RAUTAIN **204**

———Putrika-putra *son, whether recognised—Presents to natural father, whether vitiate adoption—Ceremonies for adoption, when can be dispensed with—*Gotra, *same, of adoptive father and adopted boy, effect of.*

Per *Stuart, A. J. C.*—Although the practice of begetting a *putrika-putra* son has fallen into disuse, it is nevertheless recognised by the Mitakshara Law.

Under the Hindu Law an adoption is not vitiated by the payment of a price for an adopted son.

A male Hindu under the Mitakshara Law can only change his *gotra* on adoption.

Per *Kanhaiya Lal, A. J. C.*—According to the Hindu Law, a son affiliated in the *putrika-putra* form is a valid substitute for a son. The ease with which a son could be obtained by adoption has had the effect in the course of time of rendering affiliation in the form of *putrika-putra* more or less uncommon, but it has by no means become obsolete and effect cannot legitimately be refused to an affiliation in the *putrika putra* form if it is made.

The supply of clothes or ornaments to the parents of the boy to be adopted or the payment of money therefor in anticipation of the adoption cannot invalidate the adoption or be taken to indicate that it was made from sinful or improper motives.

The performance of requisite ceremonies for adoption can be dispensed with, if the adoptive father and the adopted boy belong to the same *gotra*. **O** LAL TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER, FYZABAD, 5 O. L. J. 294 **225**

———**Partition**—*Construction of deed—Division of all family properties except outstandings—Severance in status—Presumption—Partial partition, validity of.*

A deed of partition executed between a Hindu father and son recited that the division was effected owing to misunderstandings among the female members of the family and that the properties mentioned

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in the schedule were divided. The outstandings due to the family were not mentioned in the schedule:

Held, (*Wallis, C. J., dubitante*) that the family became divided in status even in respect of the outstandings.

Per *Wallis, C. J.*—The mere fact that members of a joint Hindu family execute a document dividing a particular item of property is not sufficient to raise a presumption that they intend to become divided in status. If such a presumption is to be raised, there must be something else in the document to raise it.

Per *Seshagiri Aiyar, J.*—When one member of a joint family intimates his willingness to get separate from others, that effects a division in status and where a partition is effected not specifically dealing with some items of the joint property, the status of coparcenary cannot be deemed to be continued in respect of this property which is not divided. **M** SUBBA REDDI *v.* ALAGAMMAL, 34 M. L. J. 596; 8 L. W. 84 **552**

——**Partition**—Jestabagam, *or allotment of extra share to eldest member, validity of—Living in commensality and failure to keep accounts after partition, effect of—Re-union or release—Throwing extra share into hotchpot, effect of—Registered document, whether necessary.*

The old idea of giving *jestabagam* or an extra share to the eldest member of a Hindu family has become obsolete and the allotment of such a share at a partition will not be binding on the other shares.

The fact that after partition, the members lived in commensality, incurring marriage expenses indiscriminately will not, under Hindu Law, amount to a re-union.

The joint living of the members after partition, or their failure to keep accounts, or their incurring marriage expenses indiscriminately or making acquisitions jointly or even the throwing in of an extra share by the eldest members into hotchpot will not have the effect of converting separate property into common property. The extra share cannot be given up except by a document duly registered. **M** VENKATA REDDI *v.* KUPPA REDDI, 8 L. W. 400; (1918) M. W. N. 680 **716**

——**Succession**, *whether can be altered by agreement—Grant, construction of—Sanad laying down special rule of succession, validity of—Successive life-estates, whether can be created in favour of unborn persons—Custom, family, proof of—Evidence.*

A grant of lands made by a Hindu in favour of another Hindu, in so far as it lays down a rule of succession unknown to the Hindu Law, is absolutely void.

The Hindu Law does not permit the creation of successive life-estates in favour of unborn persons, the estate itself remaining undisposed of.

An agreement between a grantor and a grantee cannot alter the line of succession according to law.

A rule of succession laid down in a grant creating successive life-estates in the property granted to certain female members of a Hindu family cannot be binding upon the family even though it has been actually followed in the family for a long time, unless it has ripened into a family custom.

In deciding the question whether there was a family usage under which certain female members

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of a family acquired by succession ownership to the family property, the fact that the female members who were in possession of the properties for the time being made transfers and otherwise dealt with the properties as if they were owners thereof, cannot be excluded from consideration.

In order to establish a *kulachar* (family custom) it must be shown that the custom has existed from time immemorial, and where the custom set up is peculiar only to a single family the rule is more strictly enforced than in other cases. **C** AMBALIKA DASI *v.* ARPANA DASI, 45 C. 835; 23 C. W. N. 160 **402**

——**Widow**—*Compromise by widow, whether binding on reversioners—Collusion—Burden of proof.*

A Hindu widow is entitled to avoid the expenses of litigation by compromising a *bona fide* claim, subject to the qualification that the compromise is made for the benefit of the estate and not for the personal advantage of the widow.

Where, however, the reversioners seek to set aside such a compromise, the burden is on them to show that the compromise was entered into by the widow collusively for the purpose of conferring upon herself a benefit at the expense of the estate. **Pat** RAM SUMRAN PROSAD *v.* SHYAM KUMARI **697**

——*Maintenance, arrears of—Court, power of, to award arrears—Demand, whether necessary.*

In dealing with claims for arrears of maintenance made by Hindu widows Courts possess a large discretion to grant or withhold those arrears with special reference to the urgent needs and necessities of the widow.

As soon as the widow satisfies the Court that she was in want at the time at which she was entitled to maintenance, provided that time is within the period of limitation, the Court might in any given case award her arrears to that extent, and that would be quite independent of any demand on her part. In other words, while a demand is allowed to be *prima facie* evidence of need on the widow's part, it is not in a demand that the right to obtain arrears of maintenance is rooted. Nor is any demand necessary. **B** KARBASAPPA GOOLAPPA NAREGAL *v.* KALLAVA GOOLAPPA NAREGAL, 20 BOM. L. R. 823 **623**

——, *possession taken during lifetime of, by trespasser, whether adverse to reversioners.*

Possession taken by a trespasser during the lifetime of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow. **A** GANGA *v.* KANHAI LAL **222**

——, *remarriage of, effect of—Succession to deceased son of first marriage.*

A remarried Hindu widow is entitled to succeed to the property left by a son of her first husband if the son dies after the re-marriage. **N** APA PANDURANG *v.* DAMDIA, 14 N. L. R. 149 **647**

——*Reversioner—Compromise prior to reversion falling in—Widow induced to alter her position to her own detriment—Reversioner, whether can go behind compromise when reversion opens—Estoppel.*

R. the widow of the last surviving brother of a joint Hindu family which originally consisted of three brothers, brought a suit for the recovery of the

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whole family properties against *P.* and *K.*, the widows of the two predeceased brothers, who both alleged that the brothers died separate, and one *L.*, who claimed the whole estate as the adopted son of *P.* and her husband, agreeing with *R.*'s contention that her husband died undivided. The adoption set up by *L.* was questioned by *R.* and *K.* and the division set up by *P.* and *K.* was questioned by *R.* and *L.* A compromise was entered into, whereby *R.* consented to take a fourth of the estate absolutely for herself and a fourth absolutely for her only daughter who was then alive, *P.* and *K.* each got a fourth absolutely for themselves and *L.*'s adoption was recognised but he was to take *P.*'s one-fourth. Subsequently *L.* got himself registered as the proprietor of *P*'s one-fourth share with her consent. On *R*'s death, which had been preceded by that of her daughter, *L.* brought two suits against those who claimed under *R.* and her daughter and against *K.* and those who claimed under her claiming the properties respectively in their possession:

Held, (1) that *L.* had by his part in the compromise induced *R.* to change her position to her own detriment and to *L.*'s substantial benefit and that *L.* was, therefore, estopped from claiming as a reversioner;

(2) that for the same reason, the suit against *K.* and those claiming under her must also fail. **P C** KANHAI LAL *v.* BRIJ LAL, 40 A. 487; 28 C. L. J. 394; 5 P. L. W. 294; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 20 BOM. L. R. 1048 **207**

——— **Widow**—*Reversioner, interest of, whether transferable—Widow, relinquishment of estate by, validity of—Alienation by widow, validity of—Legal necessity—Consent of reversioner, value of*—Bona fide *transferee, position of—Joint heiresses, position and rights of—Separate possession and enjoyment of inheritance, effect of.*

A reversionary heir has a mere *spes successionic* which he cannot validly transfer.

If two widows or two daughters taking jointly the estate of their deceased husband or father make an arrangement for separate possession and enjoyment, the arrangement will not ordinarily deprive the survivor of her right to the whole estate or enable the ladies to confer a title on a third party which will not terminate at the latest with the life of that survivor.

There can be no relinquishment by a Hindu female heiress of anything less than the entire estate.

The case-law of Bengal recognizes not merely the relinquishment by the widow of her husband's entire estate but the sale of the entirety to the next reversioner or with his consent to a third party.

A partial alienation of her husband's estate by a Hindu widow, even with the consent of the next reversioner, is not valid unless made for legal necessity. The consent of the next reversioner is merely strong presumptive evidence of necessity, but the presumption is not conclusive.

The propriety of an alienation with the consent of the next reversioner may come in question not only with reference to the conduct of the widow, whether or not she was justified by necessity, but also with reference to the conduct of the next reversioner, whether or not his conduct was honest. If in the absence of legal necessity he engineered the

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transaction to suit his own ends and for his own immediate gain, his consent would lose all its virtue. The transaction would stand no higher than a partial alienation in his favour, and would have to be judged from that standpoint. Nevertheless whatever might be said of the conduct of the widow or the next reversioner, the transferee, if he made due enquiry and acted *bona fide*, would acquire a good title. Nor would the antecedent mismanagement of the estate affect him unless he was in some way a contributory party thereto. **C** SHYAMADAS ROY *v.* RADHIKA PROSAD, 22 C. W. N. 846 **853**

——— **Widow**—Reversioner, transfer by, validity of **214**

——————*Reversioners, suit by—Compromise, whereby reversioners take on widow's death—Reversioner predeceasing widow—Survivor, interest of, nature of.*

A suit by two of the reversioners of a deceased Hindu against his widow for a declaration that an alleged Will by the deceased was not genuine ended in a compromise which provided that the property should go to the reversioners on the widow's death. One of the reversioners having predeceased the widow, the survivor claimed the entire property, on the death of the widow, to the exclusion of the deceased reversioner's sons:

Held, that, by the compromise, the reversioners took a vested interest in the property which did not pass by survivorship, but was heritable and divisible between the two donees. **M** KRISHNA IYER *v.* SWAMI NATHA IYER, (1918) M. W. N. 503; 8 L. W. 140; 24 M. L. T. 101 **723**

Intent and attempt, *distinction between:*

An intent to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such offence. It exists before the attempt is begun. A mere intent is not by itself an offence: therefore, where it is used as essential to bring a particular act within the category of criminal offences, and proof has been given that such an act accompanied by such an intent has been committed, the offence is complete, even though the further act intended may not have been committed or even attempted. **N** EMPEROR *v.* DHANTUA LODHI, 19 CR. L. J. 881 **77**

Interest, *high rate of—Compound interest, whether penalty.*

A covenant to pay compound interest in case of default at the rate originally fixed is not necessarily penal.

Where a mortgage-deed provided for payment of interest at Rs. 1-8-0 per cent. per mensem and for payment of compound interest with six-monthly rests if the mortgage money was not paid within the fixed period:

Held, that the rate of interest secured by the mortgage-deed was neither penal nor hard and unconscionable. **O** RAM SEWAK *v.* BALDEO BAKHSH SINGH, 5 O. L. J. 442 **649**

Interlocutory Order, whether open to revision **676**

Interpretation of Statutes.

In interpreting the plain words of a positive enactment any suggestion of hardship is out of place. **C** SECRETARY OF STATE *v* SHIB NARAIN HAZRA, 22 C. W. N. 802 **502**

Interpretation of Statutes—concld.

——— *Proviso to section, whether can be considered.*

Per *Ayling, J.*—Where there is doubt as to the true meaning of the substantive part of a section, it is legitimate to look to the words of a proviso to it in order to determine which interpretation is correct.

Per *Seshagiri Aiyar, J.*—Where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section, but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. **M** SANKARAN NAMBUDRIPAD *v.* RAMASAMI IYER, 34 M. L. J. 446; 23 M. L. T. 346; 8 L. W. 12; 4 M. 691 **301**

——— *Statutes of Limitation.*

Statutes of Limitation are in their nature strict and inflexible and are not susceptible of equitable construction. **C** DEUTSCH ASIATISCHE BANK *v.* HIRALAL BURDHAN AND SONS **122**

——— *Words and phrases having technical meaning, interpretation of.*

The first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their technical meaning if they have acquired one. **S** JIVANJI MAMOOJI *v.* GHULAM HUSSAIN, 12 S. L. R. 20 **771**

Issues, *framing of—Duty of Court.*

Courts are not bound to raise issues on questions of fact of their own motion where parties do not ask for them. The omission to raise such issues implies an abandonment of such questions by the party interested. Where, however, the question is one purely of law, such as limitation or jurisdiction, it is incumbent on the Court to frame proper issues on such question. **M** NAGAPPA *v.* SIDDALINGAPPA, 35 M. L. J. 372 **589**

Journalist, duty of, to comment on questions of public interest **449**

Jurisdiction, *objection to, omission to raise, in Trial Court—Appellate Court, power of, to record finding on question of jurisdiction.*

Where an objection to the jurisdiction of a Court to try a suit is not taken in that Court at the proper time, the Appellate Court should not allow such objection to be raised before it and record a finding thereon. **M** CHOKKALINGAM CHETTIAR *v.* KURUNTHAPPAN CHETTIAR, (1918) M. W. N. 661 **764**

Jurisdiction of Civil and Revenue Courts **594**

Jurisdiction of Court **4**

Jurisdiction of Small Cause Court **842**

"Kanyarikam" ceremony, performance of, whether within section 373 of Penal Code (Act XLV of 1860) **865**

Land Improvement Loans Act (XIX of 1883), s. 7 (1) (c) **301**

Landlord and tenant—*Abandonment of holding—Landlord, right of re-entry of—Transfer of non-transferable occupancy holding—Settlement by landlord, effect of.*

The plaintiff purchased a non-transferable occupancy holding from the heirs of the original tenant; a few days later the defendant purchased the same holding from a relation of the original tenant who had no right, title or interest in the occupancy holding. Both the plaintiff and the defendant obtained settlement of the land from the landlord, the defendant's settlement being prior to that of the plaintiff:

Held, that the settlements made by the landlord might be regarded in the light that they signified the landlord's consent to the transfers respectively set up by the plaintiff and the defendant and that inasmuch as the transfer set up by the defendant was from a pretended owner, the consent of the landlord could have no validating effect upon the title derived by the defendant from that transfer but it operated to validate and confirm the title derived by the plaintiff from the true owners. **C** WAHID ALI BHUYA *v.* MAHAMAD ANSAR ALI **147**

Landlord and tenant—contd.

———Darputni *lease—Sum payable by* darputnidar *to superior landlord, whether rent—Revenue and cesses paid by* darputnidar, *whether can be deducted.*

Under the terms of a *darputni* lease out of Rs. 142 fixed as the *darputni* rent, the *darputnidar* had to pay Rs. 112 to the superior landlord of the *putnidar* and the balance Rs. 30 to his landlord, the *putnidar*:

Held, (1) that the sum of Rs. 112 payable to the superior landlord of the *putnidar* was rent;

(2) that the sum of money which the *durputnidar* paid into the Collectorate as revenue and cesses on behalf of the superior landlord by his direction could not be disallowed as a voluntary payment, and that the *darputnidar* should get credit for the same in respect of the rent payable by him. **C** NAGENDRABALA DASSY *v.* AMRITA LALL CHATTOPADHYA **753**

———Kabuliyat *fixing rent at certain amount of paddy or in default certain sum of money—Landlord, whether can recover price of paddy.*

Where a registered *patta* by which a tenancy was created provided that 52 *aris* of paddy would be delivered by the tenant every year as rent and on default of delivery of the paddy fixed the paddy, or its price Rs. 15 would be realised according to law with costs and interest:

Held, that under the terms of the *patta* the landlord was not entitled to recover more than Rs. 15 as the price of the paddy in case of its non-delivery. **C** PRAN KRISHNA NATH *v.* MOHESH CHANDRA CHOUDHURY **134**

———*Occupancy holding, transfer of, in favour of* zarpeshgidar—*Landlord, right of re-entry of—Ejectment.*

Where a non-transferable holding is sold to a *zarpeshgidar* of the holding, the landlord has a right of re-entry even where the *zarpeshgi* right of the purchaser had been recognized by the landlord prior to the sale. **Pat** MUKHRAM SINGH *v.* SADASI KOER **132**

———*Occupancy tenant executing fresh lease—Landlord, right of, to eject tenant.*

Where a *raiyat* acquires a right of occupancy in his holding by virtue of twelve years' possession and cultivation and subsequently executes a fresh lease, he cannot be ejected by the landlord on the expiry of the term of the lease. **C** SAIAD SHA MAIDAL *v.* SRIDHAR DOLEY **157**

———Raiyati *right, whether can be acquired by cultivator settled by trespasser.*

Landlord and tenant—concld.

The actual cultivator of a land who honestly and *bona fide* believes that the person who settled him on the land had a right to settle him may, after a period of years, acquire a right in the land as a *raiyat* even where it is proved that the settlor had no such right. **C** AMAR CHANDRA *v.* NOOR KHATUN **777**

———*Tenant ejected from holding, whether can continue to occupy house in village* abadi.

Where a tenant is ejected from his agricultural holding in a village, he has no right to occupy a house in the village *abadi* against the will of the *zemindar*. **O** GHIRRAO *v.* KARAM SINGH, 5 O. L. J. 453 **645**

———*Tenant proving registered* kabuliyat—*Landlord, whether can show that he never accepted* kabuliyat.

Where a *kabuliyat* executed and registered by a tenant is proved by the tenant in a suit, there is nothing in the Registration Act or the Evidence Act which prohibits the landlord from showing that he never assented to or accepted the *kabuliyat*. **C** HEMANTA KUMAR KAR *v.* BIRENDRA NATH ROY **1003**

———*Tenure-holder, whether can change status to prejudice of tenants.*

A tenure-holder cannot be allowed to change his status to that of a *raiyat* to the prejudice of tenants on the land at the time of the change and even as regards tenants who enter upon the land after the change, their status would not be prejudicially affected if the change in the status of the tenure-holder is only in respect of an undivided portion of his tenancy and not in respect of the whole of that tenancy. **C** ANNADA PRASANNA LAHIRI *v.* BADULLA MANDAL **985**

———*Under-*raiyati *interest, whether transferable—Purchaser of portion of under-*raiyat, *rights of.*

The interest of an under-*raiyat* is not transferable.

A transferee of a portion of a non-transferable under-*raiyati* interest cannot get his title declared by a suit as against the landlord who is in peaceful possession of the land. **C** RAJANI KANTA GHOSE *v.* LALA ROUT **298**

Letters Patent (Cal.), cl. 15—*"Judgment," meaning of—Order dimissing appeal without investigation, whether "judgment"—Limitation Act (IX of* 1908*), s.* 5.

The term "judgment" in clause 15 of the Letters Patent means "decree" or "order", consequently an order of dismissal of an appeal without investigation of the merits may be a "judgment."

Quære.—Whether an order dismissing an appeal on the ground that it had been preferred after the period of limitation prescribed therefor and that sufficient ground had not been made out for extension of the period under section 5 of the Limitation Act is a "judgment" within the meaning of clause 15 of the Letters Patent. **C** PROSUNNO KUMAR *v.* RAM CHANDRA DE, 28 C. L. J. 205 **677**

——— **cl. 15**—*Order granting or refusing amendment, whether judgment.*

Ordinarily an order granting or refusing an amendment would not be a "judgment" within the meaning of clause 15 of the Letters Patent. **C** UPENDRA NARAIN ROY *v.* JANAKI NATH ROY, 22 C. W. N, 611; 45 C, 305 **129**

License—*Permanent structure built upon land—Revocation of license.*

Where by an oral agreement the plaintiff allowed the defendant to execute and work out on the plaintiff's land an irrigation scheme of considerable permanent benefit to a very large number of villages at a considerable amount of expense:

Held, that the agreement created a license which could not be revoked at the instance of the plaintiff. **Pat** SECRETARY OF STATE *v.* HIRANAND OJHA **166**

Limitation **28, 911**

———Instalment bond—Default in payment of instalment—Waiver of right to sue for entire amount **926**

Limitation Act (IX of 1908), s. 3, Sch. I, Arts. 120, 132—*Turn of worship at temple, whether immoveable property—Mortgage of turn of worship, suit to enforce—Limitation.*

A turn of worship at a temple is not an interest in immoveable property. Therefore, a suit to enforce a mortgage of a turn of worship is not governed by Article 132 of the Limitation Act but by Article 120. **C** NARASINGHA BANA GOSWAMI *v.* PROLHODMAN TEVARI, 22 C. W. N. 994 **25**

——— **ss. 4, 14,** *scope of—Limitation, expiry of, on holiday - Plaint, presentation of, on succeeding day, in wrong Court, effect of—Institution in wrong Court for prompt realisation of debt—Good faith—Return of plaint for presentation to proper Court.*

Section 4 of the Limitation Act is a particular statutory provision, not for the purpose of computing the period of limitation prescribed as in section 14, but allowing in certain circumstances the filing of suits after the period has expired.

The section can be availed of only if the suit, appeal or application is filed in the *proper* Court when the time for doing so has expired on a holiday.

Section 14 of the Limitation Act only prescribes a certain rule to be observed in computing the period of limitation prescribed for a suit, appeal or application, *i. e.*, in reckoning the number of days if time has expired, the period allowed by the section may be deducted from the period that has actually expired.

Where a plaintiff instituted a suit on the day after the last day of limitation, the last day being a holiday in a Court within whose jurisdiction one only of the defendants resided and the Court declining to give leave under section 20 (*b*), Civil Procedure Code, returned the plaint for presentation to the proper Court, which was subsequently done:

Held, that the plaint not having been presented to a proper Court on the day after the last day of limitation, the suit was barred.

The institution of a proceeding in a Court with a view to prompt realisation of the claim from the defendant, who is an officer of that Court, is not a proceeding lacking in good faith within the meaning of section 14. **M** RAMALINGAM AYYAR *v.* SUBBAIER, 8 L. W. 256; 24 M. L. T. 214 **624**

——— **s. 5**—*Appeal, delay in presenting—Review, time spent in obtaining, exclusion of—Sufficient cause.*

An appellant is not entitled, as a matter of right, to a deduction of the period during which his application for review remains pending in the Court below. He has to seek extension of time under section 5 of the Limitation Act, in other words, to

Limitation Act—1908—contd.

satisfy the Appellate Court that he had sufficient cause for not preferring the appeal within the prescribed period. **C** PROSUNNO KUMAR *v.* RAM CHANDRA DE, 28 C. L. J. 205 **677**

——— **ss. 9, 15,** *applicability of—"Disability" and "inability", meanings of—Alien enemy, right of suit of—Limitation, running of.*

Section 9 of the Limitation Act covers the case of an alien enemy who is debarred from suing in consequence of a declaration of war.

The general rule is that once limitation has begun to run, a subsequent "disability" to sue will not avail to stop it in the absence of express statutory provision.

Per *Sanderson, C. J.*—The Legislature in enacting section 9 of the Limitation Act did not mean exactly the same thing by the use of the two words "disability" and "inability."

An express statutory provision on a particular matter would have the effect of overriding any common law rule regarding the same.

Per *Woodroffe, J.*—Section 15 of the Limitation Act clearly refers to orders of Civil Courts, and not to the condition of things under which an alien enemy is prevented from suing owing to a declaration of war. **C** DEUTSCHE ASIATESCHE BANK *v.* HIRA LALL BURDHAN AND SONS, 23 C. W. N. 157 **398**

——— **ss. 9, 15**—*"Disability" and "inability," meanings of—Alien enemy, right of, suspension of, whether disability—Applicability of s. 9 to alien enemies prevented from suing—S. 15, interpretation of—Royal proclamation, effect of.*

Section 9 of the Limitation Act applies to, and makes no exception in favour of, alien enemies who are prevented from suing in consequence of a declaration of war.

The suspension of an alien enemy's right to sue is a "disability" within the meaning of the section.

The word "disability" in section 9 of the Limitation Act means want of legal ability. It is different from "inability" to sue.

The Official Liquidator of a Bank cannot be looked upon as an agent of the Bank. He is an officer of the Crown whose rights depend upon the terms of his appointment.

Section 15 of the Limitation Act relates to injunctions or orders of Court, and not to royal proclamations which prevent the institution of suits by alien enemies. **C** DEUTSCHE ASIATISCHE BANK *v.* HIRA LA BURDHAN AND SONS

——— **s. 10** **122**

——— **s. 10, Sch. I, Art. 60,** *applicability of—Suit to recover money deposited with defendant—Limitation applicable.* **290**

Where money is sent by the plaintiff to the defendant to keep, on the understanding that it is to be returned when demanded, a suit to recover the money is governed by Article 60 of Schedule I of the Limitation Act. Section 10 of the Limitation Act has no application to such a suit. **P** DALIP *v.* LABEN RAM, 65 P. L. R. 1918; 166 P. W. R. 1918 **592**

——— **s. 14** **624**

——— **s. 15** **122, 398, 798, 907**

——— **s. 15 (2),** *applicability of—Bengal Tenancy Act (VIII B. C. of 1885), s. 104H, suit under—Civil Procedure Code (Act V of 1908), s. 80, notice under—Exclusion of time during currency of notice.*

Limitation Act—1908—contd.

The provisions of section 15, sub-section (2) of the Limitation Act, do not apply to a suit instituted under the terms of section 104H of the Bengal Tenancy Act. Therefore, a suit under that section must be brought in any event within the six months specified therein and the plaintiff is not entitled to exclude the period of the currency of the notice to the Secretary of State under section 80, Code of Civil Procedure. **C** GANGADHAR NANDA *v.* JANAKIMONI DASI, 22 C. W. N. 817; 28 C. L. J. 536 **524**

——— **ss. 15 (2), 29 (1) (b)**—*Bengal Tenancy Act (VIII B. C. of 1885), ss. 104 H, 184, 185—Civil Procedure Code (Act V of 1908), s. 80—Suit under s. 104H, Bengal Tenancy Act, against Secretary of State—Notice under s. 80, Civil Procedure Code—Limitation—Period of notice, whether can be deducted—Local Act.*

In computing the period of limitation for a suit instituted under the provisions of section 104H, Bengal Tenancy Act, against the Secretary of State, the plaintiff is not entitled under section 15 (2) of the Limitation Act to deduct the two months in respect of the notice required by section 80, Civil Procedure Code.

The Bengal Tenancy Act is a Local Act to which the saving clause in section 29 (*b*) of the Limitation Act applies.

The Bengal Tenancy Act has always been regarded as a self-contained Act on the subject of limitation even as regards periods of limitation prescribed by it to which sections 184 and 185 are inapplicable. **C** SECRETARY OF STATE *v.* SHEO NARAIN HAZRA, 22 C. W. N. 802 **502**

——— **s. 20, Sch. I, Art. 132**—*"Debtor" in s. 20, meaning of—Hindu joint family—Son, whether debtor or agent of father—Mortgage-deed—Money payable by instalments—Default in payment of instalments—Suit instituted more than 12 years after default—Limitation—Waiver.*

Where a mortgage-deed provided for payment of the mortgage money by certain definite instalments and further stipulated that if the instalments were not paid at the appointed time and if any default were to take place then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to bring their suit at once and claim interest at a certain rate:

Held; (1) that a suit brought by the mortgagees on the basis of the above mortgage-deed more than 12 years after the date when the first default in payment was made was time-barred under Article 132 of Schedule I of the Limitation Act;

(2) that no question of waiver on the part of the mortgagees could arise for consideration in connection with a mortgage bond, the enforcement of which was being sought by a sale of the property.

The word "debtor", as used in section 20 of the Limitation Act, means the person who is liable under the contract of debt. Hence, where a father and his son form together a joint Hindu family and a debt is contracted by the father, the son is in the lifetime of the father neither a debtor nor, in the absence of any evidence, an agent of the father for the purposes of the said section. **O** LACHHMI NARAIN *v.* DAYA SHANKAR, 5 O. L. J. 419 **655**

Limitation Act—1908—contd.

——— **s. 20**—*Mortgage - Interest, payment of, by mortgagor—Limitation, extension of, against purchaser of equity of redemption.*

A payment of interest due on a mortgage made by the mortgagor saves limitation under section 20 of the Limitation Act not only as against the mortgagor, but also as against a subsequent purchaser of a portion of the equity of redemption or a subsequent mortgagee of a portion of the mortgaged property. **A** RAUSHAN LAL *v.* KANHAIYA LAL, 16 A. L. J. 790 **845**

——— **s. 22** **894**

——— **s. 29 (1) (b)** **502**

——— **Sch. I, Art. 10**—*Punjab Pre-emption Act (I of 1913), s. 30, applicability of—Sale including specific plots and share in* shamilat—*Limitation.*

Section 30 of the Punjab Pre-emption Act only comes into operation in cases not provided for by Article 10 of Schedule I of the Limitation Act.

A suit for pre-emption in respect of property consisting of certain specific plots of land together with a share in the village *shamilat* is governed by Article 10 of Schedule I of the Limitation Act, inasmuch as the share in the *shamilat* does not admit of physical possession. **P** LEHANA SINGH *v.* BHAGAT SINGH, 68 P. R. 1918; 158 P. W. R. 1918 **359**

——— **Art. 60** **592**

——— **Art. 60**—*Deposit for term, payable on demand after expiry of term—Suit for recovery of deposit—Limitation.*

A suit for recovery of money deposited for a term which is re-payable on demand after the expiry of the term is governed by Article 60 of the Limitation Act, as the money is still left in deposit after the termination of the term. **M** CHELLAPPA CHETTY *v.* SUBRAMANIA CHETTY, 8 L. W. 221; (1918) M. W. N. 564; 24 M. L. T. 264 **948**

——— **Art. 62** **161**

——— **Arts. 62, 97, 116,** *applicability of—Sale—Consideration, failure of—Suit to recover purchase-money—Limitation, commencement of.*

It is only where a sale is void *ab initio* that Article 62 of Schedule I of the Limitation Act can apply to a suit by the vendee for refund of the purchase-money. If, however, the vendee has actually obtained and held possession of the property, Article 97 may be applied even if the sale turns out to be void *ab initio*, for otherwise the claim for refund might be barred although the vendee had been given no occasion to sue. The same Article is applicable where there is a subsequent failure of consideration.

Where the vendor has no title to convey, the Article applicable to a suit for refund of the purchase-money is Article 116, and time in such a case begins to run from the date of the execution of the conveyance if there is no question of fraud. **N** DHARAM CHAND *v.* GORE LAL **886**

——— **Art. 62**—*Consideration of deed, failure of—Money, recovery of, suit for.*

A suit to recover money advanced under a void agreement is barred under Article 62, Schedule I of the Limitation Act, if it is instituted after the expiry of three years from the date of the execution of the agreement. **O** HAR NATH KUAR *v.* INDRA BAHADUR SINGH, 5 O. L. J. 277 **214**

Limitation Act—1908—contd.

——— **Sch. I, Art. 75**—*Instalment bond—Default in payment of instalment—Waiver, forbearance to sue, whether amounts to.*

A mere forbearance to sue for the whole amount of a bond payable by instalments, on default in payment of one or more instalments, is not a waiver within the meaning of Article 75 of Schedule I of the Limitation Act. **C** HARA KUMAR SAHA *v.* RAM CHANDRA PAL **943**

——— **Art. 91** **505**

——— **Art. 91,** *applicability of—Suit to recover possession of property sold during minority—Limitation.*

Article 91 of Schedule I of the Limitation Act does not apply to a suit for possession, where the plaintiff alleges and proves that a sale-deed is void because it was executed by him while a minor, but does not claim expressly to have it cancelled or set aside. **B** NARSAGAUDA SAVANTGAUDA PATIL *v.* CHAWAGAUDA ADGAUDA PATIL, 20 BOM. L. R. 802 **581**

——— **Arts. 93, 95, 120**—*Suit for declaration that document shall not bind reversion—Limitation.*

Articles 93 and 95 of the Limitation Act have no application to a suit by a reversioner for a declaration that a *kot kobala* executed by the last owner and a compromise decree made in suit to enforce the *kot kobala* are not binding on the inheritance. The Article that applies to such a suit is Article 120 and where the plaintiff is in possession, limitation does not begin to run until some act is done on the documents sought to be declared not binding on the inheritance. **C** HARA NARAIN BERA *v.* SRIDHAR PANDE **2**

——— **Art. 95** **2**

——— **Art. 97** **886**

——— **Art. 115** **924**

——— **Art. 116** **161, 886**

——— **Art. 119**—*Suit to establish adoption—Limitation.*

Where an adoption is challenged and the rights of the adopted son are interfered with, the latter is bound to bring his suit to establish his adoption within six years of the interference under Article 119 of Schedule I of the Limitation Act.

Plaintiff's adoption was challenged in 1901 and a decree was passed against him. In 1913 he brought a suit for a declaration that he was not bound by the decree in the former suit:

Held, that the plaintiff having failed to establish his adoption within six years of the decree in the former suit, the present suit was barred by time. **B** BHARMA SHIDAPPA BHORE *v.* BALLARAM SAKHARAM GUJAR, 20 BOM. L. R. 856 **639**

——— **Art. 120** **2, 25 733, 820**

——— **Arts. 120, 125**—*Alienation by widow, what amounts to—Mortgage by husband, suit on—Withdrawal of defence by widow—Collusion—Sale in execution of mortgage decree—Purchaser, whether alienee from widow—Suit by reversioner—Limitation.*

A Hindu reversioner impeaching an alienation by a widow need not prove an actual transfer by the widow. It is enough if he proves that the widow had done an act which resulted in the transfer of the property.

Limitation Act—1908—contd.

The withdrawal by the widow of her defence to an action on a mortgage executed by her husband would not be tantamount to an alienation by her, and if a decree is passed in the suit and the mortgaged property is sold, the Court-sale cannot be treated as a private sale by the widow, unless it is shown that it was the necessary result of some collusive arrangement made by her to use the Court as a medium of transfer, *i. e.*, that she intended to transfer the property by means of a Court-sale and took steps to bring it about.

A suit by the reversioner to set aside such a sale is governed by Article 120 and not by Article 125 of the Limitation Act.

One *K.* executed a mortgage in favour of *R. R.* in 1883. In a suit by *K.*'s widow the mortgage was recognised as valid and in another suit by a subsequent mortgagee it was held to be valid against the widow. In execution of a decree against *R.R*, his mortgagee interest was sold and purchased by *R. A.* *R. A.* brought a suit on the mortgage. The widow at first contested the suit but afterwards abandoned her defence. A decree was passed and the property was sold in Court auction and was purchased by 2nd defendant. In a suit by the plaintiff, the nearest reversioner to *K.*, to set aside the sale, impleading the widow as 1st defendant:

Held, (1) that the suit was not maintainable, as under the circumstances the Court-sale could not be treated as an alienation by the widow;

(2) that as the suit was brought more than 6 years from the date of the sale, it was barred under Article 120 of the Limitation Act. **M** RANGA ROW *v.* RANGANAYAKI AMMAL, 35 M. L. J. 364; 8 L. W. 455; (1918) M. W. N 739

——**Sch. I, Art. 123** 578
——**Art. 124** 139
——**Art. 125** 290
——**Art. 130,** *applicability of.* 578

Unless and until a tenure is found to be a rent-free tenure, Article 130 of the Limitation Act can have no application to a suit for assessment of its rent. **C** KAMINI SUNDARI CHOWDHURANI *v.* ABDUL HALIM MOULAVI, 28 C. L. J. 254

——**Art. 132** 420
——**Arts. 137, 138, 142,** *applicability of—Purchaser of bare site—Possession, symbolical, value of—Dispossession—Limitation.* 25, 655

Plaintiff sued to recover possession of a bare site in March 1916, on the allegation that he purchased the site in dispute in July 1902 and took symbolical possession thereof in October 1904 and that defendants had ousted him therefrom two years before suit:

Held, that the property in dispute being a bare site, plaintiff's symbolical possession was equivalent to actual possession, and that the article *prima facie* applicable to the suit was Article 142 of the Limitation Act.

Articles 137 and 138 of Schedule I of the Limitation Act apply only where the purchaser has never taken possession of the property. **P** KAMMAN *v.* UMRA, 76 P. R. 1918; 156 P. W. R. 1918

——**Art. 138** 411
——**Art. 141** 844
——**Arts. 141, 144**—*Alienation by Hindu widow—Suit to set aside alienation by heir of reversioner—Limitation applicable.* 977

A Hindu died leaving two widows *K.* and *R.* and two daughters *S.* and *T.* In March 1897 *K.* sold the property in suit to the defendant. *K.* died in July 1902 and *R.* died on the 17th January 1903. On the death of *R.*, *S.* and *T.* took severally an estate absolute. *S.* died in 1907, leaving the present plaintiff, her son. *T.* died in 1911. On the 13th January 1915, the plaintiff brought a suit to recover possession of the property:

Held, (1) that the suit was governed by Article 144 and not by Article 141 of the Limitation Act, inasmuch as the plaintiff claimed as the heir of *S.* who was an absolute owner;

(2) that the reversioners not being entitled to immediate possession during the lifetime of *K* and *R.*, the defendant's possession did not become adverse as against the plaintiff till the death of *R.* and that, therefore, the suit was within time. **B** MALKARJUN MAHADEV BELURE *v.* AMRITA TUKARAM DAMBARE, 20 BOM. L. R. 762

——**Sch. I, Art. 142** 153
——**Arts. 142, 144** 411
——**Art. 144** 733
——**Art. 144**—*Adverse possession—Independent trespassers, whether can tack on their periods of possession.* 153

Plaintiffs as collaterals of one *B.* sued to recover possession of certain land held by the latter as an occupancy tenant. It appeared that after *B.*'s death in 1903 his mother remained in possession till 1905, when she was ejected by the defendant under due process of law. It was contended that the plaintiffs' suit was time-barred as it was open to the defendant to "tack on" to his period of adverse possession the period during which *B.*'s mother was in adverse possession:

Held, that it was not open to the defendant to tack on the period during which *B.*'s mother was in adverse possession, as both were independent trespassers and he could not assert that he claimed through or under her. **P** HUSSAIN BAKHSH *v.* PALA SINGH, 153 P. W. R 1918

——**Art. 145,** *applicability of.* 189

Article 145 of Schedule I of the Limitation Act does not apply to a deposit of money, except in the case of coins which are ear-marked and where it is the intention of the parties that the identical shall be returned to the depositor. **P** DALIPA *v.* LABHU RAM, 35 P. L. R. 1918; 166 P. W. R. 1918 592

——**Art. 148,** *applicability of—Mortgage—Redemption, suit for, by purchaser of portion of equity of redemption—Limitation—Mortgagee, possession of, nature of—"Co-mortgagor," who is.*

All persons who step into the shoes of the original mortgagor are co-mortgagors for all purposes.

A suit by a purchaser of the equity of redemption in a part of the mortgaged property for redemption of his share of the property against a purchaser of another portion of the mortgaged property who has redeemed the whole of the property is governed by Article 148, Schedule I of the Limitation Act, and the period of limitation is sixty years from the date on which the mortgage became capable of redemption

Limitation Act—1908—contd.

The possession of a mortgagee must be deemed to be that of the person entitled to the equity of redemption. **A** WAZIR ALI *v.* ALI ISLAM, 16 A. L. J. 740 **833**

——**Sch. I, Art. 158** **597**
——**Arts. 169, 176** **962**
——**Art. 180** **844**
——**Art. 181** **137, 562**
——**Art. 181**—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Final decree, application for—Limitation, commencement of.*

The right to apply to have a decree for sale made absolute arises when the time fixed for payment by that decree has expired or where there has been an appeal, when that appeal is decided, the date of the appellate decree, which finally determines the rights of the parties, being taken to be the starting point of limitation within the meaning of Article 181 of the Limitation Act, if it does not extend the time originally fixed or if the time to fixed has not expired. **O** LALLU RAM *v.* JOT SINGH, 21 O. C. 176 **206**

——**Art. 182** **798**
——**Art. 182**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 11 (3)—Execution of decree, application for—Failure to file copy of decree, effect of—Application, whether in accordance with law—Limitation, saving of.*

The question whether an application for execution is in accordance with law or not must be determined with regard to what the law requires to be done at the time when the application is made, and it is not permissible to consider what the law requires to be done after the application has been made.

An application for execution of a decree, which satisfies all the requirements of rule 11 of Order XXI of the Civil Procedure Code, but which is subsequently dismissed on account of the decree-holder's failure to file a copy of the decree within the time specified by the Court, is an application in accordance with law within the meaning of Article 182 of Schedule I of the Limitation Act and operates to save limitation. **Pat** ARJUN NAIK *v.* LAKHAN, 5 P. L. W. 205 **993**

——**Art. 182**—*Execution of decree—Instalment decree—Default in payment of instalment, effect of—Limitation.*

A decree for Rs. 800 odd made on the 28th June 1910 provided that the debt should be paid off by eight annual instalments of Rs. 100 each, and there was a term in the decree that on failure to pay any one of these instalments before the next had become due the creditor could call in the whole amount of debt with interest at the agreed rate. No instalment was ever paid and in September 1915 the decree-holder applied for execution of the decree:

Held, that the right to execute the decree for the whole amount of the debt having accrued to the decree-holder as a complete legally enforceable right before the end of 1910, and the limitation allowed to him within which to enforce it being three years, the application for execution was barred by time. **B** RAICHAND MOTICHAND GUJAR *v.* DHOND LAXUMAN BHURE, 20 BOM. L. R. 773 **313**

——**Art. 182 (5)** **726**

Limitation Act—1908—concld.

——**Sch. I, Art. 188.**

Article 181 of Schedule I of the Limitation Act prescribes that the period of limitation for making an application for restitution shall be three years from the date when the right to apply accrued. But the Article does not in any way control the period during which mesne profits shall be allowed to accumulate, and whatever the number of years during which the opposite party has been in possession, the applicant is entitled to be compensated in respect of the whole of that period, provided he applies within three years of the date on which the right to relief accrues. **Pat** KRUPASINDHU ROY *v.* BALBHADRA DAS, 3 P. L. J. 367 **47**

Locus pœnitentiæ, *when can be allowed.*

A *locus pœnitentiæ* should not be allowed to an accused person who has made a false statement in Court and who, when subsequently tried for perjury, adheres to his former statement, admits it was correctly recorded and asserts that it is true. **P** EMPEROR *v.* JAGAT RAM, 28 P. R, 1918 CR.; 19 CR. L. J. 972; 39 P. W. R. 1918 CR. **872**

Madras Board of Revenue Standing Order No. 173 **873**

Madras City Municipal Act (III of 1904), ss. 282, 420—*Construction of inflammable* pandal—*Offence—Owner and occupier, liability of.*

The words "whoever contravenes" in section 420 of the Madras City Municipal Act, 1904, cover owners as well as occupiers of the premises.

The construction of an inflammable *pandal* or the continuance of an existing one is an offence under section 282 read with section 420 of the Act. **M** EMPEROR *v.* VARADACHARIAR, 24 M. L. T. 180; 19 CR. L. J. 948; 8 L. W. 581 **672**

——**s. 420** **672**

Madras Estates Land Act (I of 1908), ss. 3 (16), 20—*'Tank-beds,' meaning of.*

In using the expression 'tank-beds' in section 3 (16) of Madras Act I of 1908 the Legislature was alluding to such class of tank-beds as are cultivable, *i.e.*, as are capable of being cultivated when the tank has become dry or when there is no water in the tank in certain years.

Where tank-beds are capable of being cultivated or used in any such manner, the rights of the land-holders over them are not affected by the enactment of section 20 of the Act. **M** BOLUSAWMY *v.* VENKATADRI APPA RAO **594**

——**s. 20** **594**
——**ss. 46, 189**—*Jurisdiction of Civil and Revenue Courts in suits for rent—Execution of instrument by Collector conferring occupancy right on person not 'non-occupancy* ryot', *effect of.*

Where there is no dispute about the rate of rent under the proviso to section 46 of the Madras Estates Land Act, there is nothing in section 189 or in the Schedule to the Act to oust the jurisdiction of the Civil Court or confer jurisdiction on the Collector as a Revenue Court.

Where the Collector acting under section 46 (3) of the Madras Estates Act executes an instrument conferring occupancy right on a person who is not a 'non-occupancy *ryot*,' he acts *ultra vires* and the juris-

Madras Estates Land Act—concld.

diction of the Civil Court is not ousted. **M** MADURA DEVASTANAM *v.* CHENA KONDAMA NAICKEN, 23 M. L. T. 352

——— **s. 189** **858**

Madras Hereditary Village Offices Act (III of 1895) **858**

Madras Police Act (XXIV Mad. of 1859), s. 46—'Mamul', *payment of, to Police Officer – Offence.* **733**

The mere demand by a Police Officer of 'mamul' or a customary payment with a view to extend his favour to the person making the payment is in itself a threat and, consequently, the obtaining of money by such a demand comes within section 46 of the Police Act. **M** EMPEROR *v.* LAL BAGE, 41 M. 465 19 CR. L. J. 943 **666**

Madras Regulation I of 1803 **692**

——— **II of 1803** **692**

——— **VII of 1828, s. 3** **692**

Madras Revenue Recovery Act (II Mad. of 1864), ss. 37A, 38 (I), proviso, 99—*Madras Regulations I and II of* 1803—*Madras Regulation VII of* 1828, *s* 3—*Sale for arrears of revenue—Confirmation by Deputy Collector and approval by Collector, effect of – Finality of order —Board of Revenue, powers of, to direct Collector to cancel sale—Suit to set aside cancellation and for possession—Limitation.*

Where a certain power is given to the Collector by Statute, it is not open to the authority having only general powers of revision over him, to direct him to pass a special order contrary to what he has already done.

Where a revenue sale is confirmed by the Deputy Collector and approved by the District Collector under section 3 of Madras Regulation VII of 1828, the order becomes final under section 38 (3) of the Madras Revenue Recovery Act.

The Board of Revenue has no jurisdiction to interfere with such order and direct the Collector to cancel the sale.

Where, therefore, a Collector, under the Board's directions, in supersession of his order approving of a sale, cancelled it and the purchaser brought a suit for setting aside the order of cancellation and for possession:

Held, (1) that the action of the Board of Revenue was wholly without jurisdiction;

(2) that the suit was not governed by the limitation period prescribed in section 59 of the Madras Revenue Recovery Act as the order cancelling the sale was only a review of the previous order confirming the sale.

The proviso to section 38 of the Madras Revenue Recovery Act does not give power to set aside a sale after it has been confirmed under the first part of the section. **M** SUNDARAM AYYANGAR *v.* RAMASWAMI AYYANGAR, 35 M. L. J. 177; 8 L. W. 289; 24 M. L. T. 207; 41 M. 955

——— **s. 38 (I), proviso** **692**

——— **s. 42**—*Land Improvement Loans Act (XIX of* 1883), *s.* 7 (1) (c), *sale under, effect of—Prior encumbrances, whether saved.* **692**

The provisions of section 42 of the Madras Revenue Recovery Act apply to a sale under section 7 (1) (*c*) of the Land Improvement Loans Act XIX of 1883. Such a sale is free from prior incumbrances.

Madras Revenue Recovery Act—concld.

The fact that the first instalment of a loan taken under Act XIX of 1883 was applied towards meeting the expenses of argicultural improvements already started on the land or that an extension of time was granted by the Government to the borrower, does not make it the less a loan taken for making an improvement within the meaning of the Act.

Per *Seshagiri Aiyar, J.*—The language of section 7 (*c*) of Act XIX of 1883 amounts to a declaration that the land is charged with the payment of the revenue.

The effect of section 42 of Madras Act II of 1864 is not only to discharge pre-existing incumbrances upon the property on which the arrear is due, but also pre-existing incumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter.

The effect of section 7 (1) (*c*) of Act XIX of 1883 is to make a declaration on behalf of the Government that it has a first charge on the property for the loan advanced in respect of that property, just as under section 2 of the Madras Revenue Recovery Act the Government has a first charge for arrears of Government revenue. **M** SANKARAN NAMBUDRIPAD *v.* RAMASAMI IYER, 34 M. L. J. 446; 23 M. L. T. 346; 8 L. W. 12; 41 M. 691

——— **s. 99** **301, 692**

Malabar Compensation for Tenants' Improvements Act (I of 1900), ss. 3 (2), 6 (3)—*Ejectment suit against mortgagee—Order for payment of amount due and improvements within certain time, nature and effect of—Preliminary and final decrees.*

The word "ejectment" in section 3 (2) of the Malabar Compensation for Tenants' Improvements Act includes "redemption" or recovery of possession of the land mortgaged.

The distinction between preliminary and final decrees made in rules 7 and 8 of Order XXXIV, Civil Procedure Code, is unknown to decrees passed under section 6 (1) of the Malabar Compensation for Tenants' Improvements Act. The latter Act provides only for one decree which is a decree in ejectment, though that decree is liable to be revised by orders passed by the executing Court under section 6 (3) of the Act.

An application for enhancement of the value of improvements owing to further improvements effected by the defendant after the date of the decree cannot be treated as an application for a final decree, nor can the order thereon be deemed to be the final decree in the suit. An order for re-valuation of improvements can only be passed by the executing Court. **M** NANU NAIR *v.* KUNDAN ASHTAMURTHI, (1918) M. W. N. 551; 8 L. W. 275

——— **s. 6 (3)** **914, 914**

Malabar Law—Injunction restraining *karnavan* from contracting loans for managing *tarwad* property

——— *Karnavan, rights of—Management delegated to another, resumption of—Melcharth, grant of, before expiry of Kanom term, validity of—Improvident transactions by Karnavan, effect of.* **778**

Malabar Law—concld.

It is open to the Karnavan of a Malabar Tarwad, who has delegated his duties to another, to resume the management at any time.

If a Karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the Tarwad, this would be a ground for removing him from Karnavastanam, but a particular lease cannot be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the Tarwad.

The grant of a Melcharth by a Karnavan before the expiry of the previous Kanom does not render it *ab initio* void, but it will not bind the grantor's successor. **M** ABDULLA KOYA *v.* MAVILERI EACHARAN NAIR, 35 M. L. J. 405 **945**

Maral deposit—*'Deposit in name of one person* maral *another', meaning of—Rights of* maral *man—Nattukottai Chetties, practice of.*

'A deposit in the name of one person *maral* another' means only that the deposit was made on the recommendation or introduction of the latter, and the *maral* man can neither be regarded as a trustee in respect of the money nor has he a right to operate on it, as by directing the transfer of the deposit in the name of another person.

Though a usage has sprung up among Nattukottai Chetties that, when money is deposited on the *maral* of a third party, it should not be allowed to be drawn out unless with the consent of the intermediary, the usual remedy by suit is open to the depositor when the *maral* man declines to give his consent, and the hands of the Court are not tied down by the usage. **M** CHELLAPPA CHETTY *v.* SUBRAMANIA CHETTY, 8 L. W. 221; (1918) M. W. N. 564; 24 M. L. T. 264 **948**

Master and servant—*Master, liability of, for servant's acts.*

The general rule is that a master is not criminally answerable for the acts of his servant. **C** BHUBAN RAM *v.* BIBHUTI BHUSAN BISWAS, 22 C. W. N. 1062: 19 CR. L. J. 915 **287**

Maxim—*Omnia praesumuntur rite esse acta*, application of **9**

Memorandum *written by witness, admissibility of.*

Where a witness, on being asked if he has had an interview with a particular person and what the purport of that interview was, replies that he has had such an interview and had noted the purport of it at the time in a written memorandum, and produces that memorandum, the memorandum is admissible in evidence. **O** LAL TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER FYZABAD, 5 O. L. J. 291 **225**

Mortgage—*Decree against father—Son "exempted" from decree, effect of—Execution against son's estate—Objection by son allowed—Suit against son for declaration, maintainability of.*

A suit was instituted against a father and son on the basis of a mortgage. The son put forward the plea that there was no family necessity. The Court gave a simple money decree against the father, which stated that the son was "exempted" and that he should get his costs from the plaintiff. The latter executed the decree against the father's estate, and that having proved insufficient, he sought to attach and sell the son's estate. The son objected in execution and his objection was allowed. Thereupon the plaintiff brought the present suit seeking a declaration that the son's property could be sold in execution of the decree on the principle of the pious obligation of a son to pay his father's debts:

Held, (1) that the effect of the decree was to dismiss the suit as against the son with costs;

(2) that under section 47 of the Civil Procedure Code the order on the son's objection in execution was final and that the suit was barred under that section. **A** DATA DIN *v.* NANKU, 16 A. L. J. 752 **864**

Mortgage—contd.

——— *decree, whether can be executed against some owners of equity of redemption—Execution of decree—Limitation, suspension of, while case struck off.*

A mortgage decree cannot be executed against some of the owners of the equity of redemption.

After the final decree in a mortgage suit had been set aside in appeal as against some of the defendants and the case as against them was ordered to be retried, the decree-holders applied for execution of the decree as against the other defendants, but the executing Court, declining to issue execution until the liability of the defendants against whom the decree had been set aside was finally settled, made an order striking off the execution case for the present:

Held, that the execution of the decree was stayed by the Court's order striking off the execution case, so that limitation in respect of execution did not begin to run until the liability of the defendants against whom the decree had been set aside was finally settled. **C** SATISH MOHINI DEBYA *v.* PABNA BANK, LIMITED **907**

——— English, what is **529**

——— *in favour of manager of joint Hindu family—Suit by sons of* [*mortgagee—Disclaimer of interest by other members of family—Registered conveyance, whether necessary—Succession certificate, whether required.*

A mortgage-deed stood in the name of a person who together with his sons and nephew formed a joint Hindu family. After his death the sons claimed the entire money due on the mortgage, and the nephew stated that he had received from the sons his share of the mortgage money and had no objection to the sons realizing the entire mortgage money:

Held, (1) that a registered deed of assignment by the nephew was in the circumstances not necessary to give the sons a right to sue;

(2) that the plaintiffs being the survivors of a joint Hindu family, a succession certificate was not required to enable them to bring a suit on the mortgage. **O** RAM SEWAK *v.* BALDEO BAKHSH SINGH, 5 O. L. J. 442 **649**

——— *Foreclosure, suit for—Costs, personal decree for, whether can be passed—Appeal, whether lies.*

In a suit for foreclosure a Court may pass a decree directing that the costs of the suit should be recovered personally from the mortgagor, if there is a condition to that effect in the mortgage-deed.

An appeal lies from a preliminary decree for foreclosure directing the recovery of the costs of the suit from the person of the mortgagor. **N** SHRIRAM *v.* RAGHURAM **542**

——— *Interest, heavy rate of—Proviso for capitalising arrears of interest—Undue influence—Presumption.*

In a suit on a mortgage bond the Court should not presume that undue influence has been exercised upon the mortgagor, from the mere fact that the rate of interest stipulated for is heavy and there is a proviso in the bond for capitalising the interest in arrear. **C** KACHHIRANNESSA CHOWDHURANI *v.* HEM CHARAN KASYA 11

——— *Money-decree for mortgage amount against heirs of mortgagor paid off by one heir, effect of—Charge, redemption of.*

A money-decree for the amount of a mortgage-debt obtained against the heirs of the mortgagor was paid off by one of the heirs, the first defendant, who remained in possession of the mortgaged property with the consent of the other heirs. Subsequently his creditors obtained decrees against him and attached this property and sold it in execution. One of the other heirs of the mortgagor then sued to redeem the property impleading his co-heirs and the auction-purchasers as parties to the suit:

Held, (1) that the transaction between the first defendant and his co-heirs amounted to a joint charge given by the latter to the former on their joint undivided share of the property in respect of the amount of their share in the debt, and that the plaintiff being one of the co-heirs on whose behalf the joint charge was made was entitled to redeem it;

(2) that the charge was not an interest in the land, and that, therefore, all that the auction-purchasers obtained by their purchase was the share of the 1st defendant in the mortgaged property. **L B** KYA ZAN *v.* TUN GYAW, 9 L. B. R. 169 121

——— *Mortgaged property, part of, purchased by mortgagee, subject to mortgage, effect of.*

Where a mortgagee purchases a part of the mortgaged property subject to his mortgage, the question of the sale price is immaterial and the effect of the purchase is to extinguish the mortgage to an amount proportional to the extent of the property purchased. **O** SHAMSHAD ALI KHAN *v.* MOHAMMAD ALI KHAN, 21 O. C. 172 200

——— *Mortgagee in possession—Redemption—Improvements, cost of, whether must be paid—Transfer of Property Act (IV of 1882), ss.* 63, 72, 76.

The Transfer of Property Act is silent upon the question of a mortgagee's right to recover from his mortgagor the reasonable and proper costs of lasting improvements effected by him on the mortgaged property. This, however, does not mean that the intention of the Legislature was that this right should never be recognised. In a proper case, therefore, a mortgagee should be allowed the benefit of money laid out by him on lasting improvements, so far as it has enhanced the value of the mortgaged property.

Per *Marten, J.*—In allowing costs of improvement the Court should be on its guard against extravagant or unfounded claims, it should enquire strictly into the *bona fides* and fairness of the claim in each particular case. **B** NIJALINGAPPA NIJAPPA HALAGATTI *v.* CHANABASAWA SATAVIRAPPA NESARI, 20 BOM. L. R. 895 751

——— *of moveables—Mortgagor in possession—Purchaser, bona fide, from owner without notice of mortgage, position of.*

A *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of the encumbrance. **M** SREERAM NARASIAH *v.* BOMMIREDDI VENKATARAMIAH, 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 454 976

——— of occupancy holding, validity of 852

——— with possession—Mortgagor taking mortgaged property on lease—Intention 351

——— *Priority—Registered and equitable mortgages—Negligence—Notice—Search in registration office, absence of.*

A subsequent mortgagee who has wilfully abstained from the obvious course of searching in the registration office cannot obtain priority over an earlier registered mortgage merely on the ground that the latter did not call for the title-deeds and retain them in his control. **L B** BANK OF BENGAL *v.* AUNG THA HLA 774

——— Redemption, suit for, by purchaser of portion of equity of redemption 833

——— *Sale in execution of mortgage decree—Prior and subsequent mortgagees—Auction-purchaser, whether bound by statement in plaint—Sale subject to prior lien—Purchaser, whether entitled to question lien.*

Property passing in execution of a mortgage decree is dependent upon the terms of the plaint.

Where in a mortgage suit the plaintiff prays for the sale of the property subject to a prior lien, it is not open to the auction-purchaser in execution of the decree obtained in that suit to dispute the subsistence of the lien. **Pat** BASAWAN SINGH *v.* GANGAPHAL RAI 224

——— *Separate suits by first and second mortgagee without impleading each other—Sales under separate decrees—Possession and enjoyment, right to—Puisne mortgagee, suit by, for sale, without impleading prior mortgagee—Decree, form of—Court, duty of, in ordering sale.*

Where two separate suits are filed by a first and second mortgagee respectively, neither impleading the other, and each brings the property mortgaged to him to sale, the present right of possession and enjoyment of the property passes to the first purchaser and this right cannot be sold again

Where the second mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser under the first mortgagee's decree has no right to turn him out but he can, *qua* first mortgagee, bring the property to sale in a properly framed suit.

Where the first mortgagee brings the property to sale first, and the purchaser obtains possession, the purchaser under the second mortgagee's decree has no more than the rights of the second mortgagee; he has no right to possession.

A puisne mortgagee may sue for sale without making the prior mortgagee a party to the suit; but where the prior mortgagee is impleaded, the Court should not ordinarily permit a sale subject to the first mortgage. The proper form of the decree is Form No. 8 in Appendix D to the Civil Procedure Code.

When a person holding both a first and a second mortgage sues on the second mortgage only, the

Mortgage—contd.

Court should ordinarily refuse to order a sale unless it be free of both the mortgages. **S** PAMANDAS *v.* HIRANAND, 12 S. L. R. 1 **792**

———, *suit on—Decree absolute made on barred application, whether can be challenged in execution—Civil Procedure Code (Act V of 1908), s. 48, applicability of, to execution proceedings in mortgage suit which was pending at the date of coming into force of the Code.*

A decree absolute in a mortgage suit made by a Court in the presence of both parties and on proper adjudication cannot be challenged in execution on the ground that the Court ought not to have made the decree absolute inasmuch as the application for it was barred by limitation.

The mere fact of the coming into force of the new Code of Civil Procedure pending a suit on a mortgage does not make the new section 48 applicable to proceedings in execution of the decree in that suit. **C** SYAM CHAND MAITI *v.* BAIKUNTHA NATH MANDAL **143**

———, *suit on—Interest from date fixed for payment to date of realisation—Contractual rate of interest, whether can be allowed—Discretion of Court.*

The rate of interest which a Court can allow in a mortgage decree from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion, however, the Court will ordinarily refer to the contractual rate, if it be a reasonable one. **O** AJODHIA BANK, LD., FYZABAD *v.* ABDUL GHANI **701**

——— *suit—Party impleaded without objection, whether can complain of error in impleading him after decision of suit.*

A party who has been impleaded in a suit on his own motion or being impleaded does not object, cannot, after being cast in the suit, change front and complain of the error in impleading him Having taken the chance of a favourable verdict, he cannot be permitted to undo the effect of an adverse verdict by being permitted to retire from the suit. The adverse verdict must, however, be one which is correct in point of law. **N** ADAM KHAN *v.* DATTARAM **536**

——— *suit—Prior mortgage paid off by purchaser of equity of redemption—Lien of purchaser not recognised in final decree—Suit, separate, to enforce lien, maintainability of.*

Defendant brought a suit on a mortgage against the plaintiff, who was the purchaser of the equity of redemption of the mortgaged property and had paid off a prior mortgage. The plaintiff set up the prior mortgage as a shield and the preliminary decree recognised his lien. But no mention of his lien was made in the final decree and the property was sold and purchased by the defendant, who took possession of it without discharging the plaintiff's lien. The plaintiff thereupon applied to be put in possession of the property until his lien was discharged. The application was rejected and plaintiff then brought a suit to recover the amount of his lien:

Held, that the suit was barred both by the principle of *res judicata* and by section 47 of the Civil Procedure Code. **A** MOTI RAM *v.* BANKE LAL, 16 A. L. J. 685 **954**

——— *suit—Purchaser of portion of equity of redemption, whether can object to sale in execution—Independent title, whether can be enforced in execution—Civil Procedure Code (Act V of 1908), s. 47.*

Mortgage—concld.

A purchaser of a portion of the mortgaged property who is joined as a defendant in the mortgage suit, cannot, under section 47, Civil Procedure Code, object to the sale of the mortgaged property under the final decree in the mortgage suit on the ground that he has acquired a new and independent interest in that portion of the property.

Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. **C** BINDU BASINI DASYYA *v* SRIMANTA SIL **374**

———, *usufructuary—Mortgagee, failure of, to keep accounts—Presumption.*

Where on taking the accounts of a usufructuary mortgage it appears that the mortgagee has kept no regular accounts, every reasonable presumption should be made against him. **N** MUKAND RAM SUKAL *v.* SHEO NARAIN **21**

———, *usufructuary—Redemption before fixed date, whether can be allowed—Accounts, stipulatian, not to claim—Mortgagee failing to pay off prior encumbrance—Accounts, whether can be claimed—Mortgagor paying off incumbrance—Suit for re-imbursement—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Arts. 62, 116.*

A mortgagee has no right to remain in possession of the mortgaged property after the mortgage money is satisfied from the usufruct, even though the parties may have miscalculated that the liquidation of the mortgage money from the usufruct shall take a longer period and may have said so in the deed.

Where in consequence of an usufructuary mortgagee's failure to pay the money left with him for payment to a prior encumbrancer, the mortgagor has to satisfy the prior encumbrance, the mortgagor is entitled to claim at the time of redemption accounts of the realizations made by the mortgagee in spite of a stipulation to the contrary contained in the mortgage-deed. Such accounts should not be adjusted on the footing of the consideration actually advanced by the mortgagee, but the mortgagor is entitled to a set-off for the amount paid by him in satisfaction of the prior encumbrance.

Where a mortgagee who is bound to pay off a prior incumbrance fails to do so and the mortgagor is compelled to pay it off and then sues the mortgagee for re-imbursement the suit is governed by Article 62 and not by Article 116 of the Limitation Act and limitation would begin to run from the date on which the plaintiff paid off the prior incumbrance. **O** PRAG *v.* MOHAN LAL, 5 O. L. J. 263 **161**

Motor Vehicles Act (VIII of 1914), s. 14—*Punjab Motor Vehicle Rules, rr. 10, 17, applicability of—Servant driving motor car without lights—Master, liability of.*

Rules 10 and 17 of the Punjab Motor Vehicle Rules only apply to the driver or to a person using the car at the time it is being driven, and not to an absent owner. The owner of a car, therefore, is not liable to be fined because in his absence his servant drove his motor-car without lights after lighting-up time. **P** SOHAN SINGH *v.* EMPEROR, 27 P. R. 1918 CR.; 19 CR. L. J. 928; 37 P. W. R. 1918 CR. **444**

Muhammadan Law—*Guardianship—Mother acting as* de facto *guardian, powers of—Alienation by mother, validity of.*

Under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian", has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant.

A mother is entitled only to the custody of the person of her minor child, but is not the natural guardian of the minor and has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge of the infant for the time being.

A father alone, or if he be dead, his executor (under the Sunni Law) is the legal guardian of his minor child. If the father dies without appointing an executor (*wasi* and his father is alive, the guardianship of his minor children devolves on their grandfather, and should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian devolves upon the Judge as representing the Sovereign. But the powers of even the *de jure* guardians to intermeddle with the property of minors are confined within legal limits. If the mother is the father's executrix or is appointed by the Judge as the guardian of the minors, she has all the powers of a *de jure* guardian. If there is no legal guardian, the person in charge of a minor, *e. g.* the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities, such as food, clothing or nursing), but has no power to deal with the immoveable property. **P C** IMAMBANDI *v.* MUTSADDI, 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 BOM. L. R. 1022 **513**

——— *Marriage—Legitimacy—Acknowledgment, presumption arising from.*

Clear and reliable evidence that a Muhammadan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother. **P C** IMAMBANDI *v.* MUTSADDI, 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 BOM. L. R. 1022 **513**

——— *Moveables and immoveables, distinction between.*

The Muhammadan Law makes a sharp distinction between "goods and chattels" and immoveable property with regard to the powers of dealing by guardians. **P C** IMAMBANDI *v.* MUTSADDI, 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 BOM. L. R. 1022 **513**

——— *Religious office, transfer of, validity of—Public policy.*

A religious office such as that of a *khadim* or *mutwalli* is not capable of being mortgaged. The transfer of such an office is opposed not only to the Muhammadan Law but also to public policy. **C** SHAHED BAKSH *v.* GOLAM NABI KHONDOKAR, 22 C. W. N. 996 **117**

Municipal Courts, *jurisdiction of, over foreigners*

A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree can be enforced against him in the foreign State is a question for disposal for the Courts of that State. **M** RAJABHAI NARAIN OF CUTCH *v.* KARIM MAHOMED OF BOMBAY, 35 M. L. J. 189; 19 M. W. N. 521; 24 M. L. T. 209 **708**

Negotiable Instruments Act (XXVI of 1881), s. 83, *applicability of—Hundi payable at sight—Holder for valuable consideration—Consideration money, return of.*

Section 83 of the Negotiable Instruments Act has no application to cases of *hundis* payable at sight, inasmuch as such *hundis* are presented not for acceptance but for payment.

Holders of *hundis* for valuable consideration are entitled to return of the consideration money paid by them to their endorsers, if the *hundis* subsequently turn out to be worthless and no payment can be obtained upon them. **O** RAM DAYAL *v.* LALTA PRASAD 5 O. L. J. 415 **683**

Notice, *service of, proof of—Entry in order sheet, value of.*

An entry in an order sheet that a certain notice has been served is not sufficient proof of the service. **C** PRAFULLA NATH TAGORE *v.* SHITAL KHAN, 22 C. W. N. 788 **97**

Orissa Tenancy Act (II B. & O. of 1913), ss. 31, 250 (e)—*Transfer of occupancy holding—Registration fee, payment of, whether obligatory—Suit to recover fee, maintainability of—Appeal, second, whether lies.*

The word "registration" in section 31 of the Orissa Tenancy Act means nothing more than that the landlord should signify his consent to the transfer; and his consent may be either verbal, written or in any way that he thinks proper.

Under section 31 of the Orissa Tenancy Act it is the duty of the transferee of an occupancy holding to apply to the landlord for his consent; and once the landlord gives his consent, the transferee becomes liable to pay the fee prescribed by the Act. If the transferee refuses to pay the fee a suit would lie to recover it, and in that suit a second appeal to the High Court would be competent. **Pat** MRITUNJOY PRAHARAJ *v.* JAGANNATH JEU, 3 P. L. J. 351 **34**

——— **s. 250 (e)** **34**

Oudh Estates Act (I of 1869), s. 22—*Widow's possession, effect of—Heirs, remote, position of—Vested interest—Expectancy of inheritance—Hindu Law—Reversioner, transfer by, validity of.*

There is nothing in the language of section 22 of the Oudh Estates Act which can be interpreted as showing that simultaneously with the devolution of the life-interest in an estate upon the widow of the last holder under clause (8) of that section there descends a vested interest, comprising the residue of the estate, upon any of those who are declared to be the more remote heirs in the scale of succession.

Where it was found that a person was entitled to the estate left by a *taluqdar* under section 22, clause 1), of the Oudh Estates Act, but for the existence of the *taluqdar's* widow who was in possession of the estate under clause 8 of that section:

Held, that during the widow's lifetime he had no vested interest, but merely an expectancy of inherit-

Oudh Estates Act—concld.

ance in the estate which he could not transfer.

Although under the scheme of inheritance propounded in section 22 of the Oudh Estates Act, the widow of a Hindu *taluqdar* has an interest which is in many respects different from the interest held by a female heir under the ordinary Hindu Law, yet this fact does not make any difference in the nature of the legal position of the person who is entitled to succeed to the estate after the widow's death. **O** HAR NATH KUAR *v.* INDRA BAHADUR SINGH, 5 O. L. J. 277 **214**

——— s. 22 (4)—Taluka, *succession to—Daughter's son treated as son dying intestate and issueless, estate of, succession to—Impartibility of* taluka, *retention of—Oudh Estates Act (I of 1869), s. 22, adoption under—Hindu Law, rules of, whether applicable to adoption made by* taluqdar.

Where a person succeeding to a *taluka* under the provisions of section 22, clause 4 of the Oudh Estates Act, dies issueless and intestate, the *taluka* goes to his heirs, and not to those of his maternal grandfather.

An adoption under the provisions of section 22 of the Oudh Estates Act is merely a selection which need not be according to the conditions and the restrictions found in the personal law applicable to the person making the adoption.

The succession to a person, obtaining a *taluka* under the provisions of section 22, clause 4, of the Oudh Estates Act, and dying intestate, goes, in the absence of any male lineal descendant, to the line of the person who affiliated him and treated him in all respects as a son, and not to his natural line.

Where the junior wife of a *talukdar* validly adopted a son in pursuance of a Will made by the *talukdar*, under which the latter bestowed a life-estate upon her and gave her the power to adopt a son and further directed that the adopted son would take possession of the *taluka* only after her death, under the provisions of section 22, clause 8 of the Oudh Estates Act:

Held, that the adoption was good, as it did effectuate the intention of the *talukdar* as expressed in his Will and as the *taluka* could not lose its character of impartibility in the hands of the adopted son. **O** LAL TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER, FYZABAD, 5 O. L. J. 294 **225**

Oudh Laws Act (XVIII of 1876), Ch. II, s. 9—*Pre-emption—Sale of house by* riaya *—Suit for pre-emption, maintainability of.*

A sale by an occupier of a house in a village who has merely the ordinary rights of a *riaya* in it, does not give rise to a right of pre-emption exercisable under Chapter II of the Oudh Laws Act, inasmuch as under section 9 of that Act, unless the transferor is a proprietor of a proprietary or under-proprietary tenure or a share in such a tenure, no right of pre-emption comes into being. **O** ABBAS BANDI BIBI *v.* ABDUL GHANI, 5 O. L. J. 450 **673**

——— s. 25—*"Transferred", meaning of.*

The word "transferred", as used in section 25 of the Oudh Laws Act, is of general import and its meaning cannot be restricted to cases in which the transfer has been made under orders of the Court **O** NADIR SINGH *v.* INDAR SEN SINGH, 5 O. L. J. 426 **652**

Oudh Rent Act (XIX of 1868), ss. 3, 52, 102—*Oudh land laws—Tenures recognised in Oudh—Proprietor, under-proprietor and tenant—Incidents of tenure attached by law, whether can be varied by consent of tenure-holder.*

The Oudh Rent Act, 1868, recognises three classes of persons, and three only, as having an interest in and entitled to hold land for the purposes of the Act in the province of Oudh, *viz.*, "proprietor", "under-proprietor" and "tenant".

The law attaches to the status of under-proprietor certain rights, among them the right to transfer: and while he retains that status he cannot be divested of any of those rights.

Where, therefore, at the time of settlement a landowner applied to be recorded as an under-proprietor, and under pressure from the Settlement Officer consented to be recorded as an under-proprietor without right of transfer:

Held, that this was creating a tenure unknown to the law and that no effect could be given to the words "without right of transfer" in the Settlement Officer's decree. **P C** LAL SRIPAT SINGH *v.* LAL BASANT SINGH, 22 C. W. N. 985; 21 O. C. 180; 8 L. W. 328; (1918) M. W. N. 638; 5 O. L. J. 497; 16 A. L. J. 817; 5 P. L. W. 255; 35 M. L. J. 595; 28 C. L. J. 468; 24 M. L. T. 434; 20 BOM. L. R. 1101 **424**

——— ss. 52, 102 **424**

Oudh Rent Act (XXII of 1886), Ch. VII-A—Thikadar—*Enhancement of rent.*

Chapter VII-A of the Oudh Rent Act, 1886, applies to *thikadars*, and consequently a "favourable rent" payable by a *thikadar* or person to whom the collection of rents in a *mauza* has been leased, is liable to be enhanced in the circumstances and subject to the condition therein provided. **P C** PARBATI KUNWAR *v.* DEPUTY COMMISSIONER OF KHERI, 5 O. L. J. 433; 24 M. L. T. 292; 35 M. L. J. 525; 16 A. L. J. 865; 8 L. W. 586; 5 P. L. W. 302; 28 C. L. J. 449; 41 A. 541; (1918) M. W. N. 880; 23 C. W. N. 125; 20 BOM. L. R 1095 **394**

——— s. 107G—*Jurisdiction of Civil Court—Declaration that plaintiff is under-proprietor and not tenant, suit for, maintainability of.*

A Civil Court has jurisdiction to try a suit filed by a person who has been held by the Revenue Court to be a tenant under section 107G of the Oudh Rent Act, for the purpose of obtaining a declaration that he is an under-proprietor and not a tenant. **O** NADIR SINGH *v.* INDAR SEN SINGH, 5 O. L. J. 426 **652**

Parganah Registers, Kanungo Registers, General and Mouzawari Registers under Bengal Registration Act (VII of 1876) **49**

Partition—Burden of proof **5**

Partition Act (IV of 1893), ss. 2, 3—*Partition, suit for—Defendant claiming to exercise right of purchase—Withdrawal of suit, application for, whether can be allowed.*

In a suit for partition of a house the plaintiff stated that the partition of the house by metes and bounds would spoil the house altogether and asked the Court under section 2 of the Partition Act to order a sale of the house. The defendant claimed to exercise his right under section 3 of the Act to buy the plaintiff's share at a valuation to be fixed by the Court. The Court proceeded to cause a valuation of the house to be made and after it had fixed the valuation of the plaintiff's share, the latter filed an

Partition Act—concld.

application for leave to withdraw the suit with liberty to bring a fresh suit, which was dismissed:

Held, that the application having been made at a time when matters had reached a stage at which the defendant was entitled to the benefit of the claim which he had put forward under section 3 of the Partition Act, the Court exercised a sound discretion in refusing to allow the application. **A** UMRAO SINGH *v.* UMRAO SINGH, 16 A. L. J. 584 **905**

Partnership—Contract by partners **958**

Penal Code (Act XLV of 1860), ss. 34, 323, 325, 326, 392—*Robbery—Grievous hurt caused during robbery—Identification of offender, absence of—Separate charge against each accused without specification of common intent to cause grievous hurt—Conviction under s.* 325, *legality of—Criminal Procedure Code (Act V of* 1898), *s.* 106, *scope of—'Breach of peace,' meaning of.*

Accused Nos. 1, 2 and 3 were charged with having entered the complainant's house, and removed his ear-rings. The right ear was cut off with the ear-ring and the left ear was torn. The accused were charged separately and there was no specification of a common intention to inflict grievous hurt.

The 1st accused was convicted under sections 326 and 392, the 2nd under sections 326, 325 and 109 and the 3rd under sections 325 and 392, Indian Penal Code. In appeal, the Sessions Judge substituted convictions under sections 325 and 392 with 109 as regards 1st accused. The accused were also ordered to furnish security under section 106, Criminal Procedure Code:

Held, (1) that as the identification of the person who inflicted the grievous injury was not made out, and as there was an absence of common intent, the conviction under section 325 was bad, for which must be substituted convictions under section 323;

(2) that the order under section 106 was not illegal even though there was technically no breach of the *public* peace by the accused.

A person who enters on another's premises and uses violence to him and deprives him of his property commits a breach of the peace in the wider sense of the expression. **M** SAVAREJULU NAYUDU, *In re*, 19 CR. L. J. 929 **445**

——— **ss. 79, 147, 448**—*Husband carrying away wife by force against her will—Offence, nature of—Husband, right of, to use force to compel wife to live with him—Restitution of conjugal rights, suit for.*

Both under the English and Indian Law, although it is the duty of a wife to reside and cohabit with her husband, the husband has no right to use force or violence to enforce this right even when the wife's refusal to live with him is without any reasonable cause.

There is nothing in Hindu or Muhammadan Law to justify a husband in using force or restraint to compel his wife to live with him, instead of having resort to a Civil Court for restitution of conjugal rights. Nor can such action be justified under section 79 of the Penal Code.

Where a Hindu husband in company of several associates forcibly entered the house of a third person and took away by force his married wife from there against her will:

Held, that the husband and his associates were guilty of offences under sections 147 and 448, Indian Penal Code. **S** EMPEROR *v.* RAMLO, 12 S. L. R. 29; 19 CR. L. J. 955 **807**

——— **s. 109** **871**

——— **s. 147** **807**

——— **ss. 172, 406**—*Property placed in custody of accused, non-production of, on demand—Criminal breach of trust—Contempt of Court.*

Certain moveable property was attached in execution of a decree. The officer of the Court who made the attachment placed the property in charge of the accused. When the time for auction-sale of the property arrived, notice was issued to the accused to produce the property. They evaded service of the notice on several occasions and the property was not produced:

Held, (1) that the accused could not be convicted of criminal breach of trust under section 406 of the Penal Code inasmuch as the property had not been misappropriated or converted to the use of the accused, nor had it been used or disposed of in any manner contrary to the terms of the trust;

(2) that the accused were guilty of contempt of Court under section 172 of the Penal Code. **A** HARNAM SINGH *v.* EMPEROR, 16 A. L. J. 600; 19 CR. L. J. 975 **875**

——— **s. 182**, *applicability of—Petition to District Magistrate to unlock house containing false allegations, whether falls within scope of section—Offence, gist of.*

Section 182, clause (*a*), of the Penal Code applies to a case in which it is intended that a public servant should do or omit to do something which he ought to do or omit to do if he knew the true facts, that is, which he would be legally justified in doing or omitting to do if he knew the true facts.

Asking a Magistrate to do an act which would be an illegal act even if true facts were stated to him, would not come within the purview of the section.

Accused petitioned the District Magistrate praying that as certain tenants occupying his houses had absconded leaving the houses locked up, the houses might be unlocked to enable him to execute the necessary repairs. His application was sent for compliance and report to the Police, who reported that the allegations contained in the petition were untrue, upon which the District Magistrate sanctioned his prosecution under section 182 of the Penal Code:

Held, that the section was inapplicable to the circumstances of the present case. **A** MANOHAR *v.* EMPEROR, 16 A. L. J. 614; 19 CR. L. J. 895 **91**

——— **s. 186**—*Decree for restitution of conjugal rights—Warrant to seize wife, legality of—Resistance to warrant—Offence.*

In execution of a decree for restitution of conjugal rights a warrant was issued directing the executing peon to seize the wife and deliver her bodily over to her husband, failing which to bring her under arrest before the executing Court:

Held, that the warrant was illegal, so that resistance to its execution was not an offence under section 186 of the Penal Code. **C** GAHAR MAHAMMAD *v.* PITAMBAR DAS, 22 C. W. N. 814; 19 CR. L. J. 968 **868**

——— **s. 186**—*Restitution of conjugal rights, decree for—Warrant for execution, legality of—Obstruction to warrant—Offence,*

Penal Code—contd.

A decree in a contested suit for restitution of conjugal rights passed on 3rd March 1917 directed the wife to return to her husband within 3 months of its date. The wife not having obeyed the decree, on the 15th September 1917 a warrant was issued against her without giving her any previous notice:

Held, that the wife was not entitled to a notice before the warrant was issued and that obstruction to the execution of the warrant was an offence punishable under section 186 of the Penal Code. **C** ABDUL WAZED *v.* EMPEROR, 19 CR. L. J. 976 **876**

——— **ss. 192, 193, 465, 109**—*Forgery—False evidence, fabrication of.*

A sale under a Kobala written out by one *N.* on a stamp paper of Rs. 5 and dated the 23rd May having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. *N.* was told by one *M.* that as no refund could be made after two months the date in the document might be altered from 22rd May to 23rd September. Accordingly the alteration was made, although it was quite unnecessary as the period for getting refund was not two months but six months:

Held, that *N.* and *M.* were respectively guilty of fabricating and abetting the fabrication of false evidence.

Quære.—Whether the offences committed were not forgery and abetment of forgery. **C** MOHESH CHANDRA *v.* EMPEROR, 28 C. L. J. 213; 19 CR. L. J. 971 **871**

——— **s. 193** **815, 872**

——— **ss. 201, 203, 211,** *offences under—Accomplice, whether can be convicted under ss.* 201, 202*—False information to Police implicating innocent man—Offence—Intention.*

A person who gives false information to the Police, accusing another of an offence of murder in order to screen the real offender, commits offences not only under sections 201 and 203, Indian Penal Code, but also under section 211.

The husband of the accused having been murdered at night, she gave information to the Police falsely implicating a certain person:

Held, that although there were circumstances of grave suspicion against the accused woman, as being an accomplice, yet as it would be impossible on the record as it stood to hold that she was the murderer or one of the murderers, she could be convicted under sections 201 and 203, Indian Penal Code. **C** TAPRINESSA *v.* EMPEROR, 19 CR. L. J. 903 **275**

——— **s. 203** **275**

——— **s. 209** **64**

——— **s. 210** **64, 815**

——— **s. 211** **275**

——— **s. 290**—*Public nuisance, user of premises giving rise to—Proprietors of premises, whether liable.*

Speaking generally, where the user of premises gives rise to a nuisance the person liable under section 290 of the Penal Code is the occupier for the time being, whoever he may be. A proprietor who is not in occupation of the premises is not liable, unless his conduct amounts to an abetment of the offence under that section. **C** BHUBAN RAM *v.* BIBHUTI BHUSAN BISWAS, 22 C. W. N. 1062; 19 CR. L. J. 915 **287**

Penal Code—contd.

——— **s. 295**—*'Defile,' meaning of—Entry of members of Moothan caste into precincts of temple open to non-Brahmins—Offence.*

The word 'defile' in section 295, Indian Penal Code, is not confined to the idea of making dirty but is also extended to ceremonial pollution, which, however, must be proved.

Where the accused, who belonged to the Moothan caste in Malabar and claimed the status of Vaisyas, entered into the Nallambalam of a temple which was open to non-Brahmins:

Held, that their act did not amount to 'defiling' the temple within the meaning of section 295, Indian Penal Code. **M** KUTTI CHAMI MOOTHAN *v.* RAMA PATTAR, 24 M. L. T. 181; 19 CR. L. J. 961; 41 M. 980 **812**

——— **ss. 300, Excep. 4, 304**—*Culpable homicide not amounting to murder—Death caused in sudden fight—Offence.*

A dispute arose over the payment of the rent of a certain field between the three accused and the deceased. The former attacked the deceased and his nephew with *lathis* and a regular fight took place between the parties. The result was that considerable injuries were caused on both sides and that the deceased was killed:

Held, (1) that *lathis* being lethal weapons, the accused must have known that they were likely to cause death;

(2) that the case fell under Exception 4 to section 300 of the Penal Code and that all the accused were guilty of an offence under section 304 of the Penal Code. **A** EMPEROR *v.* GULAB, 16 A. L. J. 731; 19 CR. L. J. 953 **805**

——— **s. 304** **433, 805**

——— **ss. 323, 325, 326** **445**

——— **ss. 372, 420**—*Cheating—Selling married girl as virgin.*

Accused sold a minor married girl to the complainant representing her to be a virgin:

Held, that the accused were guilty of cheating. **P** RAJ BAHADUR *v.* EMPEROR, 28 P. W. R. 1918 CR.; 23 P. R. 1918 CR.; 19 CR. L. J. 931 **447**

——— **ss. 372, 373,** *scope of—"Letting to hire," "obtaining possession," meaning of—*"Kanyarikam" *ceremony, performance of, whether within the section.*

Under sections 372 and 373, Indian Penal Code, there must be making over of possession of the minor girl either by sale or by hire or by some similar arrangement in order that a case may come within the mischief of the law.

Where the only evidence against the accused was that he performed the *kanyarikam* ceremony, *i. e.*, the nuptials of a minor girl and had sexual intercourse with her for 3 days successively, but the girl continued to live with her parents who never parted with possession of her to the accused:

Held, that these facts were not sufficient to support the conviction of the accused under section 373 of the Penal Code and the conviction of the girl's parents under section 372 of the Penal Code. **M** PUBLIC PROSECUTOR *v.* MADDILA MUTAYALU, (1918) M. W. N. 484; 35 M. L. J. 157; 24 M. L. T. 77; 8 L. W. 253; 19 CR. L. J. 965 **865**

——— **s. 377**—*Unnatural offence—Proof—Evidence, uncorroborated, of person on whom offence committed, whether sufficient,*

Penal Code—contd.

In cases under section 377 of the Penal Code it is, as a rule, unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reasons that testimony is entitled to special weight **P** GANPAT *v.* EMPEROR, 73 P. L. R. 1918; 19 CR. L. J. 946; 38 P. W. R. 1918 **670**

——— **s. 380**—*Theft from railway godown.*

The accused went to a railway godown with a carter. The latter removed a bag from the godown and the accused accompanied the carter to his house and there took delivery of the bag. The bag consisted of pilferings from a number of bags consigned to different persons:

Held, that the bag being in the possession of the railway as bailee until it left the godown, the actually taking it out of the godown was theft and that the accused and the cartman were jointly guilty of theft. **Pat** SOUKHI CHAND *v.* EMPEROR, 3 P. L. J. 354; 19 CR. L. J. 884 **80**

——— **s. 392** **445**

——— **s. 403**—*Misappropriation—Dishonest motive—Overt act of dishonesty, evidence of.*

The chief element for a conviction under section 403 of the Penal Code is the dishonest misappropriation of the property or conversion to one's own use.

In the absence of any overt act on the part of the accused no inference of dishonest motives can be imputed to him simply because he has retained certain documents in his custody. **Pat** RAM BYAS RAI *v.* EMPEROR, 19 CR. L. J. 943 **667**

——— **s. 406** **875**

——— **s. 408** **92**

——— **s. 408**—*Criminal breach of trust by clerk or servant—Marksman engaged by station master, whether servant of Railway Company—Overcharge retained by marksman—Offence.*

Accused was engaged by a station master to mark and load goods delivered to the Railway Company for despatch and was paid out of an allowance granted by the Company to the station master. The latter also entrusted the accused with the writing up of the cash register. The accused recovered a certain sum as an overcharge from a consignor of goods and converted it to his own use. He was thereupon tried and convicted of an offence under section 408 of the Penal Code:

Held, that the accused, not being a clerk or servant of the Railway Company, could not be convicted of an offence under section 408 of the Penal Code in respect of the sum received by him. **A** KARIM-UD-DIN *v.* EMPEROR, 16 A. L. J. 596; 19 CR. L. J. 967: 40 A. 565 **867**

——— **s. 420** **447, 658**

——— **ss. 447, 497, 511**—*Criminal trespass with intent to commit adultery—Complaint by husband, whether necessary.*

Where the object of a trespass is to commit an offence, such offence must be possible on the part of the person to be convicted of the trespass.

Where an offender enters the premises of his neighbour on his way to the private apartments occupied by that neighbour's wife with intent to commit adultery, the offence of criminal trespass is complete long before the stage of an attempt to commit the adultery is reached.

Penal Code—concld.

Therefore, the complaint of the husband is not necessary for proceedings in respect of house-trespass to commit adultery. **N** EMPEROR *v.* DHANUA LODHI, 19 CR. L. J. 881 **77**

——— **s. 448** **807**

——— **s. 465** **871**

——— **ss. 497, 511** **77**

Permanent tenure-holder, *whether represented by* zemindar *in title suit.*

The interest of a permanent tenure-holder is not represented by either of the rival landlords in a suit between themselves to establish title to lands comprising the tenure. **C** SHIB CHANDRA ROY CHOWDHURY *v.* HARENDRA LAL RAI CHOWDHURY, 22 C. W. N. 721; 28 C. L. J. 223 **315**

Pleadings—*Pleas, inconsistent, whether can be taken—Execution application, dismissal of, and reference to suit—Suit, order in, effect of.*

Where a suit to enforce a security bond filed in a Privy Council appeal was dismissed, on the grounds (1) that the necessary parties had not been impleaded, and (2) that the claim was barred by section 47 of the Code of Civil Procedure, and on an application for execution to enforce the said security being made, the decree-holder was met with the plea that an order passed before the institution of the above suit in a previous execution proceeding, referring him to seek his remedy by suit, operated as a bar to a fresh application for execution:

Held, that the order passed in the suit had the effect of nullifying the previous order passed in the execution proceeding.

A party who sets up a plea, to which effect has been given by a Court in a previous proceeding, should not be allowed to set up another plea inconsistent with it in a subsequent proceeding brought for the same relief. **O** BASTI BEGAM *v.* SAJJAD MIRZA, 21 O. C. 188 **558**

Possession *of* benami *purchaser under void transfer for more than* 12 *years, effect of—Adverse possession.*

A *benami* purchaser, holding under a void transfer but remaining in possession of the property for more than 12 years from the date of the purchase, acquires by prescription a good title to the purchased property as against the ostensible purchaser. **O** SAJJAD MIRZA *v.* NANHI KHANAM **694**

———, *constructive, whether claimable by trespasser.*

A trespasser cannot claim the benefit of constructive possession. **C** SHIB CHANDRA ROY CHOWDHURY *v.* HARENDRA LAL RAI CHOWDHURY, 22 C. W. N. 721; 28 C. L. J. 223 **315**

Power-of-attorney, *construction of—Minor, suit against—Admission by unauthorised agent, whether binding on minor.*

A power-of-attorney should be construed strictly.

Where a power-of-attorney relates to matters connected with the management of a minor's *jagir* only, it cannot, in the absence of express provisions, be held to authorize the person in whose favour it has been executed to defend the minor's title to the *jagir* in a suit. Any statements or admissions made by such agent in a suit against the minor relating to the *jagir* cannot, therefore, bind the minor. **N** NAZAR ALI *v.* ASHRAF ALI **528**

Pre-emption 3, 418
——— *Acquiescence, what amounts to—Plaintiff willing to sell his own share.*
In a suit brought by the plaintiff for pre-emption on the ground that he was a co-sharer in the property sold and a brother of the vendor while the vendee was a co-sharer only, it appeared that the plaintiff was heavily in debt at the time of sale, that he had no money and that he was willing to sell his own share in the property to the vendee along with his brother:
Held, that this conduct of the plaintiff amounted to an acquiescence by him in the sale, and that his suit must, therefore, be dismissed. **A** ANCHAL *v.* DALIP SINGH, 16 A. L. J. 779 400
———, suit for 194
———, *suit for, dismissal of—Vendee recovering costs out of deposit—Suit decreed on appeal—Deposit, whether to be treated as intact.*
A suit for pre-emption was dismissed by the first Court with costs. The vendee thereupon recovered his costs from the deposit of one-fifth of the purchase price made by the plaintiff. On appeal the suit was remanded and the plaintiff eventually got a decree:
Held, that the deposit made by the plaintiff must be treated as if it were intact, and that the plaintiff was bound to pay into Court only the balance of the purchase price after deducting the full amount of his deposit. **P** GIRDHARI LAL *v.* ATTAR, 96 P. W. R. 1918 511
———, suit for, whether must embrace entire property sold 894
——— *Trees standing on land and right of easement, whether go with land.*
In a suit for possession of a piece of land by pre-emption, the trees standing on the land and all rights of easement appertaining to the land pass with the land. **N** BALOBRAO APPARO *v.* ANAD RAO 654

Presidency Towns Insolvency Act (III of 1909), s. 7, *order under—Suit to set aside order, maintainability of—Appeal—Remedy, proper.*
No suit lies to set aside an order passed under section 7 of the Presidency Towns Insolvency Act. The proper remedy for the party aggrieved is to appeal against the order. **M** OFFICAL ASSIGNEE OF MADRAS *v.* MANGAYAR KARASU AMMAL, 40 M. 1173 (*Foot note*) 298
——— **ss. 17, 25**—*Insolvency proceedings, whether bar execution of decree—Execution—Insolvency of judgment-debtor—Limitation, running of.*
The pendency of an insolvency proceeding under the Presidency Towns Insolvency Act does not of itself, in the absence of a protection order under section 25 of the Act, bar the remedy of a decree-holder to execute his decree by arrest of the judgment-debtor. Limitation for execution of a decree, therefore, continues to run against a decree-holder during the pendency of an insolvency proceeding and he is not entitled to exclude the period during which the insolvency proceeding has been pending from the period allowed for execution of the decree.
A decree-holder arrested his judgment-debtor in execution of his decree. On the 19th August 1911, however, the judgment-debtor was released on the production of an adjudication order made under the Presidency Towns Insolvency Act. No further action was taken by the decree-holder and the execution proceedings dropped. In January 1916 the adjudication was annulled. The decree-holder then applied for execution:
Held, that in the absence of a protection order under section 25 of the Presidency Towns Insolvency Act the decree-holder was at liberty to execute his decree by arresting the judgment-debtor, and that, therefore, limitation continued to run against the decree-holder and the present application for execution was barred by time. **Pat** SHEO SARAN RAM *v.* BASUDEO PRASAD SAHU, (1918) PAT. 357 798
——— **s. 25** 798
——— **s. 49** 529

Probate and Administration Act (V of 1881), ss. 76, 98—*Orders for exhibiting accounts, scope of.*
Sections 76 and 98 of the Probate and Administration Act contemplate orders merely directing the exhibiting of accounts in Court. Orders purporting to fix the capital of the trusts and giving directions for their administration are entirely outside the scope of these sections. **S** NOTANDAS *v.* KISHNIBAL, 12 S. L. R. 27 750
——— **s. 98** 750

Procedure—*Judges, change of—Successor, whether bound to accept finding of predecessor on certain issues.*
A Judge who is called upon to decide a case on the conclusion of all the evidence is not bound by the previous decision of his predecessor on certain issues, and can decide them afresh. **L B** OFFICIAL ASSIGNEE *v.* MAHOMED HADY, 11 BUR. L. T. 97 555

Pro-note, *suit on—Question whether executant signed it as security for other persons, whether can be determined.*
In a suit on a promissory note the question whether the defendant, executant of the note, signed it by way of security for others cannot be tried or determined, except so far as it affects the question of consideration. **C** DURGA CHARAN *v.* LAKHI NARAIN 917

Provincial Insolvency Act (III of 1907), s. 16—*"Pending", meaning of—Leave to commence suit, when to be obtained—Court, inherent authority of, to terminable proceedings in insolvency.*
A legal proceeding is said to be "pending," as soon as commenced, and until it is concluded, that is, so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with therein.
A Court has no inherent authority to terminate the proceedings in an insolvency and deny to creditors and debtors, the exercise of rights clearly conferred by Statute.
Insolvency proceedings would be considered as still 'pending' within the meaning of section 16 of the Provincial Insolvency Act where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge.
The 'leave' to commence a suit, referred to in section 16 (2) of the Provincial Insolvency Act should be obtained before the institution of the suit, and cannot be obtained subsequently to its institution. **S** JIVANJI MAMOOJI *v.* GHULAM HUSSAIN, 12 S. L. R. 20 771

Provincial Insolvency Act—concld.

——— **ss. 18 (3), 20, 47**—*Sale by Official Receiver—Purchaser obstructed in taking possession—Enquiry by Insolvency Court—Order directing delivery to purchaser—Civil Procedure Code (Act V of 1908), O. XXI, rr. 97, 98—Jurisdiction of Insolvency Court—Suit for declaration of obstructor's title, injunction and possession, maintainability of.*

The power conferred by section 18 (3) of the Provincial Insolvency Act is intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of questions of title as between the insolvent and third parties. This provision is not intended to confer jurisdiction over a person against whom the insolvent has merely a right enforceable by suit.

An Insolvency Court has, therefore, no jurisdiction to institute an enquiry under Order XXI, rules 97 and 98, Civil Procedure Code, into an alleged resistance to a purchaser at the Official Receiver's sale taking possession of the property.

Where an order has been passed by the Insolvency Court directing the removal of the obstruction and delivery of possession to the purchaser, the aggrieved party has a right to file a suit for a declaration of his title and for an injunction restraining delivery of the property to the purchaser. It will not be correct to embody a prayer in such a suit for the setting aside of the order of the Insolvency Court, as that is a matter within the jurisdiction of the High Court.

Per *Krishnan, J.*—Under section 18 (3) of the Provincial Insolvency Act, the Court has power, in a proper proceeding instituted before it by the Receiver, to enquire into and decide on the merits of an adverse claim to possession set up by a third party.

The rules of the Civil Procedure Code can be availed of only where section 47 of the Insolvency Act applies. To apply that section it must be shown that there was some proper proceeding under the Act in the Insolvency Court, for section 47 merely provides for the procedure to be adopted "in regard to proceedings under this Act."

An order passed by an Insolvency Court under Order XXI, rules 97 and 98 without jurisdiction may be set aside by the High Court on appeal, but that does not bar a fresh suit by the aggrieved party. **M** MADDIPOTI PERAMMA *v.* GANDRAPU KRISHNAYYA, (1918) M. W. N. 479; 8 L. W. 136; 24 M. L. T. 106 **308**

——— **s. 20** **308, 577**

——— **s. 22**—*"Aggrieved," meaning of—Application under section—Limitation.*

Where a Receiver in insolvency at the instance of a creditor attaches and takes possession of a property as the property of the insolvent, a third person claiming to be the owner of the property becomes "aggrieved" within the meaning of section 22 of the Provincial Insolvency Act; so that an application by him under that section should be made within 21 days from the date of the act of the Receiver in taking possession. **C** CHARU CHANDRA BHATTACHARJEE *v.* HEM CHANDRA MOOKERJEE **62**

——— **s. 47** **308**

Provincial Small Causes Courts Act (IX of 1887), s. 25—*Jurisdiction, question of, decision of—Revision, whether lies.*

Provincial Small Causes Courts Act—concld.

A suit for compensation for breach of contract having been brought in the Court of Small Causes at Agra, a preliminary objection was raised that the alleged breach having taken place at Allahabad, the Court at Agra had no jurisdiction. The Court, after taking evidence, held that it had jurisdiction:

Held, that no revision lay against the order, inasmuch as the case had not been decided on the merits nor had it been 'disposed of' within the meaning of section 25 of the Provincial Small Causes Courts Act. **A** MAKHAN LAL PARSOTTAM DAS *v.* CHUNNI LAL BRIJ LAL, 16 A. L. J. 777 **610**

——— **Sch. II, Art. 41**—*Debt paid off by one of several heirs—Suit to recover share from co-heir—Jurisdiction of Small Cause Court.*

Where one of several heirs of a deceased Muhammadan pays off a debt due by the deceased and then sues his co-heirs to recover their share of the debt, the suit is cognisable by a Court of Small Causes and is not excluded from its cognisance by Article 41 of Schedule II to the Provincial Small Causes Courts Act. **A** MAHMUD ALI *v.* TAMIZ-UN-NISSA BIBI, 16 A. L. J. 787 **842**

Public Gambling Act (III of 1867), as amended by Act I of 1917, ss. 3, 4—*Keeping common gambling house—Being found in gaming house—Proof—Presumption.*

In order to sustain the conviction of an accused person for keeping a common gambling house it is necessary for the prosecution not only to prove that the accused owned the house, or was the occupier of it, and that instruments of gambling were kept or used in it, but that they were kept or used for the profit of the accused. In the absence of evidence to show that profit or gain was actually made, a conviction cannot be maintained upon mere suspicion.

Where it is not established that a particular house is a common gaming house, the presence of the accused in that house can raise no presumption against them, and even if the house is a common gaming house, no presumption will arise against them unless it can be shown that gambling was going on at the time when they were present. **A** RAGHUNATH *v.* EMPEROR, 16 A. L. J. 760; 19 CR. L. J. 958 **810**

——— **s. 13**—*Public place, what is—Betting and gaming, distinction between—Betting, whether offence—Betting book, whether instrument of gaming.*

The words "public place" in section 13 of the Public Gambling Act, 1867, signify a place to which the public resort as a matter of fact, whether of right or with the permission of a private owner.

In order to obtain a conviction under section 13 of the Public Gambling Act, it must be proved that the accused were found playing for money or other valuable thing with some instrument of gaming (*ejusdem generis* with cards, dice or counters) used in playing any game not being a game of mere skill.

Recording bets or laying bets about an uncertain event which the recorders and betters cannot prevent or bring about is not playing a game within the meaning of section 13 of the Public Gambling Act.

A book in which bets are recorded is not an "instrument of gaming" within the meaning of section 13 of the Public Gambling Act.

Public Gambling Act—concld.

Mere betting is no offence in the Central Provinces or Berar. **N** GAJJU *v.* EMPEROR, 14 N. L. R. 137; 19 CR. L. J. 917 **433**

Punjab Courts Act (III of 1914), s. 39 (4) **875**

Punjab Limitation (Ancestral Land Alienetion) Act (I of 1900), Art. 2, *applicability of—Limitation Act (IX of 1908), Sch. I, Art.* 141—*Suit by reversioner after death of widow —Limitation applicable.*

A suit by a reversioner to recover possession of ancestral land after the death of the alienor's widow is governed by Article 141 of the Limitation Act and not by the Punjab Limitation Act, even where the alienor died after the latter Act came into force, inasmuch as the reversioner could not sue for possession during the lifetime of the widow of the alienor. **P** GANESHA RAM *v.* PANJU SINGH, 95 P. R. 1918 **977**

Punjab Motor Vehicle Rules, r. 10 **444**

——— r. 17 **444**

Punjab Pre-emption Act (I of 1913), s. 30 **359**

Punjab Tenancy Act (XVI of 1887), s. 4 (6)—*"Landlord", meaning of—Pre-emption —Sale of occupancy rights to mortgagee with possession of proprietary rights—Vendor's collateral, whether can pre-empt.*

The term 'landlord' as defined in section 4 (6) of the Tenancy Act includes a mortgagee in possession.

Where, therefore, plaintiff sued for possession by pre-emption of certain land sold by defendant No. 1, an occupancy tenant, to the mortgagees with possession of the proprietary rights:

Held, that the plaintiff was not entitled to succeed, inasmuch as the sale must be held to have been made in favour of the landlord. **P** NANAK *v.* BHAGWAN SINGH, 149 P. W. R. 1918 **3**

——— s. 77—*Proviso added by Act III of* 1912 *—Jurisdiction of Civil and Revenue Courts—Suit for possession—Pleadings—Examination of parties by Court—Defendants claiming occupancy rights.*

In an ejectment suit the plaintiffs asserted in the plaint that the defendants were mere trespassers and the defendants in their written statement contended that the plaintiffs had no rights whatsoever in the land, but on examination by Court the plaintiffs urged that the defendants were their tenants-at-will and the defendants pleaded that they were occupancy tenants of the settlers of the village:

Held, that under the proviso added by Punjab Act III of 1912 to section 77 of the Punjab Tenancy Act the plaint must be returned for presentation to the Revenue Court. **P** ATA ULLAH KHAN *v.* UMAR DIN, 68 P. L. R. 1918; 171 P. W. R. 1918 **594**

Railways Act (IX of 1890), s. 122—*Unlawful entry upon Railway premises—Offence, essence of.*

The essence of the offence under both the clauses of section 122 of the Railways Act is unlawful entry. Mere unlawful entry makes the offender liable to a fine of Rs. 20 but if after the unlawful entry he refuses to leave the Railway, on being requested to do so, his offence becomes aggravated and he renders himself liable to a fine of Rs. 50.

Railways Act—concld.

If the original entry is lawful, a subsequent refusal to leave on being requested to do so would not make the original entry unlawful or bring it under clause (2) of section 122 of the Railways Act, which is but an aggravated form of the offence under clause (1). **C** DURRELL *v.* KUMUD KANTA CHAKRABARTY, 22 C. W. N. 575; 19 CR. L. J. 878 **74**

Record of Rights, entry in—Presumption—Burden of proof **765**

Reformatory Schools Act (VIII of 1897) *Offender under s.* 304, *Penal Code, whether can be dealt with under that Act.*

As laid down in Punjab Government Notification No. 37 of 20th January 1906, a convict under section 304 of the Penal Code is not liable to be dealt with under the Reformatory Schools Act. **P** EMPEROR *v.* NUR MUHAMMAD, 17 P. R. 1918 CR.; 25 P. W. R. 1918 CR.; 19 CR. L. J. 917; 91 P. L. R. 1918 **433**

Registration Act (XVI of 1908), s. 17 **716**

——— ss. 17, 49—*Map and* chitta *showing allotments on partition, whether require registration.*

A map and a *chitta* put in to prove that the land in dispute was allotted on a partition to a certain person, cannot be said to be instruments falling within the purview of section 17 of the Registration Act and thus requiring registration. **C** BRINDABAN CHANDRA DE *v.* KRISHNA MOHAN DE **159**

——— s. 49 **159**

——— s. 49—*Charge, unregistered, creation of, on moveables and immoveables, effect of.*

Where there is a blend of moveable and immoveable properties in respect of which a charge is created, if the document creating the charge is not registered, it will only deprive the promisee of his right in the immoveable property and will not affect his rights in the moveable property. **M** PUSAPATI VENKATAPATHIRAJU GARU *v.* VATSAVAYA VENKATA SUBHADRAYYAMMA **563**

Regulation XXV of 1802 **733**

Regulation VI of 1831 **733**

Remand, *order of—Party accepting remand, whether can object subsequently.*

The appellant obtained from the District Judge a remand on the ground among others that the decision in a former boundary suit was not to be treated as *res judicata* between the parties:

Held, that if the appellant was not satisfied with the order as to *res judicata*, he should have appealed against the order but that having taken the remand, he must be taken to have accepted the condition laid down by the Judge as to *res judicata*. **C** JADAVENDRA NANDAN DAS MAHAPATRA *v.* GAJENDRA NARAIN DAS MAHAPATRA, 28 C. L. J. 203 **650**

Res Judicata **154**

——— *Co-sharer* zemindar *purchasing tenure—Suit against neighbouring* zemindars *and their tenants for declaration of title—Decree, whether* res judicata *as regards* zemindari *title.*

The plaintiff, who was proprietor of a 4/5ths share of a *zemindari*, purchased a tenure under it in execution of a decree for his share of the rent. One of the defendants having successfully put forward a claim to the tenure in the execution proceeding on the ground that he held it under some other defendants who were the proprietors of another *zemindari* adjoining that of the plaintiff, the plaintiff

brought a title suit against all the defendants and also the defaulting tenure-holder, asserting his 4/5ths *zemindari* title and his right to the tenure, in which it was decided that as a certain river formed the boundary between the two neighbouring *zemindaris*, the plaintiff had title to the lands in suit:

Held, that the decision was *res judicata* between the parties not only as regards the plaintiff's title to the tenure but also as regards his *zemindari* title to the lands in suit:

Held, also, that the decision could not operate as *res judicata* against the persons to whom the tenure was mortgaged before its execution sale and who purchased the same in execution of a decree on the mortgage, as those persons were not made parties to the suit and could not have been represented by the defaulting tenure-holder, who held only the equity of redemption, so that those persons were entitled to show that some of the lands purchased by them in execution of the mortgage decree were not included in the defaulting tenure, but as regards such of those lands to which the plaintiff's *zemindari* title was declared in the previous suit, those persons being parties to the present suit should pay to the plaintiff such rent as was agreed upon between themselves and the rival *zemindars* from whom they got settlements of those lands. **C** SHIB CHANDRA ROY CHOWDHURY *v.* HARENDRA LAL RAI CHOWDHURY, 22 C. W. N. 721: 28 C. L. J. 223 **315**

——— *Custom, erroneous decision on point of, whether operates as* res judicata—*Question not necessary to be decided.*

The question of the existence of a custom is one of fact and an erroneous decision on a question of custom between the same parties operates as *res judicata* in a subsequent suit, even though the subsequent suit relates to other property than that concerned in the former suit.

Where, however, it is not necessary to decide a question of custom as against a party to a suit, a decision on the question does not operate as *res judicata* against that party in a subsequent suit. **P** TANI *v.* TARA CHAND, 82 P. R. 1918; 160 P. W. R. 1918 **373**

——— *Execution proceedings—Non-transferable holding—Failure to raise objection as to non-transferability in previous execution proceeding—Estoppel—Tenant, whether can object to sale of non-transferable holding to which landlord consents.*

A tenant can object to the sale of a non-transferable holding in execution of a money-decree even if the landlord consents to it.

If a tenant judgment-debtor omits to raise an objection as to the non-transferability of a holding in an execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree. **Pat** RAMESHWAR SINGH *v.* KESHWAR RAI **790**

——— *Matter not decided by Court—Suit for declaration of title by survivorship, dismissal of—Subsequent suit for declaration that certain alienations shall not bind reversion, maintainability of—Causes of action.*

A decision cannot operate as *res judicata* on a question which the Court deliberately abstained from deciding.

The dismissal of a suit based on the allegation that the plaintiff took a certain property by survivorship on the death of a certain person, cannot operate as *res judicata* on the claim of the plaintiff, put forward in a subsequent suit, for a declaration that a *kot kobala* executed by the deceased and a compromise decree entered into in a suit to enforce it are not binding on the inheritance when it comes to the hands of the plaintiff as a reversioner. **C** HARA NARAIN BEAR *v.* SRIDHAR PANDE **2**

——— *Rent suit, finding in*—Kabuliyat *held to be valid and effective—Subsequent suit to challenge validity of* kabuliyat, *maintainability of.*

The question whether the decision in a rent suit can operate as *res judicata* on matters other than the relationship of landlord and tenant, depends upon what were the issues raised and decided between the parties in the rent suit.

Where in a rent suit, a *kabuliyat* has been held, on a judicial determination, to be valid and effective as against the tenant and to have been properly executed, a subsequent suit by the tenant for a declaration that the *kabuliyat* is null and void is barred by the rule of *res judicata*. **C** BENI MADHAB CHACKRABUTTY *v.* BHOLA NATH MAJILA **8**

Restitution, *application for, nature of—Restoration of possession—Application, subsequent, for mesne profits, maintainability of—Limitation.*

On the 22nd March 1909 plaintiffs got a decree for recovery of possession of some immoveable property. In pursuance of that decree they took possession on the 24th September 1910. The defendant appealed against that decree to the High Court and succeeded in getting it reversed on the 4th June 1913. The defendant then took possession of the property on the 4th of December 1913. On the 2nd of June 1916 the defendant applied, under section 144 of the Civil Procedure Code, for restitution of mesne profits in respect of the property for the period during which the plaintiffs were in possession, namely, from the 24th September 1910 till the 4th December 1913:

Held, (1) that the defendant was not debarred from claiming mesne profits by reason of the provisions of Order II, rule 2, of the Civil Procedure Code;

(2) that the right to apply having accrued to the defendant on the date of the High Court's judgment *viz.*, 4th June 1913, the application was within time and the defendant was, therefore, entitled to mesne profits for the whole of the period from 4th September 1910 to 4th December 1913. **Pat** KRUPASINDHU ROY *v.* BALBHADRA DAS, 3 P. L. J. 367 **47**

Revenue papers, *entries in, value of—Under-proprietary right, claim for.*

Where a person is entered in the revenue papers as an under-proprietor, but it appears from other evidence that he does not hold such a status, the entry in the revenue papers is of no avail to him for the purpose of establishing his title as an under-proprietor. **O** RAM RUP SINGH *v.* DEBI PERSHAD SINGH, 5 O. L. J. 513 **754**

Revenue Survey map, *accuracy of—Presumption.*

There is a rebuttal presumption of accuracy in favour of the Revenue Survey map. **C** SHIB CHANDRA ROY CHOWDHURY *v.* HARENDRA LAL RAI CHOWDHURY, 22 C. W. N. 721; 28 C. L. J. 223 **315**

Revision 171, 443
Santhal Parganas Regulation (III of 1872), s. 6—*Interest on interest, whether can be allowed—Mortgage suit—Paramount title, whether can be enquired into—Decree, form of—Civil Procedure Code (Act V of 1908), O XXXIV.*

Under Order XXXIV of the Civil Procedure Code a mortgage decree must set fourth the amount due on the latest date of payment. This is the decree which is contemplated by section 6 of the Santhal Parganas Regulation.

Section 6 of the Santhal Parganas Regulation is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit.

In mortgage suits the paramount title of parties other than the mortgagor or his representative-in-interest cannot be gone into. **Pat** KESHOBATI KUMARI *v.* SATYA NIRANJAN CHAKRABERTY, (1918) PAT. 305 **179**

Service tenure, palayams *held under—Grant for Military and Police services—Alienation by* zemindar—*Abolition of services before alienation, effect of—Liability of* palayam *for* poligar's *debts—Omission to issue permanent* sanad, *effect of—Regulation XXV of* 1802, *Regulation VI of* 1831 *and Madras Act III of* 1895, *scope and effect of*—Spes successionis, *mortgage and sale of, effect of, on transferor's title—Mortgage decree—Personal liability clause, sale on foot of—Vendee, adverse possession of, whether bars successors of mortgagor—Limitation, commencement of.*

In India, apart from Statute, lands held on service tenure are inalienable beyond the lifetime of the holder.

The subsequent enfranchisement of the lands from service will not validate alienations previously made.

Lands originally held on service tenure and which, on that ground, are inalienable, become alienable on the abolition of the services. They become subject to the ordinary laws of descent and disposal as in the case of ordinary property.

Section 8 of Regulation XXV of 1802 recognises and gives effect to the above principle.

The omission to issue or the delay in issuing a *sanad* under Regulation XXV of 1802 finally settling the *peishcush* payable by the holder, will not affect the alienability of such lands after the abolition of the services.

The effect of section 5 of the Regulation was to release the lands forthwith from the condition of rendering Police service or at any rate that was the policy of the Government and there is nothing in the Regulation to prevent effect being given to that intention without the grant of a permanent *sanad*. The prohibition against alienation of the lands on the grounds of public policy definitely ceased after the passing of Madras Act III of 1895 which has repealed Regulation VI of 1831 except to a limited extent

A mere transfer of a *spes successionis* in property does not operate on the transferor's interest when he gets possession of the property.

Obiter—Where a *poligar* or *zemindar* who ordinarily represents the estate is dispossessed and fails to sue for possession, the person dispossessing him gets an indefeasible title after 12 years and the

Service tenure—concld.

successor of the dispossessed *zemindar* cannot claim a fresh starting point from the date of his succession unless he shows that the previous holder had effectually debarred himself from suing and there was no one who could have sued successfully. **M** MIDNAPORE ZEMINDARI COMPANY, LTD *v.* MALAYANDI APPAYASAMI NAICKER, 34 M. L. J. 533; 24 M. L. T. 1; 41 M. 749; 8 L. W. 382 **733**

Set-off—*Claim barred at date of filing of written statement, whether can be set off.*

A claim which has become barred by limitation at the time of filing of the written statement in a suit is not a debt legally recoverable by the defendant from the plaintiff and cannot, therefore, be allowed to be set off against the plaintiff's claim. **C** KANAILAL KUNDU *v.* NITYA SARAN MUKHERJEE **938**

Specific Relief Act (I of 1877), s. 39—*Limitation Act (IX of 1908), Sch. I, Art. 91—Cancellation of instrument, suit for—Limitation, starting point of.*

The word 'entitled' in Article 91 of Schedule I of the Limitation Act means entitled by law, *i.e.*, under section 39 of the Specific Relief Act.

In a suit for cancellation of a document time will begin to run from the time when plaintiff becomes aware of facts which create in him a reasonable apprehension that he will suffer injury if the document be left outstanding. **M** BALASUNDARA PANDIAM PILLAI *v.* AUTHIMULAM CHETTIAR **505**

——— s. 42 **820**

——— s. 42—*Declaration, suit for, maintainability of—Property in possession of third person—Further relief, whether can be asked.*

Where on the death of a person several persons claim to be his heirs, and the property in dispute is in possession of a tenant who refuses to pay rent to either party until one party or the other establishes his title to the property, the possession of the tenant must be deemed to be on behalf of the rightful owner, and each of the claimants is entitled to bring a suit for a declaration of his title without suing for possession of the property in dispute. **A** RATAN MOTI *v.* TILAK CHAND, 16 A. L. J. 666 **856**

——— s. 42—*Declaration that Will containing power to adopt was not executed, suit for, maintainability of—Discretion of Court.*

A suit lies under section 42 of the Specific Relief Act for a declaration that a Will giving power to the testator's widow to adopt a boy was not in fact executed.

Per *Seshagiri Aiyar, J.*—Whenever a cloud is cast or attempted to be cast on the title of a plaintiff, he is entitled to come to Court under section 42. But where the cloud is flimsy or of a shadowy character or where the machinery of the Court is utilised to unnecessarily harass the defendant, the Court might refuse to grant relief even though the plaintiff can exercise his right of suit. **M** PADMANABJUDU *v.* BUCHAMMA, 35 M. L. J. 144; 8 L. W. 335 **702**

Stamp Act (II of 1899), ss. 38, 40, 57—*Document, insufficiently stamped—Deficit duty levied by Collector—Reference to High Court, whether competent.*

Where a Collector holding that a document is not sufficiently stamped levies the deficit duty and

Stamp Act—concld.

penalty and then certifies that the document is sufficiently stamped, the case before the Collector is fully decided and a reference to the High Court under section 57 of the Stamp Act is not competent In such a case there is no room for any further disposal by the High Court in accordance with section 59 of the Act. **A** *In the matter of* KHUB CHAND, 16 A. L J. 49; 40 A. 128 **299**

——— **ss. 40, 57** **299**

——— **Sch. I, Art. 13**—*Bill of exchange—Order on firm to pay specified sum to certain person or bearer.*

An order directing a certain firm to pay a specified sum of money to a certain person or bearer is a bill of exchange payable on demand and is chargeable with a duty of one anna under Article 13 of Schedule I of the Stamp Act. **F C Bur** RAEBURN AND CO., *In re*, 11 BUR. L. T. 87 **561**

Subordinate Court, *duty of, to follow ruling of High Court.*

A Magistrate should not follow a ruling of a High Court to which he is not subordinate, when he has a ruling of the High Court to which he is subordinate before him. **A** AZIZUR RAHMAN *v.* HANSA, 16 A L. J. 715; 19 CR. L. J. 925 **441**

Succession Act (X of 1865), ss. 101, 105—*Remoteness—Charitable bequest, whether subject to rule against perpetuities—English rule, whether applicable to Indian bequests.*

Section 101 of the Succession Act applies to all bequests, whether they are of a charitable nature or not.

The question whether a bequest is invalid for remoteness, does not depend upon what did in fact happen but upon whether under the terms of the Will the bequest might be delayed beyond the time specified in section 101 of the Succession Act.

The positive language of the Succession Act as contained in the provisions of section 101 is sufficient to preclude the application of English Law.

A testator, after bequeathing certain properties to a church subject to certain conditions, directed that should the conditions be ever broken or in any way infringed, then the properties shall be made over to another church:

Held, that the gift over was invalid for remoteness. **C** JONES, J. H. *v.* ADMINISTRATOR-GENERAL OF BENGAL **383**

——— **s. 105** **383**

——— **ss. 269, 293**—*Executor, power of, to deal with property of deceased—Legacy—Assent of executor, effect of.*

An executor, after having given his assent to a legacy, is not competent to deal further with the property bequeathed.

An executor, although he has the power to dispose of the property of the deceased in such manner as he thinks fit under section 269 of the Succession Act, must be able to give reasons for doing so. **C** PENHEIRO *v.* JOTINDRA MOHAN SEN, 28 C. L. J. 141 **289**

——— **s. 293** **289**

Suits Valuation Act (VII of 1887), s. 11—*Under-valuation of suit—Prejudice to defendant.*

Where a suit which has been undervalued is tried by a Munsif's Court, the defendant can reasonably say that he has been prejudiced by the case being tried by a Court which had no jurisdiction to try it. **C** MAMRAJ AGARWALA *v.* AHAMAD ALI MAHAMAD **932**

Surrender, *implied—Payment of rent on behalf of tenant.*

A mere non-cultivation of a holding by or on behalf of a tenant is not in itself sufficient to constitute an implied surrender. **N** SHAMRAO *v.* SATYA BHAWU BAI **28**

Thak map, probative value of **49**

Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 8—*Transfer of share along with profits already accrued due, validity of—Suit to recover profits, maintainability of.*

Under section 8 of the Transfer of Property Act only profits accruing after the transfer pass with the land. Profits already accrued due are not a beneficial interest in the land, since the land cannot be transferred with retrospective effect.

A suit, by an assignee of a village share along with the profits accrued due prior to the sale, to recover such profits is not maintainable, inasmuch as it is a suit for the enforcement of a mere right to sue within the meaning of clause (*e*) of section 6 of the Transfer of Property Act. **N** LAKHPAT SAHAI *v.* TIKARAM **158**

——— **ss. 5, 6, 58.**

An assignment of future property is not invalid in India. Section 6 of the Transfer of Property Act does not contain a total prohibition against the assignment of all future property, but must be construed as an exception to the general rule in favour of transfers of property, present and future.

Portions of a section should be construed *ejusdem generis* with the rest of the section.

The words 'of a like nature' in clause (*a*) of section 6 indicate that the '*possibility*' referred to therein must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy.

Under section 58 of the Transfer of Property Act, a property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. A transfer, therefore, if otherwise valid, is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement. **M** PUSAPATI VENKATAPATHIRAJU GARU *v.* VATSAVAYA VENKATA SUBHADRAYYAMMA **563**

——— **s. 6 (a)** **599, 853**

——— **s. 6 (a)**—Taluqdar's *widow and Hindu widow, estates of, difference between.*

A transfer made by a Hindu reversioner of his expectant interest in an estate prior to the year 1882 was void, not under section 6 (*a*) of the Transfer of Property Act, but under the Hindu Law. **O** HAR NATH KUAR *v.* INDRA BAHADUR SINGH, 5 O. L. J. 277 **214**

——— **ss. 6 (b), 109, 111 (g)**—*Lease—Reversion, transfer of—Forfeiture for breach of condition—Transferee, whether can enforce forfeiture where breach occurred before transfer.*

A transfer of the reversion of a lease carries with it the right to enforce forfeiture of the lease for breach of a condition, even where the breach

Transfer of Property Act—contd.

has occurred prior to the transfer. **B** VISHVESHVAR VIGHNESHVAR SHASTRI *v.* MAHABALESHVAR SUBBA BHATTA, 20 BOM. L. R. 767 **198**

——— **s. 6 (e)** **158**

——— **s. 6 (e)**—*Assignment—Contract of service, whether assignable.*

A contract of service being a personal contract is not assignable before breach, as the transfer would be of a mere right to sue. **N** KARAN KHAN *v.* DANGUSHTI **902**

——— **s. 6 (e)**—*Profits, transfer of right to receive, validity of.*

A transfer of a share of the profits of a village which have at the time actually accrued due, is an assignment of a debt and not of a mere right to sue and is, therefore, not bad in law under the provisions of section 6 (*e*) of the Transfer of Property Act, although the transfer of a right to sue is a necessary incident of the transaction. **O** BHARAT SINGH *v.* BINDA CHARAN, 5 O. L. J. 398 **634**

——— **s. 8** **158**

——— **s. 19** **723**

——— **s. 38** **853**

——— **s. 41**—*Estoppel, doctrine of—Consent of true owner—Transferee from trespasser, position of—Acquiescence of real owner, effect of.*

The legal principle which is embodied in section 41 of the Transfer of Property Act is based upon the doctrine of estoppel, and the mere circumstance that the real owner kept silence and advanced no claim for a long time cannot be treated as evidence of such an implied consent on his part to the continuance of the trespasser's possession during that time, as can be profitably availed of by a transferee from the trespasser. **O** SAIYED-UN-NISA *v.* MAIKU LAL, 5 O. L. J. 391 **687**

——— **s. 52**—Lis pendens, *doctrine of, applicability of—Landlord and tenant—Lease by* ijaradar, *after expiry of* ijara *and during pendency of ejectment suit, validity of.*

W., who was the owner of a 12-annas share and an *ijaradar* of the remaining four-annas share of certain lands, made a settlement of the lands on the expiry of the *ijara*, while a suit by the proprietors for his ejectment from the four-annas share covered by the *ijara* was pending:

Held, that the *raiyats* with whom *W.* had settled the lands were liable to be ejected from the four-annas share covered by the *ijara* by the proprietors thereof, as *W.* did not act in good faith in making the settlement. **C** FELU SARKAR *v.* HEMANTA KUMARI DEBYA **365**

——— **ss. 52, 60**—*Mortgage—Redemption, suit for, by some of several mortgagors—Acquisition of portion of equity of redemption by mortgagee pending suit, effect of*—Lis pendens, *doctrine of, applicability of—Plaintiff, whether can redeem whole property.*

Where a mortgagee acquires a portion of the mortgaged property, the right of the owner of the other portion of the property to redeem the whole is not absolute. In such a case the right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage; but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate.

Transfer of Property Act—contd.

Where a mortgagee acquires a portion of the mortgaged property, pending a suit for redemption by some of several mortgagors, it cannot be said that by taking such a transfer he affects the rights of the plaintiffs under the decree or order which may be made in the suit. Section 52 of the Transfer of Property Act has, therefore, no application to such a case, and the mortgagee can insist upon his right to confine the plaintiffs to a suit for redemption of their share of the mortgaged property only. **O** RAMADHIN *v.* JOKHAN, 5 O. L. J. 248 **115**

——— **s. 53**—*Fraudulent transfer—Presumption.*

In a suit for declaration of title, the plaintiff set up a *kobala* (conveyance) executed in his favour by his father. The defendant, a judgment-creditor of the father, pleaded that the *kobala* was voidable under section 53 of the Transfer of Property Act. Both the lower Courts, holding that there was no evidence that the plaintiff's father had any debts at the time of the *kobala*, decreed the suit, although it was proved that the *kobala* was executed in the very year in which the defendant obtained his decree against the plaintiff's father:

Held, that the decision of the lower Courts could not stand, as neither of them had considered the fact that the *kobala* was executed at a time when the executant was well aware of the probability of the decree of a substantial sum being passed against him, and also as neither Court in considering the evidence and facts of the case had set clearly before its mind the presumption created by clause (2) of section 53 of the Transfer of Property Act. **C** MAMRAJ AGARWALA *v.* AHAMAD ALI MAHAMAD **932**

——— **s. 53**—*Preference to one creditor—Mortgage in favour of creditor to secure payment of genuine debt, validity of, as against other creditors.*

A mortgage executed by a debtor in favour of one of his creditors to secure the payment of a genuine debt, the properties mortgaged not exceeding in value the amount which they are intended to secure, is not invalid under section 53 of the Transfer of Property Act as against the other creditors, even where the mortgage bond is taken after the mortgagee-creditor has knowledge that other creditors of the mortgagor are exercising pressure for the re-payment of debts due to them. **C** RASH MOHAN SAHA *v.* KRISTO DAS ROY, 22 C. W. N. 982 **412**

——— **ss. 54, 59**—*Contract Act (IX of 1872), s. 202—Mortgage by deposit of title-deeds—Possession transferred to mortgagee—Registration, whether necessary—Mortgagee, whether can be ejected without payment of mortgage debt.*

In consideration of a loan advanced by the defendants to the plaintiffs the latter made over certain lands to the former together with their title-deeds, the arrangement being that the defendants should remain in possession of the lands and take the rents and profits thereof in lieu of interest Subsequently the plaintiffs sued for possession of the lands on the ground that no interest in the lands had passed to the defendants in the absence of a registered document:

Held, (1) that there was nothing in the Transfer of Property Act or the Registration Act to require a registered document for such a transfer of possession as was effected in this case, inasmuch a

Transfer of Property Act—contd.

the transaction was not one of sale or mortgage requiring such an instrument under sections 54 and 59 of the Transfer of Property Act;

(2) that the defendants had a charge on the land and were entitled to retain possession thereof until the charge was paid off, and in the meantime to take the rents and profits in lieu of interest as arranged at the time when they were put into possession;

(3) that from another point of view the defendants might be regarded as having received authority from the plaintiffs to manage the lands and to receive the rents and profits in lieu of interest, and as such authority was given to them in consideration of the loan to the plaintiffs, the authority could not be terminated under section 202, Indian Contract Act, until the loan was repaid. **L B** SHWE LON *v.* HLA GYWE, 9 L. B. R. 172 **133**

——— **s. 54,** *whether exhaustive—Ejectment—Equities in favour of person in possession—Agreement, unregistered, for conveyance, whether can be pleaded by defendant in answer to ejectment suit.*

Under the influence of the defendant brought to bear upon the execution-purchasers of his lands, the plaintiff got from them a transfer of those lands for a consideration subject to an oral agreement to reconvey a part thereof to the defendant. While the defendant was in possession of that part the plaintiff brought a suit to eject him therefrom:

Held, that as the defendant's possession was itself a title which the plaintiff must displace before he could eject the defendant, the plaintiff's suit could not succeed even though it was too late for the defendant to sue for specific performance of the oral agreement.

Per *Richardson, J.*—The Transfer of Property Act does not contain the whole law on the subject of transfer of property. **C** MAHAMMAD SHAFIKUL HUQ *v.* KRISHNA GOBINDA DUTTA, 28 C. L. J. 77 **42**

——— **s. 55 (2)**—*Covenant, implied, nature of.*

The covenant implied under section 55 (2) of the Transfer of Property Act is merely that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. **N** DHARAM CHAND *v.* GORE LAL **886**

——— **s. 58** **563**

——— **s. 59** **133**

——— **s. 60** **115**

s. 72 **751**

——— **ss. 74, 101**—*Mortgage—Subrogation, right of, enforcement of, by suit—Payment of prior mortgage, whether gives right to subrogate—Intention—Presumption.*

The right of subrogation is an equitable right and where it is a simple mortgage right that has been acquired, it can be enforced by a suit against an auction-purchaser

A purchaser of the equity of redemption paying off a prior mortgage out of the purchase-money is presumed to keep it alive as against puisne mortgagees when it is to his interest to do so. The question is one of intention. **M** RAMA RAO *v.* MANDACHALUGAI, (1918) M. W. N. 505; 8 L. W. 175; 24 M. L. T. 133; 35 M. L. J. 467 **882**

——— **s. 76** **751**

——— **ss. 76, 101**—*Extinguishment of mortgagee rights—Accounts.*

Transfer of Property Act—contd.

Section 76 of the Transfer of Property Act does not apply to a case where the mortgage has in fact become extinct. **Pat** BASAWAN SINGH *v.* GANGAPHAL RAI **224**

——— **s. 91**—*Agra Tenancy Act (II of 1901), s. 10—Mortgage of sir plots—Sale of proprietary rights by mortgagor—Mortgagor, whether can redeem.*

Plaintiff executed a usufructuary mortgage of certain *sir* plots. Subsequently his proprietary rights in the land were sold and were purchased by the defendants, who later on also purchased the mortgagee rights in the *sir* plots. Plaintiff brought a suit to redeem the usufructuary mortgage executed by him:

Held, that as soon as the plaintiff's proprietary rights were sold he became an ex-proprietary tenant of the *sir* plots under section 10 of the Agra Tenancy Act, and that as the mortgage stood between him and his right to occupy the land as an ex-proprietary tenant, he was a person who had an interest in the property within the meaning of section 91 of the Transfer of Property Act and was, therefore, entitled to redeem it. **A** MUHAMMAD HUSSAIN KHAN *v.* HANUMAN, 16 A. L. J. 796 **861**

——— **s. 91**—*Mortgage—Redemption—Interest in mortgaged property, what is—Perpetual lessee, whether can redeem.*

The interest which entitles a person to redeem must be derived directly or indirectly from the mortgagor since the making of the mortgage. In other words, a person may redeem only if he is affected by the mortgage; if he is not affected by it, there is no occasion for his redeeming and he cannot be permitted to do so.

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management; but it is not competent to him to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he created the mortgage.

The owner of certain *malik makbuza* plots mortgaged them to the defendant and subsequently granted a perpetual lease thereof to the plaintiff. The defendant obtained a sale decree upon the mortgage, without making the plaintiff a party to the suit, and himself purchased the mortgaged property in the execution sale The plaintiff thereupon brought a suit to redeem the mortgage:

Held, (1) that the plaintiff's lease was contrary to usage and was, therefore, not binding on the defendant;

(2) that the foreclosure and sale in pursuance of the mortgage prejudiced the plaintiff's interest in the mortgaged property and he was, therefore, entitled to redeem it. **N** SHANKER SINGH *v.* HUKUMCHAND, 14 N. L. R. 117 **99**

——— **s. 101** **224, 882**

——— **s. 106**—*Landlord and tenant—Lease providing for re-entry on certain conditions—Notice to quit, whether necessary.*

The provisions for serving a notice to quit on a lessee were inserted in the Transfer of Property Act to provide for cases where the parties to the lease are not regulated by their contract.

Transfer of Property Act—concld.

Where a lease itself provides that the landlord may at any moment resume possession of the land on payment of full compensation to the lessee for the buildings he may have erected thereon, there is no necessity for giving a notice to quit under section 106 of the Transfer of Property Act in order to entitle the landlord to get back *khas* possession of the land. **C** MONINDRA NATH CHOWDHURI *v.* RADHA PROSANNO GON **19**

——— **ss. 108 (j), 115**—*Lease, assignment of —Assignee, position of—Forfeiture of lease.*

Section 115 of the Transfer of Property Act designedly confines forfeiture to the case of an under-lease, so that where a lessee has assigned his entire interest under the lease the assignee's interest cannot be forfeited by any act of the original lessee. **B** GOPAL JAYVANT SHIRGAONKAR *v.* SHRINIWAS VITHAL PAI, 20 BOM. L. R. 830 **635**

——— **s. 108 (j)**—*Lease, transfer of—Lessee, original, liability of, for rent.*

Under section 108, clause (*j*), of the Transfer of Property Act, the liability of a lessee to pay rent continues even after he has parted with his interest in the lease, and it is no answer to a suit for rent that the transferee from the lessee is willing to pay the rent. **C** AKRURMANI BAISNABI *v.* MADHAB CHANDRA CHAKRABARTY **800**

——— **ss. 109, 111 (g)** **198**

——— **s. 115** **635**

——— **s. 130**—*'Actionable claim,' assignment of —Assignment effected by entry in accounts, validity of—'Instrument in writing,' meaning of—Novation, absence of, whether material.*

The words 'instrument in writing,' in section 130 of the Transfer of Property Act, do not mean a document couched in technical language or in any particular form. What is intended is that the transfer should be made in writing and it is sufficient if the intention of the creditor to transfer the debt due to him to the transferee, can be gathered from the writing.

After the date of the transfer, the transferee is the only person entitled to sue for the debt.

An assignment made in a statement of accounts by way of an entry is an assignment within the section.

An assignment does not become invalid for want of consent of the original debtor or by reason of the absence of a novation of contract. **M** SEETHARAMA AYYAR *v.* NARAYANASWAMI PILLAI **749**

Trespass—Chhajjas *projecting over neighbour's land.*

Erection of *chhajjas* cornices) in a house so as to project over a neighbour's land constitutes a trespass on that land. **O** KUNJ BIHARI PRASAD *v.* BASDEO PRASAD, 5 O. L. J. 464 **950**

——— *Injunction, suit for—Trees overhanging plaintiff's land—Damages, proof of, whether necessary.*

Where trees belonging to one man overhang another man's land the latter has the right to cut off the overhanging portions of the trees, and he has the right also to maintain an action to enforce that right, if it is disputed, apart from any question of damages. **B** VISHNU JAGANNATH JOSHI *v.* VASUDEO RAGHUNATH OKA, 20 BOM. L. R. 826 **629**

Trespass—concld.

——— *Suit against joint trespassers—Defendants acting in concert—Title in one defendant, whether can be relied upon by others.*

A defendant who is sued as a trespasser can rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. **N** BHAOSINGH *v.* MAHIPAT **550**

Trial by Jury—*Functions of Jury in appraising value of confession.*

The question of the relevancy and admissibility of a confession is for the Judge to decide. When he has decided that it is relevant and it has been laid before the Jury, it is for them to appraise its value as evidence and one test which they will have to apply is whether it appears to them to have been freely and voluntarily made. **C** EMPEROR *v.* KABILI KATONI, 22 C. W. N. 809; 19 CR. L. J. 959 **811**

Trusts Act (II of 1882), ss. 81, 82—*Property purchased by husband in name of wife—Advancement—Presumption—English Law.*

The rule of English Law that when a husband buys property in the name of his wife he should be presumed to have done so for the benefit of the wife, applies to persons of British nationality resident in India, and the mere fact that after the purchase the husband continues to manage the property and collect rents is not sufficient to rebut the presumption. **L B** KERWICK *v.* KERWICK **376**

——— **s. 88**—*Person in fiduciary position taking advantage of position and securing benefit—Transaction, validity of.*

Plaintiff and her sister, who had been brought up in the house of their uncle, the defendant, and were under his influence, executed a sale-deed in his favour for an inadequate consideration. After the death of her sister the plaintiff brought a suit to recover the property conveyed by the sale-deed:

Held, that the defendant stood in a fiduciary position towards the plaintiff and her sister and that, therefore, under section 88 of the Trusts Act, the sale-deed was null and void both as regards the share of the plaintiff and that of her sister. **B** GOVIND RAMJI GANJALE *v.* SAVITRI RAMA THOSAR, 20 BOM L. R. 911 **883**

Undue Influence—Interest, heavy rate of—Proviso for capitalising arrears of interest **11**

U. P. Court of Wards Act (IV of 1912), s. 54, *applicability of—Title of ward defeasible, effect of—Pre-emption, suit for, whether must embrace entire property sold.*

The provisions of section 54 of the U. P. Court of Wards Act cover all suits relating to the property of any ward, that is, any property belonging to him, though his title thereto may be defeasible by reason of a claim for pre-emption which may be maintainable in regard to the same.

The rule that a suit for pre-emption must embrace the entire property sold, unless the plaintiff is not entitled to claim pre-emption in regard to any portion thereof, is inapplicable where the interests of the vendees, *inter se*, are distinct or where they have since been separated or divided.

U. P. Court of Wards Act—concld.

A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. **O** NAU NEHAL SINGH *v.* DEPUTY COMMISSIONER, UNAO, 5 O. L. J. 546 **894**

U. P. Land Revenue Act (III of 1901), s. 111—*Partition—Jurisdiction of Civil Court to determine question of title.*

A Civil Court has no jurisdiction to determine a question of title with regard to a property under partition before a Revenue Court, unless the latter Court refers the question for decision to the former Court by an order passed explicitly under section 111 of the U P. Land Revenne Act. **O** CHAUBAR SINGH *v.* BAKHTAWAR SINGH, 5 O. L. J. 486 **897**

U. P. Municipalities Act (II of 1916), s. 326—*Suit against Municipality for declaration of title and injunction—Notice, whether necessary—Suit, maintainability of*

The defendant Municipality served a notice on the plaintiff, on 17th June 1916, requiring him to remove a platform which projected on to a public road. Plaintiff served a notice of action on the Municipality on 14th July 1916, and on the 4th August instituted a suit against the Municipality for a declaration that the platform was his ancestral property, and that the notice issued by the Municipality for the demolition thereof was invalid, and also prayed for an injunction:

Held, (1) that the suit was in substance one for a declaration of title and was not a suit in which the only relief claimed was an injunction and that, therefore, the exemption contained in clause (4) of section 326 of the U. P. Municipalities Act was not applicable to it;

(2) that the suit having been commenced before the expiry of two months after the service of the notice prescribed by section 326 (1) of the U. P. Municipalities Act was premature and must be dismissed. **A** MUNICIPAL BOARD OF BENARES *v.* GAJADHAR, 16 A. L. J. 793 **848**

Universities Act (VIII of 1904), ss. 21 (1) (c), (f), 25 (1), (2) (m) **642**

Vendor and purchaser—*Stipulation in conveyance that on purchaser being dispossessed vendor would not be liable—Purchaser, failure of, to get possession—Refund of purchase-money, suit for.*

Plaintiff made a speculative purchase of a piece of land from the defendant. The latter protected himself by insering a clause in the conveyance to the effect that if the plaintiff was dispossessed by anybody other than the vendor defendant, the latter would not be liable to the purchaser:

Held, that on his failure to get possession of the land, the plaintiff was not entitled to a refund of the purchase-money. **C** INDRA NARAIN DAS *v.* BADAN CHANDRA DAS **340**

——— *Vendor, duty of, to protect purchaser's title—*

Caveat emptor, *doctrine of, applicability of.*

Where a purchaser's title is impeached in a suit to which the vendor is a party and the latter makes an admission which renders a decision adverse to the purchaser inevitable, and the purchaser thereupon allows the suit to go against him, the vendor cannot subsequently, in a suit by the purchaser to recover the purchase-money from him, turn round and say that the abandonment of the defence by the purchaser which was brought about by his own admission was improvident In such a case there is a failure of the consideration for the contract of sale without any fault on the part of the purchaser, and the vendor is, therefore, liable to refund the purchase-money. **Pat** BHATTU RAM *v.* GANGA PRASAD GOPE, P. L. J. 358 **37**

Wajib-ul-arz, entry in, value of **823, 920**

Will, *construction of—Bequest, religious, for performance of* thaligais *in temples—Allocation of income not indicated—Uncertainty—Surplus income, appropriation of, for religious instruction, legality of—* Cy pres, *doctrine of, applicability of, to Indian conditions—Appointment of* vars *(successor) for conducting charity, effect of—Trust, creation of—Evidence Act I of 872), ss. 6, 32 (3), (7)—Statements by testator in judicial and other proceedings, admissibility of.*

One *A.*, a Hindu, left a Will appointing his brother's son as his *vars* "to conduct charities Tiruvedanthai, Tirukkadalmalai and Tirupathi with the help of my properties." The mode of conducting the charity was specified to be the giving of *thaligais* in the temples on the Tirunakshatram day, but no special allotments were made for the purpose. At the registration of the Will in his house the testator declared before the Registrar that he intended by the Will to bequeath properties to charities. It also transpired that, in a suit against the testator for a declaration that part of the properties in dispute and some other properties did not belong to him solely, the testator had filed a written statement stating that he acquired the properties for charity and intended to make a testamentary disposition in that behalf. In a suit instituted under section 92, Civil Procedure Code, for removal of the 1st defendant, the *vars* aforesaid, from trusteeship and for a scheme for the management of the trust:

Held, (1) that the dedication was definite and not void for vagueness or uncertainty.

(2) that the mention of the word '*vars*' in the Will did not make the 1st defendant the sole owner of the properties subject to the carrying out of the directions relating to charity, but only constituted him trustee for the charities;

(3) that the direction as to the performance of *thaligai* was not meant to be exhaustive but only illustrative and that it was competent to the Court, after the allotment of a particular fund for the *thaligai*, to direct the rest of the income to be devoted for imparting religious instruction;

(4) that statements made by the testator at the registration of the Will and in judicial proceedings relating to the properties comprised in the bequest were admissible under sections 6 and 32 of the Evidence Act;

(5) that the trust was a public and not a private trust.

Per *Abdur Rahim, J.*—The rule as to *cy pres* is quite in harmony with the teachings of Hindu Sastras and has been applied in many cases relating to charitable gifts by Hindus.

Per *Seshagiri Aiyar, J.*—The principal consideration where the object mentioned does not exhaust the

Will—contd.

corpus of the fund, is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite, if the law will not allow the application of the fund for the purpose, it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purposes of a charitable kind.

The primary rule is to ascertain whether the object aimed at by the testator could be carrid out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended that the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not misappropriate the funds.

If the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income, will not be any reason for holding that the bequest failed in whole or in part. If it appears that the donor intended that, in any event, the fund should be devoted to charity and that a particular institution was named merely as the channel by which that intention was to be effected, the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of *cy pres*.

The rule of English Law that even answers to interrogatories may be regarded either as a codicil or a Will may not apply to testamentary dispositions in India. Under the Hindu Wills Act and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as testamentary.

There is nothing in the religion of the Hindus in their traditions and in the consciousness of the people, which will compel Courts to respect prejudices which sap at the root of religion and which pervert and not advance its precepts. Therefore, whenever grants made to religious institutions are not ear-marked or, if ear-marked, are not intended to exhaust the recurring income, and whenever they are made as a general thanksoffering, it is proper and legitimate to direct their application to the promotion of knowledge.

Indian Courts have ample powers to give directions towards the application of the trust income, even though the trustee may not himself be competent similarly to apply it. The doctrine of *cy pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated. **M** MUTHUKRISHNA NAICKEN *v.* RAMA CHANDRA NAICKEN **611**

——, *construction of—Gift by implication—English rules, applicability of, to Hindu Wills—Bequest by Hindu to his daughter—Absolute estate, grant of, presumption as to—Devise to two daughters, one with and the other without offspring—Direction that offspring to be born to daughter having no issue should take like offspring of other daughter—Express words of gift to latter, absence of, effect of.*

Will—contd.

The general principles of construction governing English Wills are applicable also to Hindu Wills, *e g.*, where there are no express words of gift but the gift can be implied from the language used in the Will, the Courts should have regard to the dominating intention of the testator and effectuate that intention by ascertaining it from the entire scheme of the Will.

There is no positive presumption of Hindu Law that a gift by a person to his daughter is of an absolute estate.

A Hindu testator devised his property to his two daughters, *S.* and *A.* *A.* had issue at the time of the death of the testator while *S* had none. The Will recited that as *A.* was attending to the testator's comforts and had male offspring who would perform *karmams* (ceremonies after death) to him, he gave her two out of three shares and he gave *S.* who had no issue, the remaining one share. The Will further recited that any person adopted by *S.*, should not get her share, but that if any male child was born to her he should, like the children of *A.*, enjoy his mother's share from generation to generation:

Held, that there was no gift of an absolute estate to *A.* and that though there were no express words of gift to her children, they took the reversion after *A.*'s death. **M** KOMANDAR SRINIVASA SESHACHALU *v.* KOMANDUR SESHAMMA, 34 M. L. J. 479 **758**

——— *Execution, proof of—Disposing mind of testatrix—Evidence in support of Will.*

In an application for Letters of Administration with the Will annexed, it was not denied by the caveators that the testatrix had a disposing mind on the date on which the Will was alleged to have been executed. Expert evidence proved decisively that the impression on the Will was the thumb-mark of the testatrix, but it was contended that though a Will was, in fact, executed, it was lost and that the Will propounded was a forgery, having been written to the thumb-impression which already existed on a piece of paper in possession of the applicant's husband, who held a general power-of-attorney from the testatrix. The Will was supported by the scribe and the three attesting witnesses. The applicant herself testified that she had seen the Will written, that it had been made over to her by the testatrix and that she had kept it with herself:

Held, (1) that it was not proved that the original Will was lost and that the theory of a dishonest conspiracy to forge a Will could not be sustained in view of the positive evidence produced in support of the Will;

(2) that the Will was a genuine document duly executed by the testatrix. **P** BHAGIRTHI *v.* GHISA SINGH **174**

——— *Execution, proof of—Presumption—Sound disposing mind, what is—Burden of proof.*

A plaintiff who sets up a title under a Will must satisfy the Court that the Will was "duly executed", that is to say, he must furnish proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator. The ordinary rule is that the execution of a Will by a competent testator

Will—contd.

raises a presumption that he knew and approved of the contents of the Will; and ordinarily the competency of the testator is presumed, if nothing appears to rebut the ordinary presumption. But where the mental capacity of the testator is challenged by evidence, it is the duty of the Court to find whether upon the evidence it is established that the testator was of sound disposing mind and did know and approve of the contents of the Will. In order to constitute what is known in law as "a sound disposing mind," it must be shown that the testator was able to understand his position, able to appreciate his property and able to form a judgment with respect to the parties whom he chose to benefit. O RAJ BACHAN SINGH *v.* SHATRANJI, 5 O. L. J. 519 **963**

———, interpretation of **912**

———, *revocation of, proof of—Construction of document—Will, interpretation of—Adoption, power of, given by Will—Adoption, validity of—Testator, intention of.*

A Will duly executed is not to be treated as revoked, either wholly or partially, by a Will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later Will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier Will that the two cannot stand together. It is not enough to show that the Will which is not forthcoming differed from the earlier Will, if it cannot be shown in what the difference consisted.

Where under a Will a *talukdar* gave to his second wife in supersession of his first wife a life-estate in the *taluka* and a power to adopt a son, and further stipulated that the adopted son would after her death succeed as full proprietor in the manner contemplated by section 22, clause 8, of the Oudh Estates Act, and the second wife then adopted a son:

Held, (1) that "clause 8" in the Will was merely a clerical error for "clause 9";

(2) that the adoption was valid, inasmuch as the *talukdar* could give to his second wife the power to adopt a son irrespective of the Will and as the intentions of the *talukdar* under the Will were substantially carried out, for the estate taken by the adopted son retained the characteristics of a *taluka*.

A Will duly executed cannot be treated as revoked, either wholly or in part, by a Will which is not forthcoming, and the contents of which cannot be definitely ascertained. It is not enough to show that the Will which is not forthcoming differs from the earlier one, if it cannot be shown in what the difference consists. O LAL TRIBHAWAN NATH SINGH *v.* DEPUTY COMMISSIONER, FYZABAD, 5 O. L. J. 294 **225**

Workman's Breach of Contract Act (XIII of 1859), ss. 1, 2, *application under—Procedure—Magistrate, duty of.*

An application to a Magistrate asking him to enforce the provisions of sections 1 and 2 of Act XIII of 1859 should not be summarily disposed but the matter should be enquired into and evidence fully taken. A AZIZHUR RAHMAN *v.* HANSA, 16 A. L. J. 715; 19 CR. L. J. 925 **441**